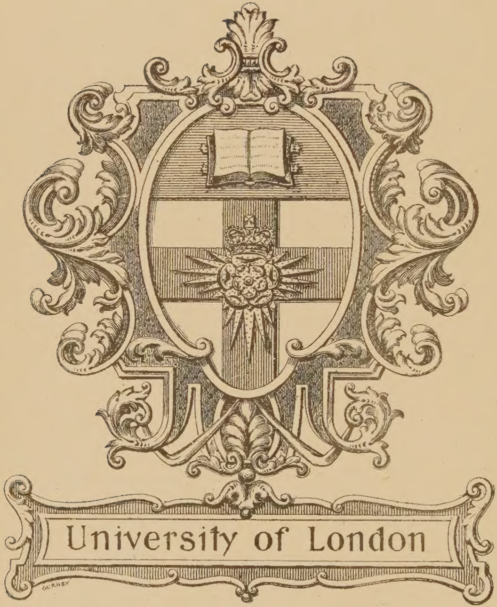
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

346.4
Mx·North Gallery



University of London

11 JUN 1991

Digitized by the Internet Archive
in 2026

https://archive.org/details/all-england-law-reports-reprint_1937_2

These reports are cited thus :

[1937] 2 All E. R.

Printed by Thomas De La Rue & Co., Ltd., 110 Bunhill Row, London, E.C.1.

CASES REPORTED IN VOLUME 2

PAGE
Adams *v.* Jenks, Langley Cartage Co., Ltd. *v.* Jenks [K.B.D. Divl. Ct.] .. 525
Adamson *v.* Birkenhead Corpn. [Ch. D.] .. 221
Adamson (Inspector of Taxes), Brown *v.* [K.B.D.] .. 792
Alderman *v.* Great Western Railway Company [H.L.] .. 408
Allen *v.* Trehearne (Inspector of Taxes) [K.B.D.] .. 400
All Hallows, Lombard Street, *Re* [P.C.] .. 64
Allied Newspapers, Ltd. *v.* Hindsley (Inspector of Taxes) [K.B.D.] .. 663
Anchor Line (Henderson Bros.) Ltd., *Re* [Ch. D.] .. 823
Andrews *v.* Director of Public Prosecutions [H.L.] .. 552
Appenrodt *v.* Central Middlesex Assessment Committee [C.A.] .. 325
Armstrong, Taylor & Whittaker *v.* Oldham Corporation [K.B.D. Manchester Winter Assizes] .. 577
Ashby *v.* Tolhurst [C.A.] .. 837
A.-G. *v.* Dickinson and Baron [K.B.D.] .. 485
A.-G. *v.* Liverpool Corpn. and London, Midland & Scottish Ry. Co. [Ch. D.] .. 698
Automatic Salesman, Ltd., West *v.* [C.A.] .. 706
Avery *v.* London & North Eastern Railway Co. [C.A.] .. 777
Ballard's Conveyance, *Re* [Ch. D.] .. 691
Baron, Dickinson and, A.-G. *v.* [K.B.D.] .. 485
Bartlam, Evans *v.* [H.L.] .. 646
Beaumont Settled Estates, *Re* [Ch. D.] .. 353
Beresford *v.* Royal Insurance Co., Ltd. [C.A.] 243
Bird & Co. (London), Ltd. *v.* Thomas Cook & Son, Ltd., and Thomas Cook & Son (Bankers), Ltd. [K.B.D.] .. 227
Birkenhead Corpn., Adamson *v.* [Ch. D.] .. 221
Bonner *v.* London & North Eastern Railway Co. [C.A.] .. 777
Booth, Rogers *v.* [C.A.] .. 751
Borough *v.* Leeke, *Re* Leeke's Settlement Trusts [Ch. D.] .. 563
Bowles *v.* Bowles [Div.] .. 263
Brendon *v.* Spiro [C.A.] .. 496
Brimecome, Brooks *v.* [C.A.] .. 637
Brooks *v.* Brimecome [C.A.] .. 637
Brown *v.* Adamson (Inspector of Taxes) [K.B.D.] .. 792
Brown *v.* New Empress Saloons, Ltd. [C.A.] 133
Burgess, *Ex p.*, R. *v.* Worthing Borough Council and Horsham and Worthing Assessment Committee, R. *v.* Horsham and Worthing Assessment Committee, *Ex p.* Burgess [K.B.D. Divl. Ct.] .. 681
Byrne *v.* Deane [C.A.] .. 204
Caney *v.* Leith [Ch. D.] .. 532
Carruth *v.* Imperial Chemical Industries, Ltd. [H.L.] .. 422
Carter, Etherington *v.* [K.B.D. Divl. Ct.] .. 528
Casse, *Re*, Robinson *v.* Grigg [Ch. D.] .. 710
Cattermole (Inspector of Taxes), Palmer *v.* [K.B.D.] .. 667
Cecil Film, Ltd., Miller *v.* [Ch. D.] .. 464
Central Middlesex Assessment Committee, Appenrodt *v.* [C.A.] .. 325
Charlesworth *v.* Fox (Samuel) & Co., Ltd. [H.L.] .. 157
Clark, Son & Morland, Ltd.'s, Trade Mark, *Re* [C.A.] .. 594
Clark, Yukon Consolidated Gold Corporation, Ltd. *v.* [K.B.D.] .. 343
Clay's Policy of Assurance, *Re*, Clay *v.* Earnshaw [Ch. D.] .. 548
Clelland *v.* Lloyd (Edward), Ltd. [K.B.D.] 605
Cominelli, Lake View & Star, Ltd. *v.* [P.C.] 285
Compston, Down (Inspector of Taxes) *v.* [K.B.D.] .. 475
Cook (Thomas) & Son, Ltd., and Thomas Cook & Son (Bankers), Ltd., Bird & Co. (London), Ltd. *v.* [K.B.D.] .. 227
Cooper (Cuthbert) & Sons, Ltd., *Re* [Ch. D.] 466
Cooper *v.* Wilson [C.A.] .. 726
Cornwall County Valuation Committee, R. *v.*, *Ex p.* Falmouth Borough Council [C.A.] 266
Cousen's Will Trusts, *Re*, Wright *v.* Killick [Ch. D.] .. 276
Crowe *v.* Crowe [Div.] .. 723
Dahne and White, Provident Accident & White Cross Insurance Co., Ltd. *v.* [K.B.D.] 255
Davies *v.* Griffiths [K.B.D. Divl. Ct.] .. 671
Davies *v.* May [K.B.D. Divl. Ct.] .. 582
Davies, Merchants' and Manufacturers' Insurance Co., Ltd. *v.* [C.A.] .. 767
Deane, Byrne *v.* [C.A.] .. 204
De Cespedes, *Re*, The Debtor *v.* Petitioning Creditor and Official Receiver [C.A.] .. 572
de Stempel *v.* Dunkels [K.B.D.] .. 215
Dickinson and Baron, A.-G. *v.* [K.B.D.] .. 485
Director of Public Prosecutions, Andrews *v.* [H.L.] .. 552
Domine *v.* Grimsdall [K.B.D.] .. 119
Down (Inspector of Taxes) *v.* Compston [K.B.D.] .. 475
Drapers Company *v.* London Passenger Transport Board [Ch. D.] .. 12
Drown *v.* Gaumont-British Picture Corporation, Ltd. [Ch. D.] .. 609
Duckworth *v.* Lowe (Inspector of Taxes) [K.B.D.] .. 418
Dunkels, de Stempel *v.* [K.B.D.] .. 215
Earnshaw, Clay *v.*, *Re* Clay's Policy of Assurance [Ch. D] .. 548
Ecclesiastical Commissioners for England *v.* Sackville Estates, Ltd. [K.B.D.] .. 720
Elmhirst *v.* Inland Revenue Comrs. [K.B.D.] 349
Etherington *v.* Carter [K.B.D. Divl. Ct.] .. 528
Eustace, Kirk *v.* [H.L.] .. 715
Evans *v.* Bartlam [H.L.] .. 646
Ewer *v.* National Employers' Mutual General Insurance Association, Ltd. [K.B.D.] .. 193
Falmouth Borough Council, *Ex p.*, R. *v.* Cornwall County Valuation Committee [C.A.] .. 266
Farrer (T. N.), Ltd., *Re* [Ch. D.] .. 505
Finch, Martin *v.* [C.A.] .. 631
Fowler, R. *v.* [C.C.A.] .. 380
Fox (Samuel) & Co., Ltd. Wragg *v.*, Charlesworth *v.* Samuel Fox & Co., Ltd. [H.L.] .. 157
Frazier, Jelke & Co., Samson *v.* [K.B.D.] .. 588
Gaumont-British Picture Corporation, Ltd., Drown *v.* [Ch. D.] .. 609
German Property Administrator, Holland *v.* [C.A.] .. 807

PAGE
Great Western Ry. Co., Alderman *v.* [H.L.] 408
Great Western Ry. Co. *v.* United Kingdom Chamber of Shipping [C.A.] 138
Greville Trust Co. *v.* Grey, *Re* Warwick's Settlement Trusts [Ch. D.] 828
Grey, Greville Trust Co. *v.*, *Re* Warwick's Settlement Trusts [Ch. D.] 828
Griffiths, Davies *v.* [K.B.D.] 671
Grigg, Robinson *v.*, *Re* Casse [Ch. D.] 710
Grimsdall, Domine *v.* [K.B.D.] 119
Hague *v.* Hague [Div.] 539
Halsted's Will Trusts, *Re*, Halsted *v.* Halsted [Ch. D.] 570
Hargraves' Trusts, *Re*, Leach *v.* Leach [Ch. D.] 545
Harris *v.* London & North Eastern Railway Co. [C.A.] 777
Harrods, Ltd. *v.* Tester [C.A.] 236
Hayter, *Re* Hayter *v.* Tranter [Ch. D.] 110
Heaps *v.* Perrite, Ltd. [C.A.] 60
Higham, *Re*, Higham *v.* Higham [Ch. D.] 17
Hindsley (Inspector of Taxes), Allied Newspapers, Ltd. *v.* [K.B.D.] 663
Holland *v.* German Property Administrator [C.A.] 807
Holmes (C. D.) & Co., Ltd., Ormond *v.* [C.A.] 795
Horsham and Worthing Assessment Committee, Worthing Borough Council and, R. *v.*, *Ex p.* Burgess, R. *v.* Horsham and Worthing Assessment Committee, *Ex p.* Burgess [K.B.D. Divl. Ct.] 681
Houghton and Chester-le-Street Assessment Committee, Robinson Brothers (Brewers), Ltd. *v.* [C.A.] 298
Howard *v.* Odhams Press, Ltd. [C.A.] 509
Imperial Chemical Industries, Ltd., Carruth *v.* [H.L.] 422
Income Tax Commissioner, Bombay Presidency and Aden, Tata Hydro, Electric Agencies, Ltd. (Bombay) *v.* [P.C.] 291
Inland Revenue Comrs., Elmhirst *v.* [K.B.D.] 349
Inland Revenue Comrs. *v.* Lawrence, Graham & Co. [C.A.] 1
Inland Revenue Commissioners *v.* Ledgard [K.B.D.] 492
Inland Revenue Comrs., National Mortgage & Agency Co. of New Zealand, Ltd. *v.* [C.A.] 20
Inland Revenue Comrs., Rhokana Corpn., Ltd. *v.* [C.A.] 79
Inland Revenue Comrs., Wernher's (Sir Harold A.) Charitable Trust (Trustees) *v.* [K.B.D.] 488
International Trustee for the Protection of Bondholders Akt., R. *v.* [H.L.] 164
Jenks, Langley Cartage Co., Ltd. *v.*, Adams *v.* Jenks [K.B.D. Divl. Ct.] 525
Killick, Wright *v.*, *Re* Cousen's Will Trusts [Ch. D.] 276
Kirk *v.* Eustace [H.L.] 715
Kneale, Lever Brothers, Ltd. *v.* [C.A.] 477
Knowles *v.* Southern Railway Co. [H.L.] 403
Kurasch, R. *v.* [C.C.A.] 130
Lake View & Star, Ltd. *v.* Cominelli [P.C.] 285
Lambton Hetton & Joicey Collieries, Ltd., Newton *v.* [C.A.] 150
Lambton, Hetton & Joicey Collieries, Ltd., Wheatley *v.* [C.A.] 756
Lancashire County Council, Southport Borough Council *v.* [K.B.D.] 626
Langley Cartage Co., Ltd. *v.* Jenks, Adams *v.* Jenks [K.B.D. Divl. Ct.] 525
Lawrence, Graham & Co., Inland Revenue Comrs. *v.* [C.A.] 1
Leach *v.* Leach, *Re* Hargraves' Trusts [Ch. D.] 545
Ledgard, Inland Revenue Commissioners *v.* [K.B.D.] 492
Leeke's Settlement Trusts, *Re*, Borough *v.* Leeke [Ch. D.] 563
Leith, Caney *v.* [Ch. D.] 532
Lemon, United Dairies (Wholesale), Ltd. *v.* [C.A.] 618
Lever Brothers, Ltd. *v.* Kneale [C.A.] 477

PAGE
Liverpool Corpn. and London, Midland & Scottish Ry. Co., A.-G. *v.* [Ch. D.] 698
Lloyd (Edward), Ltd., Clelland *v.* [K.B.D.] 605
London, Midland & Scottish Railway Co., Liverpool Corporation and, A.-G. *v.* [Ch. D.] 698
London & North Eastern Railway Co., Avery *v.* [C.A.] 777
London Passenger Transport Board, Drapers Company *v.* [Ch. D.] 12
Lowe (Inspector of Taxes), Duckworth *v.* [K.B.D.] 418
Macleay *v.* Treadwell [P.C.] 38
Martin *v.* Finch [C.A.] 631
May, Davies *v.* [K.B.D. Divl. Ct.] 582
Medcalf *v.* Strawbridge (R.), Ltd. [K.B.D.] 393
Merchants' and Manufacturers' Insurance Co., Ltd. *v.* Davies [C.A.] 767
Midland Bank Executor & Trustee Co., Ltd. *v.* Yarners Coffee, Ltd. [Ch. D.] 54
Miller *v.* Cecil Film, Ltd. [Ch. D.] 464
Morgensterns (a Firm), Victor Weston (Fabrics), Ltd. *v.* [K.B.D.] 260
Mortimers (London), Ltd, *Re* [Ch. D.] 364
Morton *v.* Morton, Daly and McNaught [Div.] 470
Murray *v.* Schwachman, Ltd. [C.A.] 68
Mutual Finance, Ltd. *v.* Wetton (John) & Sons, Ltd. [K.B.D.] 657
Nathan, Williams and, Williams *v.* [C.A.] 559
National Employers' Mutual General Insurance Association, Ltd., Ewer *v.* [K.B.D.] 193
National Mortgage & Agency Co. of New Zealand, Ltd. *v.* Inland Revenue Comrs. [C.A.] 20
Naylor, R. *v.* [C.C.A.] 379
New Empress Saloons, Ltd., Brown *v.* [C.A.] 133
Newton *v.* Lambton Hetton & Joicey Collieries, Ltd. [C.A.] 150
Noel *v.* Trust & Agency Co. of Australasia, Ltd. [Ch. D.] 673
Northumbrian Shipping Co., Ltd., E. Timm & Son, Ltd. *v.* [K.B.D.] 847
Odhams Press, Ltd., Howard *v.* [C.A.] 509
Ogden, *Ex p.* R. *v.* Salford Assessment Committee [C.A.] 98
O'Gorman *v.* Paramount Film Service, Ltd. [Ch. D.] 113
Oldham Corporation, Armstrong, Taylor & Whittaker *v.* [K.B.D. Manchester Winter Assizes] 577
Ormond *v.* Holmes (C. D.) & Co., Ltd. [C.A.] 795
Palmer *v.* Cattermole (Inspector of Taxes) [K.B.D.] 667
Paramount Film Service, Ltd., O'Gorman *v.* [Ch. D.] 113
Pease & Partners, Ltd., Unsworth *v.* [C.A.] 817
Perrite, Ltd., Heaps *v.* [C.A.] 60
Porter (William) & Co., Ltd., *Re* [Ch. D.] 361
Port of London Authority, Tibbals *v.* [H.L.] 413
Provident Accident & White Cross Insurance Co., Ltd. *v.* Dahne and White [K.B.D.] 255
R. *v.* Cornwall County Valuation Committee, *Ex p.* Falmouth Borough Council [C.A.] 266
R. *v.* Fowler [C.C.A.] 380
R. *v.* International Trustee for the Protection of Bondholders Akt. [H.L.] 164
R. *v.* Kurasch [C.C.A.] 130
R. *v.* Naylor [C.C.A.] 379
R. *v.* Riordan [C.C.A.] 62
R. *v.* Rule [C.C.A.] 772
R., St. Francis Hydro Electric Co., Ltd. *v.* [P.C.] 541
R. *v.* Salford Assessment Committee, *Ex p.* Ogden [C.A.] 98
R. *v.* Worthing Borough Council and Horsham and Worthing Assessment Committee, *Ex p.* Burgess, R. *v.* Horsham and Worthing Assessment Committee, *Ex p.* Burgess [K.B.D. Divl. Ct.] 681
Rhokana Corpn., Ltd. *v.* Inland Revenue Comrs. [C.A.] 79
Ritz Cleaners, Ltd. *v.* West Middlesex Assessment Committee [C.A.] 368
Riordan, R. *v.* [C.C.A.] 62
Robinson *v.* Grigg, *Re* Casse [Ch. D.] 710

PAGE

Robinson Brothers (Brewers), Ltd. *v.* Houghton and Chester-le-Street Assessment Committee [C.A.] 298
Rogers *v.* Booth [C.A.] 751
Royal Insurance Co., Ltd., Beresford *v.* [C.A.] 243
Rule, R. *v.* [C.C.A.] 772
Sackville Estates, Ltd., Ecclesiastical Commissioners for England *v.* [K.B.D.] 720
St. Francis Hydro Electric Co., Ltd. *v.* R. [P.C.] 541
Salford Assessment Committee, R. *v.*, *Ex p.* Ogden [C.A.] 98
Samson *v.* Frazier, Jelke & Co. [K.B.D.] .. 588
Schwachman, Ltd., Murray *v.* [C.A.] 68
Southern Railway Co., Knowles *v.* [H.L.] .. 403
Southport Borough Council *v.* Lancashire County Council [K.B.D.] 626
Spiro, Brendon *v.* [C.A.] 496
Stranna, The [Adm.] 383
Strawbridge (R.), Ltd., Medcalf *v.* [K.B.D.] 393
Syston and Thurmaston Gas, Light and Coke Co., Ltd., *Re* [Ch. D.] 322
Tata Hydro-Electric Agencies, Ltd. (Bombay) *v.* Income Tax Commissioner, Bombay Presidency and Aden [P.C.] 291
Tester, Harrods, Ltd. *v.* [C.A.] 236
Tibbals *v.* Port of London Authority [H.L.] 413
Timm (E.) & Son, Ltd. *v.* Northumbrian Shipping Co., Ltd. [K.B.D.] 847
Tolhurst, Ashby *v.* [C.A.] 837
Tranter, Hayter *v.*, *Re* Hayter [Ch. D.] .. 110
Treadwell, Macleay *v.* [P.C.] 38
Trehearne (Inspector of Taxes), Allen *v.* [K.B.D.] 400
Trust & Agency Co. of Australasia, Ltd., Noel *v.* [Ch. D.] 673

PAGE

United Dairies (Wholesale), Ltd. *v.* Lemon [C.A.] 618
United Kingdom Chamber of Shipping, Great Western Ry. Co. *v.* [C.A.] 138
Unsworth *v.* Pease & Partners, Ltd. [C.A.] 817
Warwick's Settlement Trusts, *Re*, Greville Trust Co. *v.* Grey [Ch. D.] 828
Waterhouse's Policy, *Re* [Ch. D.] 91
Watson *v.* London & North Eastern Railway Co. [C.A.] 777
Waxed Papers, Ltd., *Re* [Ch. D.] [C.A.] 117, 481
Wernher's (Sir Harold A.) Charitable Trust (Trustees) *v.* Inland Revenue Commissioners [K.B.D.] 488
West *v.* Automatic Salesman, Ltd. [C.A.] .. 706
West Middlesex Assessment Committee, Ritz Cleaners, Ltd. *v.* [C.A.] 368
Weston, Victor (Fabrics), Ltd. *v.* Morgensterns (a Firm) [K.B.D.] 260
Wetton (John) & Sons, Ltd., Mutual Finance, Ltd. *v.* [K.B.D.] 657
Wheatley *v.* Lambton, Hetton & Joicey Collieries, Ltd. [C.A.] 756
Williams *v.* Williams and Nathan [C.A.] .. 559
Wilson, Cooper *v.* [C.A.] 726
Winterbottom, G. (Leeds), Ltd., *Re* [Ch. D.] 232
Worthing Borough Council and Horsham and Worthing Assessment Committee, R. *v.*, *Ex p.* Burgess, R. *v.* Horsham and Worthing Assessment Committee, *Ex p.* Burgess [K.B.D. Divl. Ct.].. 681
Wragg *v.* Fox (Samuel) & Co., Ltd. [H.L.] .. 157
Wright *v.* Killick, *Re* Cousen's Will Trusts [Ch. D.] 276
Yarners Coffee, Ltd., Midland Bank Executor & Trustee Co., Ltd. *v.* [Ch. D.] .. 54
Yukon Consolidated Gold Corporation, Ltd. *v.* Clark [K.B.D.] 343

CASES REFERRED TO

PAGES
——, *Re*, (1861), 10 W.R. 86; 42 Digest 325, *3645* 497, 498
Abrahams *v.* Reiach (Herbert), Ltd., [1922] 1 K.B. 477; 17 Digest 135, *411* 578, 579
Addie (Robert) & Sons' Collieries, Ltd. *v.* Inland Revenue Comrs., [1924] S.C. 231; 8 Tax Cas. 671; Digest Supp. 291, 292, 297
Alexander *v.* Rayson, [1936] 1 K.B. 169; Digest Supp. 244, 255
Allen *v.* Allen and Bell, [1894] P. 248; 27 Digest 493, *5257* 470, 471
Allsop, *Re*, Whittaker *v.* Bamford, [1914] 1 Ch. 1; 43 Digest 996, *4370* 808, 815
Amicable Society *v.* Bolland (1830), 4 Bli. N.S. 194; 29 Digest 369, *2968* 243, 244, 248, 250, 251
Anctil *v.* Manufacturers' Life Insurance Co., [1899] A.C. 604; 29 Digest 350, *2835* 243, 245, 248, 286
Andrews *v.* Mitchell, [1905] A.C. 78; 25 Digest 325, *266* 727, 736, 743
Anglo-Austrian Printing and Publishing Union, *Re*, Isaac's Case, [1892] 2 Ch. 158; 9 Digest 450, *2922*; 66 L.T. 593 506, 508
Arthrude Press, Ltd. *v.* Eagle, Star & British Dominions Insurance Co. (1924), 18 Lloyd L.R. 382; 59 L. Jo. 529; 29 Digest 325, *2656* 194, 195, 200
Ascherson *v.* Tredegar Dry Dock & Wharf Co., Ltd., [1909] 2 Ch. 401; 26 Digest 127, *902* 710, 713
Ashby's Cobham Brewery Co., Petitioners, *Re* The Crown, Cobham, Ashby's Staines Brewery Co., *Re* The Hand & Spear, Woking, [1906] 2 K.B. 754; 30 Digest 55, *421* 325, 335, 336
Ashby *v.* White (1703), 1 Bro. Parl. Cas. 62; 1 Digest 23, *187* 773
Assam Railways and Trading Co., Ltd. *v.* Inland Revenue Commissioners, [1935] A.C. 445; Digest Supp. 21, 24, 25, 26, 27, 31, 34, 35, 36
Athlumney, *Re*, *Ex p.* Wilson, [1898] 2 Q.B. 547; 42 Digest 702, *1191* 637, 643
A.-G. *v.* County of London Electric Supply Co., [1926] Ch. 542; Digest Supp. 699, 700
A.-G. *v.* Gravesend Corpn., [1936] 1 Ch. 550; Digest Supp. 699, 700
A.-G. *v.* Lloyds Bank, Ltd., [1935] A.C. 382; Digest Supp. 486, 487, 488
A.-G. *v.* North Eastern Ry. Co., [1906] 2 Ch. 675; 42 Digest 682, *946* 699, 700
A.-G. *v.* Pearson, [1924] 2 K.B. 375; 21 Digest 15, *75* 486, 487
A.-G. *v.* Quixley (1929), 98 L.J.K.B. 652; Digest Supp. 486, 487
A.-G. *v.* Westminster City Council, [1924] 2 Ch. 416; Digest Supp. 699, 700
Atwood *v.* Chichester (1878), 3 Q.B.D. 722; Digest, Practice, 391, *951* 647, 656
Auckland City Council *v.* Alliance Assurance Co., Ltd., [1937] 1 All E.R. 645; Digest Supp. 80, 82
Austrian Property Administrator *v.* Russian Bank for Foreign Trade (1932), 48 T.L.R. 37; Digest Supp. 808, 813

Back *v.* Whitlock, [1932] 1 K.B. 747; 16 Tax Cas. 723; Digest Supp. 349, 351
Baddeley *v.* Granville (Earl) (1887), 19 Q.B.D. 423; 34 Digest 233, *1977* 285, 286
Bain *v.* Central Vermont Ry. Co., [1921] 2 A.C. 412; 34 Digest 27, *54* 606, 607, 608
Baker *v.* Lloyds Bank, [1920] 2 K.B. 322; Digest Supp. 710, 713
Ballard *v.* North British Railway Co., [1923] S.C. 43; 36 Digest 88, case *581 xix* 384, 391
Barnabas *v.* Bersham Colliery Co. (1910), 103 L.T. 513; 4 B.W.C.C. 119; 34 Digest 325, *2656* 795, 806
Barrack *v.* M'Culloch (1856), 3 K. & J. 110; 21 Digest 487, *668* 236
Bater *v.* Bater, [1906] P. 209; 11 Digest 429, *935* 723, 725
Beavan, *Re*, Davies, Banks & Co. *v.* Beavan, [1913] 2 Ch. 595; 26 Digest 126, *897* 710, 711
Becker *v.* Marshall (1922), 11 Lloyd L.R. 114 194, 195, 199, 200
Bevan, *Ex p.*, (1803), 9 Ves. 223; 35 Digest 663, *3974* 2, 3, 8
Bharat Insurance Co. *v.* Income Tax Comrs. (1933), 61 L.R. Ind. App. 41 292, 294
Birch *v.* Cropper, *Re* Bridgewater Navigation Co., Ltd. (1889), 14 App. Cas. 525; 10 Digest 1003, *6965* 322, 323
Birmingham Corpn. *v.* Inland Revenue Comrs., [1929] 2 K.B. 187; Digest Supp. 21, 25
Bishop *v.* Smyrna & Cassaba Railway Co., [1895] 2 Ch. 265; 10 Digest 1005, *6979* 322, 323
Bishop Auckland Urban Council *v.* Alderson, [1913] 2 K.B. 324; 26 Digest 542, *2404* 150, 151
Black *v.* New Zealand Shipping Co., Ltd. (1913), 6 B.W.C.C. 720; 34 Digest 273, *2314* 795, 799
Blackburn *v.* Liverpool, Brazil & River Plate Steam Navigation Co., [1902] 1 K.B. 290; 41 Digest 431, *2707* 383, 388, 389
Blackpool Corpn. *v.* Starr Estate Co., [1922] 1 A.C. 27; 42 Digest 770, *1974* 12, 16, 699, 700, 703
Blagg *v.* Sturt (1846), 10 Q.B. 899; 32 Digest 158, *1908* 773, 774
Blake, *Re* (1860), 3 E. & E. 34; 42 Digest 400, *4519* 496, 501
Blakiston *v.* Cooper, [1909] A.C. 104; 5 Tax Cas. 347; 28 Digest 86, *495* 475, 476
Blount *v.* Blount, [1916] 1 K.B. 230; 28 Digest 68, *356* 674, 675
Borradaile *v.* Hunter (1843), 5 Man. & G. 639; 29 Digest 366, *2952* 243, 245, 251
Bosanquet, *Re*, Unwin *v.* Petre (1915), 85 L.J.Ch. 14; 23 Digest 419, *4903* 276, 277, 278, 283
Bostock's Settlement, *Re*, Norrish *v.* Bostock, [1921] 2 Ch. 469; 40 Digest 635, *1746* 354, 357
Boughton-Leigh *v.* Moss (1937), *Local Government Chronicle*, Jan. 16 671, 673
Brace *v.* Abercarn Colliery Co., Huggins *v.* London & South Wales Colliery Co., [1891] 2 Q.B. 699; 34 Digest 731, *1108* 285, 286, 290
Bradford-on-Avon Assessment Committee *v.* White, [1898] 2 Q.B. 630; 38 Digest 567, *1052* 298, 300, 301, 302, 303, 304, 305, 306, 307, 308, 310, 314, 317, 318, 319, 320, 321
Bradstreets British, Ltd. *v.* Mitchell, [1933] Ch. 190; Digest Supp. 510
Breay *v.* Royal British Nurses' Assocn., [1897] 2 Ch. 272; 13 Digest 359, *942* 578, 579
Bridgend Gas & Water Co. *v.* Dunraven (1885), 31 Ch. D. 219; 11 Digest 165, *433* 150, 151, 154
Brindley, *Re*, *Ex p.* Taylor, Sons & Co., [1906] 1 K.B. 377; 4 Digest 129, *1182* 260, 261, 262
Brintons, Ltd. *v.* Turvey, [1905] A.C. 230; 7 W.C.C. 1; 34 Digest 464, *3799* 795, 797, 798, 803
British & American Trustee & Finance Corpn. *v.* Couper, [1894] A.C. 399; 9 Digest 149, *840* 424, 433, 437

British American Continental Bank, Ltd., *Re*, Credit General Liegeois' Claim, [1922] 2 Ch. 589; 17 Digest 160, *609* .. 80, 83
British American Continental Bank, Ltd., *Re*, Goldzieher & Penso's Claim, [1922] 2 Ch. 575; 17 Digest 160, *608* .. 80, 83
British South Africa Co. *v.* De Beers Consolidated Mines, Ltd., [1910] 2 Ch. 502; 11 Digest 351, *361* .. 824, 827
Brittlebank, *Re*, Coates *v.* Brittlebank (1881), 30 W.R. 99; 43 Digest 881, *3239* .. 570, 571
Brook *v.* Hook (1871), L.R. 6 Exch. 89; 12 Digest 259, *2114* .. 657, 662
Brooke *v.* Price, [1917] A.C. 115; 28 Digest 75, *409* .. 2, 4, 674, 676
Brooks Wharf & Bull Wharf, Ltd. *v.* Goodman Bros., [1936] 3 All E.R. 696; Digest Supp. .. 384, 391
Brown *v.* Brine (1875), 1 Ex. D. 5; 12 Digest 253, *2075* .. 510, 515
Brown *v.* Brown and Paget (1874), L.R. 3 P. & D. 198; 27 Digest 431, *4398* .. 470, 471
Brown *v.* Watson (1871), 23 L.T. 745; 41 Digest 103, *538* .. 559, 560
Burdett, *Re*, *Ex p.* Byrne (1888), 20 Q.B.D. 310; 7 Digest 56, *301* .. 286
Burger *v.* South African Mutual Life Assurance Society (1903), 20 S.C. 538; 29 Digest 367, case *a* .. 243, 250, 251
Burroughes *v.* Abbott, [1922] 1 Ch. 86; 28 Digest 68, *358* .. 674, 675, 680
Burrows *v.* Rhodes, [1899] 1 Q.B. 816; 42 Digest 980, *112* .. 244, 245, 510, 523, 524

Cairncross *v.* Lorimer (1860), 3 Macq. 827; 3 L.T. 130; 21 Digest 28, *1227* .. 361, 363
Camberwell Assessment Committee *v.* Ellis, [1900] A.C. 510; 38 Digest 642, *1601* .. 682, 685
Campbell (Donald) & Co. *v.* Pollak, [1927] A.C. 732; Digest, Practice, 788, *3503* 134, 136, 137, 646, 650, 654
Carnarvon (Earl) *v.* Inland Revenue Comrs. (1934), 79 L. Jo. 134; 19 Tax Cas. 455; Digest Supp. .. 2, 3, 9, 10
Carnarvon's (Earl) Chesterfield Settled Estates, *Re*, *Re* Carnarvon's (Earl) Highclere Settled Estates, [1927] 1 Ch. 138; 40 Digest 729, *2599* .. 354, 358
Carter *v.* McLaren (1871), L.R. 2 Sc. & Div. 120; 4 Digest 547, case *q* .. 808, 815
Cartwright *v.* Sculcoates Union, [1899] 1 Q.B. 667; [1900] A.C. 150; 38 Digest 564, *1025* .. 299, 300, 316, 317, 318, 326, 336
Cashill *v.* Wright (1856), 6 E. & B. 891; 29 Digest 14, *178* .. 553, 555
Celia (S.S.) *v.* Volturno (S.S.), [1921] 2 A.C. 544; 17 Digest 159, *602* .. 80, 83
Chadwick *v.* Pearl Life Insurance Co., [1905] 2 K.B. 507; 28 Digest 66, *347* .. 492, 494
Chaffers *v.* Goldsmid, [1894] 1 Q.B. 186; 36 Digest 276, *240* .. 773, 774
Chaplin *v.* Hicks, [1911] 2 K.B. 786; 17 Digest 92, *98* .. 120, 125
Chapman (George) (deceased), *Re*, [1913] S.A.L.R. 173 .. 39, 40
Chatenay *v.* Brazilian Submarine Telegraph Co., [1891] 1 Q.B. 79; 1 Digest 296, *246* 164, 192
Chenoweth, *Re*, Ward *v.* Dwelley, [1902] 2 Ch. 488; 18 Digest 15, *138* .. 17, 18
Chipperfield *v.* Carter (1895), 72 L.T. 487; 12 Digest 412, *3326* .. 533, 534
Christchurch Inclosure Act, *Re*, (1888), 38 Ch. D. 520; 8 Digest 289, *658* .. 489, 490, 491
Citizens' Bank of Louisiana *v.* First National Bank of New Orleans (1873), L.R. 6 H.L. 352; 21 Digest 309, *1130* .. 256, 260
Clack *v.* Wood (1882), 9 Q.B.D. 276; 1 Digest 510, *1755* .. 533, 537
Clancarty (Lord) *v.* Latouche (1810), 1 Ball & B. 420; 35 Digest 662, *3965 vi* .. 2, 8
Cleaver *v.* Mutual Reserve Fund Life Association, [1892] 1 Q.B. 147; 29 Digest 369, *2969* .. 243, 244, 245, 249, 548, 549, 551
Clift *v.* Schwabe (1846), 3 C.B. 437; 29 Digest 366, *2949* .. 244, 251
Clover, Clayton & Co., Ltd. *v.* Hughes, [1910] A.C. 242; 3 B.W.C.C. 275; 34 Digest 273, *2316* .. 795, 799, 800, 802, 805, 806, 807
Coats (J. & P.), Ltd.'s, Application, *Re*, [1936] 2 All E.R. 975; Digest Supp. 595, 597, 599
Codling *v.* Mowlem (J.) & Co., Ltd., [1914] 3 K.B. 1055; 7 B.W.C.C. 786; 34 Digest 491, *4067* .. 778, 780, 787, 788
Coe *v.* Fife Coal Co., Ltd., [1909] S.C. 393; 34 Digest 273, *2314 i* .. 795, 799, 802
Collingwood *v.* Stanhope (1869), L.R. 4 H.L. 43; 40 Digest 607, *1429* .. 564, 566, 567, 568
Collins *v.* Blantern (1767), 2 Wils. 341; 12 Digest 260, *2122* .. 510, 514
Connell (Senior), In the Will of, In the Will of Connell (The Younger), National Trustees, Executors & Agency Co. of Australasia, Ltd. *v.* Connell, [1910] V.L.R. 471; 44 Digest 861, case *o* .. 39, 40
Consett Iron Co., Ltd. *v.* Durham County Assessment Committee for No. 5 or North Western Area, [1931] A.C. 396; Digest Supp. .. 299, 300, 312
Cook *v.* Deeks, [1916] 1 A.C. 554; 9 Digest 572, *3803* .. 424, 459
Cooper *v.* Cooper, [1936] W.N. 205; Digest Supp. .. 646, 649, 653
Coote *v.* Jecks (1872), L.R. 13 Eq. 597; 7 Digest 28, *139* .. 824, 827
Cordey *v.* Cardiff Pure Ice Co. (1903), 88 L.T. 192; 3 Digest 74, *139* .. 837, 838
Courtney, *Re*, *Ex p.* Pollard (1840), 4 Deac. 27; 11 Digest 350, *356* .. 824, 827
Cowdray (Annie, Viscountess) *v.* Inland Revenue Comrs. (1930), 15 Tax Cas. 255; Digest Supp. .. 667, 670
Cowley Settled Estates, *Re*, [1926] Ch. 725; 40 Digest 768, *3003* .. 354, 357, 359
Crampton *v.* Green (1848), 10 L.T. O.S. 442; 12 Digest 262, *2147* .. 510, 511, 515
Crane, *Re*, Crane *v.* Crane (1908), 8 S.R.N.S.W. 132; 44 Digest 862, case *g* .. 39, 40
Craze *v.* Meyer-Dumore Bottlers Equipment Co., Ltd., [1936] 2 All E.R. 1150; Digest Supp. .. 68, 69
Crichton's Oil Co., *Re*, [1902] 2 Ch. 86; 10 Digest 1006, *6980* .. 322, 323
Crippen, *In the Estate of*, [1911] P. 108; 12 Digest 244, *1998* .. 243, 245, 249
Critchell *v.* London & South Western Railway Co., [1907] 1 K.B. 860; Digest, Practice, 87, *736* .. 134
Crosfield (J.) & Sons, Ltd., *Re*, [1910] 1 Ch. 130; 43 Digest 153, *114* .. 595, 597, 603
Crosskill *v.* Bower (1863), 32 Beav. 86; 3 Digest 265, *826* .. 2, 3
Crow, *Re*, *Ex p.* Collier (1907), 97 L.T. 140; 4 Digest 129, *1183* .. 260, 262
Cullum *v.* Hodges (1901), 18 T.L.R. 6; 42 Digest 808, *162* .. 588, 593
Curtis Moffatt, Ltd. *v.* Wheeler, [1929] 2 Ch. 224; Digest Supp. .. 533, 537

Dahl *v.* Nelson, Donkin & Co. (1881), 6 App. Cas. 38; 41 Digest 517, *3471* .. 464, 465
Daniel's Settlement Trusts, *Re*, (1875), 1 Ch. D. 375; 40 Digest 458, *85* .. 545, 546

PAGES

Davidson (Chas. R.) & Co. *v.* M'Robb or Officer, [1918] A.C. 304; 10 B.W.C.C. 673; 34 Digest 276, *2339* .. 408, 410
Davies *v.* Edinburgh Life Assurance Co., [1916] 2 K.B. 852; Digest, Practice, 491, *1681* 134
Davies *v.* Gwauncægurwen Colliery, [1924] 2 K.B. 651; 17 B.W.C.C. 181; 34 Digest 313, *2572* .. 403, 408
Davies *v.* Snead (1870), L.R. 5 Q.B. 608; 32 Digest 114, *1455* .. 773
Davis & Collett, Ltd., *Re*, [1935] Ch. 693; Digest Supp. .. 466, 467, 468
Davison *v.* Duncan (1857), 7 E. & B. 229 .. 773
Death *v.* Harrison (1870), L.R. 6 Exch. 15; 29 Digest 508, *595* .. 706, 708, 709
Debtor (No. 627 of 1936), *Re* A, [1937] 1 Ch. 156; [1937] 1 All E.R. 1; Digest Supp. 710, 711
Dennis *v.* White (A.J.) & Co., [1917] A.C. 479; 10 B.W.C.C. 280; 34 Digest 321, *2627* 631, 633, 635
Deverill *v.* Burnell (1873), L.R. 8 C.P. 475; 17 Digest 132, *392* .. 578, 579
Dew *v.* United British Steamship Co., Ltd. (1928), 139 L.T. 628; Digest Supp. .. 68, 69
Dicks *v.* Yates (1881), 18 Ch. D. 76; 13 Digest 178, *133* .. 114, 115
Dickson *v.* Wilton (Earl) (1859), 1 F. & F. 419; 32 Digest 156, *1881* .. 773
Dobson *v.* Horsley, [1915] 1 K.B. 634; 31 Digest 100, *2383* .. 150, 151
Dodds *v.* South Shields Poor Law Union Assessment Committee, [1895] 2 Q.B. 133; 38 Digest 565, *1041* .. 299, 300, 318
Dome Mining Corpn., Ltd. *v.* Drysdale (1931), 41 Lloyd L.R. 121 .. 194
Domine *v.* Cohen (M.) & Co., [1936] 1 All E.R. 55; Digest Supp. .. 120, 122
Donovan *v.* Laing, Wharton & Down Construction Sydicate, [1893] 1 Q.B. 629; 34 Digest 26, *49* .. 606, 607, 608
Dott *v.* Brown, [1936] 1 All E.R. 543; Digest Supp. .. 492, 494
Double *v.* Southampton Assessment Committee, [1922] 2 K.B. 213; 38 Digest 579, *1145* .. 266, 267, 272
Drummond, *Re*, Ashworth *v.* Drummond, [1914] 2 Ch. 90; 8 Digest 244, *28* 489, 490, 491
Dufaur *v.* Professional Life Assurance Co. (1858), 25 Beav. 599; 29 Digest 372, *2987* 244, 252
Duke *v.* Doidge (1746), 2 Ves. Sen. 203, *n.*; 40 Digest 603, *1394* .. 564, 566

Eaton *v.* Bell (1821), 5 B. & Ald. 34; 3 Digest 245, *706* .. 2, 3
Edwards *v.* Wanstall (1929), 142 L.T. 288; Digest Supp. .. 528, 530
Egerton *v.* Brownlow (Earl) (1853), 4 H.L. Cas. 1; 12 Digest 240, *1971* .. 510, 513, 516
Egerton Settled Estates, *Re*, [1926] Ch. 574; 35 Digest 277, *321* .. 354, 357
Ehrensperger *v.* Anderson (1848), 3 Exch. 148; 1 Digest 451, *1406* .. 80, 82
Engelbach's Estate, *Re*, Tibbetts *v.* Engelbach, [1924] 2 Ch. 348; 29 Digest 422, *3288* 548, 549, 550, 551
English, Scottish & Australian Chartered Bank, *Re*, [1893] 3 Ch. 385; 10 Digest 1058, *7410* .. 424, 461
Evans *v.* Dodd (1912), 5 B.W.C.C. 305; 34 Digest 273, *2313* .. 795, 799
Everitt *v.* Eastaff & Co. (1913), 6 B.W.C.C. 184; 34 Digest 296, *2459* .. 403, 407

Fairman *v.* Ives (1822), 5 B. & Ald. 642; 32 Digest 133, *1639* .. 773
Fairman *v.* Perpetual Investment Building Society, [1923] A.C. 74; 36 Digest 37, *213* 150, 151
Farmer *v.* Cotton's Trustees, [1915] A.C. 922 .. 368, 369, 372, 377
Feist *v.* Société Intercommunale Belge d'Electricité, [1934] A.C. 161; Digest Supp. 164, 179, 182, 192
Felstead *v.* R., [1914] A.C. 534; 14 Digest 325, *3402* .. 243, 249
Fenton *v.* Thorley & Co., Ltd., [1903] A.C. 443; 5 W.C.C. 1; 34 Digest 266, *2264* .. 795, 797, 798, 801, 802
Fenton's Trustee *v.* Inland Revenue Comrs., [1936] 1 All E.R. 116; Digest Supp. .. 2, 4
Fergusson *v.* Fyffe (1841), 8 Cl. & Fin. 121; 3 Digest 195, *412* .. 2, 3
Finn (Wimbledon Revenue Officer) *v.* Kerslake, [1931] A.C. 457; Digest Supp. 368, 369, 370, 371, 372, 373, 374, 375, 376, 378, 379
Fitzgerald's Settled Estates, *Re*, Saunders *v.* Boyd, [1891] 3 Ch. 394; 40 Digest 607, *1427* 564, 567, 568, 569
Flannagan *v.* Shaw, [1920] 3 K.B. 96; 31 Digest 541, *6860* .. 727, 730
Flower *v.* Ebbw Vale Steel, Iron & Coal Co., [1936] A.C. 209; Digest Supp. .. 68, 69
Flowers *v.* Sadler (1882), 10 Q.B.D. 572; 12 Digest 93, *572* .. 657, 662
Foster *v.* Pritchard & Whitroe (1857), 2 H. & N. 151; 42 Digest 775, *2043* .. 706
Fowler *v.* Commercial Timber Co., Ltd., [1930] 2 K.B. 1; Digest Supp. .. 506, 508
French *v.* Russell (Archibald), Ltd. (1934), 104 L.J.P.C. 17; Digest Supp. .. 757, 759
Fry *v.* Burma Corpn., [1930] 1 K.B. 249; 15 Tax Cas. 113; Digest Supp. .. 349, 351

Gardner *v.* Jay (1885), 29 Ch. D. 50; Digest, Practice, 535, *1987* .. 646, 654, 655
Gas Light & Coke Co. *v.* South Metropolitan Gas Co. (1889), 62 L.J. Ch. 123; 25 Digest 491, *114* .. 699, 700
Gascoigne *v.* Gascoigne, [1918] 1 K.B. 223; 21 Digest 277, *935* .. 236, 237, 240
German Property Administrator *v.* Knoop, [1933] Ch. 439; Digest Supp. .. 808, 813
Gibaud *v.* Great Eastern Ry. Co., [1921] 2 K.B. 426; Digest Supp. .. 837, 838, 843
Gill *v.* Fortescue (N.) & Sons, Ltd. (1913), 6 B.W.C.C. 577; 34 Digest 428, *3477* .. 778, 780, 781, 788, 792
Glenboig Union Fire Clay Co. *v.* Inland Revenue Comrs. (1922), 12 Tax Cas. 427 .. 492, 495
Glendarroch, The, [1894] P. 226; 41 Digest 414, *2580* .. 384, 392
Glicksman *v.* Lancashire & General Assurance Co., [1925] 2 K.B. 593; 29 Digest 415, *3252* .. 194
Gold Reefs of Western Australia, Ltd. *v.* Dawson, [1897] 1 Ch. 115; Digest, Practice, 262, *24* .. 496, 500
Good, *Re*, Harington *v.* Watts, [1905] 2 Ch. 60; 8 Digest 258, *197* .. 489, 490, 491
Goodchild *v.* St. John, Hackney Trustees (1858), E. B. & E. 1; 38 Digest 528, *742* 325, 333
Goodman *v.* Saltash Corpn. (1882), 7 App. Cas. 633; 8 Digest 327, *1099* .. 489, 490, 491
Goodwin *v.* Robarts (1876), 1 App. Cas. 476; 6 Digest 451, *2884* .. 164, 167, 180, 186, 187
Graham *v.* Crozier (1879), 44 U.C.R. 378; 32 Digest 124, case *r* .. 773, 774
Graham *v.* Green, [1925] 2 K.B. 37; 9 Tax Cas. 309; 28 Digest 22, *116* .. 475, 477

PAGES
Graham *v.* Roy (1851), 13 Dunl. (Ct. of Sess.) 634; 32 Digest 19, case *m* .. 204, 206
Grant, Smith & Co. & McDonnell, Ltd. *v.* Seattle Construction & Dry Dock Co., [1920] A.C. 162; 29 Digest 199, *1585* .. 383, 387, 389
Gray, *Re*, *Ex p.* Incorporated Law Society (1869), 20 L.T. 730; 42 Digest 403, *4569* .. 496, 497
Gray, *Re*, Todd *v.* Taylor, [1925] Ch. 362; Digest Supp. .. 489, 490, 491
Great Boulder Proprietary Gold Mines, Ltd. *v.* Scriven (1932), Unreported .. 285, 286, 287, 288, 290
Great Eastern Ry. Co. *v.* Haughley (1866), L.R. 1 Q.B. 666; 38 Digest 521, *705* .. 299, 312
Great Ship Co., Ltd., *Re*, Parry's Case (1863), 4 De G. J. & Sm. 63; 10 Digest 964, *6619* .. 232, 234
Great Western Ry. Co. *v.* Bristol Corpn. (1928), 20 Ry. & Can. Tax Cas. 22 .. 139, 140, 142
Greaves *v.* Simpson (1864), 33 L.J. Ch. 641; 44 Digest 926, *7827* .. 39, 40
Greenock S.S. Co. *v.* Maritime Insurance Co., [1903] 2 K.B. 657; 29 Digest 192, *1518* .. 848, 850
Greenwood, *Re*, Greenwood *v.* Sutcliffe, [1912] 1 Ch. 392; 44 Digest 502, *3215* .. 276, 278, 283
Greg *v.* Planque, [1936] 1 K.B. 669; Digest Supp. .. 369
Gregg, *Re*, *Re* Prance (1869), L.R. 9 Eq. 141; 42 Digest 337, *3816* .. 496, 498
Griffith *v.* Paget (1877), 5 Ch. D. 894; 10 Digest 1030, *7140* .. 322, 323
Griffiths *v.* Dudley (Earl) (1882), 9 Q.B.D. 357; 34 Digest 237, *2022* .. 285, 286
Griggs, *Re*, *Ex p.* School Board for London, [1914] 2 Ch. 547; 23 Digest 66, *492* .. 39, 40, 47
Groves *v.* Western Mansions, Ltd. (1916), 33 T.L.R. 76; 31 Digest 100, *2384* .. 150, 151
Groves *v.* Wimborne (Lord), [1898] 2 Q.B. 402; 24 Digest 911, *80* .. 68, 69, 73, 75
Guaranty Trust Co. of New York *v.* Hannay & Co., [1915] 2 K.B. 536; 30 Digest 147, *219* .. 727, 734
Gundry, *Re*, (1892), 11 N.Z.L.R. 444 .. 39, 40

Hadden, *Re*, Public Trustee *v.* More, [1932] 1 Ch. 133; Digest Supp. .. 489, 490, 491
Hadley *v.* Baxendale (1854), 9 Exch. 341; 17 Digest 93, *101* .. 120, 128, 129
Hamilton *v.* Baker, The Sara (1889), 14 App. Cas. 209; 30 Digest 186, *533* .. 299, 303
Hamilton, Fraser & Co. *v.* Pandorf & Co. (1887), 12 App. Cas. 518; 41 Digest 414, *2574* .. 383, 386, 388, 389
Hammond & Co. *v.* Bussey (1887), 20 Q.B.D. 79; 17 Digest 110, *214* .. 120, 128
Hancock *v.* Smith (1889), 41 Ch. D. 456; 3 Digest 185, *364* .. 236, 240
Hannaford *v.* May, [1935] 2 K.B. 385; Digest Supp. .. 582, 583, 585
Hanson *v.* Radcliffe Urban District Council, [1922] 2 Ch. 490; 30 Digest 143, *190* .. 727, 734, 750
Hardy *v.* Fothergill (1888), 13 App. Cas. 351; 4 Digest 250, *2385* .. 710, 713
Harley *v.* Hunt, [1887] W.N. 184; Digest, Practice, 917, *4616* .. 222, 224
Harris *v.* Amery (1865), L.R. 1 C.P. 148; 43 Digest 7, *23* .. 368, 374
Harris *v.* Harris, Ltd., [1936] S.C. 183; Digest Supp. .. 466, 467
Harrison *v.* Bush (1856), 5 E. & B. 344; 32 Digest 123, *1550* .. 773, 774, 776
Harwood *v.* Green (1827), 3 C. & P. 141; 32 Digest 111, *1436* .. 773, 774
Haseldine *v.* Hosken, [1933] 1 K.B. 822; Digest Supp. .. 244, 254, 255
Haskins *v.* Lewis, [1931] 2 K.B. 1; Digest Supp. .. 559, 560, 562
Haxby *v.* Wood Advertising Agency, Ltd. (1913), 109 L.T. 946; Digest, Practice, 706, *3011* .. 478, 479
Haydock *v.* Goodier, [1921] 2 K.B. 384; 34 Digest 439, *3587* .. 285, 286
Hazlett *v.* Lynch (1889), 15 V.L.R. 713 .. 39, 40
Hebditch *v.* MacIlwaine, [1894] 2 Q.B. 54; 32 Digest 114, *1460* .. 773, 774, 777
Henderson *v.* Henderson (1843), 3 Hare, 100; 21 Digest 174, *276* .. 706, 709
Hensler, *Re*, Jones *v.* Hensler (1881), 19 Ch. D. 612; 44 Digest 505, *3240* .. 111
Hicks *v.* Powell (1869), 4 Ch. App. 741; 11 Digest 348, *342* .. 824, 827
Hill *v.* Tothill, [1936] W.N. 126; Digest Supp. .. 671, 672, 727, 736
Hillen *v.* I.C.I. (Alkali), Ltd., [1934] 1 K.B. 455; Digest Supp. .. 69, 70
Hillier *v.* Hiscock, [1900] S.A.L.R. 1 .. 39, 40
Hilton, Gibbes & Smith *v.* Morten (1908), *Financial Times*, July 3 .. 588, 593
Hird *v.* Wood (No. 1) (1894), 38 Sol. Jo. 234; 32 Digest 85, *1154* .. 204, 210
Hoare & Co., Ltd., & Reduced, *Re*, [1904] 2 Ch. 208; 9 Digest 152, *863* .. 609, 616
Holloway (George) & Webb, Ltd. *v.* Crompton, [1916] 2 Ch. 436; 28 Digest 543, *1504* .. 222, 224
Hope *v.* Great Western Railway Co., [1937] 1 All E.R. 625; Digest Supp. .. 646, 655
Hopkinson *v.* Caunt (1885), 14 Q.B.D. 592 .. 818, 819
Horn *v.* Anglo-Australian & Universal Family Life Assurance Co. (1861), 30 L.J. Ch. 511; 29 Digest 366, *2945* .. 243, 244, 251
Hornsey Corpn. *v.* Birkbeck Freehold Land Society, [1906] 1 K.B. 521; 26 Digest 522, *2229* .. 150, 151
Horsnail *v.* Bruce (1873), L.R. 8 C.P. 378; 42 Digest 773, *2011* .. 158, 162
Houghton *v.* Film Booking Offices, Ltd. (1931), 48 R.P.C. 329; Digest Supp. .. 114, 115
Howard *v.* Gosset, Gosset *v.* Howard (1847), 10 Q.B. 359; 38 Digest 62, *375* .. 559, 560, 563
Howard *v.* Harris (1683), 1 Vern. 190; 35 Digest 351, *929* .. 2, 3, 8
Howe (Earl) *v.* Inland Revenue Comrs., [1919] 2 K.B. 336; 28 Digest 111, *683* .. 21, 25
Hudson *v.* Buck (1877), 7 Ch. D. 683; 12 Digest 412, *3324* .. 533, 535, 537
Hulm & Lewis, *Re*, [1892] 2 Q.B. 261; 42 Digest 358, *4082* .. 496, 498, 502
Hunt, *Re*, Davies *v.* Hetherington (1890), 62 L.T. 753 .. 545, 546
Hussey *v.* Horne-Payne (1879), 4 App. Cas. 311; 12 Digest 72, *420* .. 533, 534, 535, 537
Hussey & Green's Contract, *Re*, *Re* Hussey, Hussey *v.* Simper, [1921] 1 Ch. 566; 44 Digest 926, *7826* .. 39, 40
Hyams *v.* Stuart King, [1908] 2 K.B. 696; Digest, Practice, 94, *794* .. 647, 656

Ideal Cleaners & Dyers, Ltd. *v.* West Middlesex Assessment Committee & Revenue Officer for West Middlesex (1930), 143 L.T. 483; Digest Supp. .. 369, 370
Inland Revenue *v.* Gunn, Collie & Topping, [1930] S.C. 389; Digest Supp. .. 369, 374, 375, 376
Inland Revenue Comrs. *v.* Ballantine (1924), 8 Tax Cas. 595; 28 Digest 63, case *t* .. 626, 628
Inland Revenue Comrs. *v.* Brooke, Inland Revenue Comrs. *v.* Bell, Inland Revenue Comrs. *v.* Leith, [1923] 2 K.B. 814; 8 Tax Cas. 527; 28 Digest 112, *698* .. 349, 351, 352, 353
Inland Revenue Comrs. *v.* Burrell, [1924] 2 K.B. 52; 28 Digest 108, *665* .. 322, 323
Inland Revenue Comrs. *v.* Clay, Inland Revenue Comrs. *v.* Buchanan, [1914] 3 K.B. 466; 39 Digest 226, *63* .. 300, 321

Inland Revenue Comrs. *v.* Crossman, Inland Revenue Comrs. *v.* Mann, [1937] A.C. 26; [1936] 1 All E.R. 762; Digest Supp. 299, 300, 301, 304, 321
Inland Revenue Comrs. *v.* Dalgety & Co., Ltd., [1930] A.C. 527; Digest Supp. 21, 24, 25, 26, 29
Inland Revenue Comrs. *v.* Falkirk Iron Co., Ltd., [1933] S.C. 546; 17 Tax Cas. 625; Digest Supp. 664, 665, 666
Inland Revenue Comrs. *v.* Holder, [1932] A.C. 624; 16 Tax Cas. 540; Digest Supp. 2, 3, 8, 9, 10
Inland Revenue Comrs. *v.* Lysaght, [1928] A.C. 234; 13 Tax Cas. 511; Digest Supp. 419, 421
Inland Revenue Comrs. *v.* Ramsay (1935), 20 Tax Cas. 79; Digest Supp. 492, 493, 494
Inland Revenue Comrs. *v.* Truman, Hanbury, Buxton & Co., [1912] 3 K.B. 377; [1913] A.C. 650; 39 Digest 236, *112* 299, 300, 301, 304, 320, 321, 325, 328, 336
Innes (or Grant) *v.* Kynoch, [1919] A.C. 765; 12 B.W.C.C. 78; 34 Digest 272, *2308* 795, 803
International Trustee for the Protection of Bondholders Akt. *v.* R., [1936] 3 All E.R. 407; Digest Supp. 80, 82
Ionides *v.* Pender (1874), L.R. 9 Q.B. 531; 29 Digest 123, *763* 767, 768, 772
Israelson *v.* Dawson, [1933] 1 K.B. 301; Digest Supp. 710, 711

James *v.* British General Insurance Co., [1927] 2 K.B. 311; Digest Supp. 244, 254
James *v.* Dickenson, Williams *v.* Wills, Lovering *v.* Limpany (1863), 14 C.B.N.S. 416; 26 Digest 342, *712* 699, 700
Jarmain *v.* Hooper (1843), 6 Man. & G. 827; 21 Digest 549, *1235* 559, 560
Jauncey, *Re*, Bird *v.* Arnold, [1926] Ch. 471; 32 Digest 407, *860* 2, 3
Jenkins *v.* Bushby, [1891] 1 Ch. 484; Digest, Practice, 536, *1990* 647, 656
Jenkins *v.* Jackson, [1891] 1 Ch. 89; 28 Digest 542, *1500* 222, 224, 225, 226
Jenoure *v.* Delmege, [1891] A.C. 73; 32 Digest 156, *1887* 773
Jervis *v.* Howle, [1937] 1 Ch. 67; [1936] 3 All E.R. 193; Digest Supp. 674, 675, 676, 680
John *v.* John, [1898] 2 Ch. 573; 23 Digest 66, *491* 39, 40
Johnson *v.* Johnson (1843), 3 Hare, 157; 44 Digest 505, *3238* 111
Jones *v.* Jones, [1916] 2 A.C. 481; 32 Digest 28, *177* 216, 218
Jones *v.* Merionethshire Permanent Benefit Building Society, [1892] 1 Ch. 193; 12 Digest 297, *2444* 657, 662
Jones *v.* Ogle (1872), 8 Ch. App. 192; 44 Digest 535, *3516* 39, 48
Jones *v.* Williams (1859), 4 H. & N. 706; 29 Digest 509, *602* 706
Jorden *v.* Money (1854), 5 H.L. Cas. 185; 21 Digest 292, *1041* 256, 260
Josef Inwald Akt. *v.* Pfeiffer (1928), 44 T.L.R. 352; Digest Supp. 808, 813
Judgment Debtor (No. 1539 of 1936), *Re* A, Judgment Debtor *v.* Judgment Creditor, [1937] 1 Ch. 137; [1936] 3 All E.R. 767; Digest Supp. 573, 574

Kaufman *v.* Gerson, [1904] 1 K.B. 591; 12 Digest 93, *573* 657, 661, 662, 663
Keir *v.* Leeman (1846), 9 Q.B. 371; 12 Digest 260, *2129* 510, 511, 514
Kensington Income Tax Comrs. *v.* Aramayo, [1916] 1 A.C. 215; 6 Tax Cas. 613; 28 Digest 102, *622* 419, 420, 421
Kensington (Lord) *v.* Bouverie (1859), 7 H.L. Cas. 557; 40 Digest 691, *2268* 829, 834, 835, 836
Kinneil Cannel & Coking Coal Co., Ltd. *v.* Sneddon (or Waddell), [1931] A.C. 575; 24 B.W.C.C. 181; Digest Supp. 778, 781, 782, 783, 784, 791
Kite, The, [1933] P. 154; Digest Supp. 384, 391
Knight *v.* Purssell (1879), 49 L.J. Ch. 120; 28 Digest 542, *1498* 222, 224
Kutner *v.* Phillips, [1891] 2 Q.B. 267; 42 Digest 768, *1950* 727, 730

Ladies' Hosiery & Underwear, Ltd. *v.* West Middlesex Assessment Committee, [1932] 2 K.B. 679; Digest Supp. 262, 273
Lake *v.* King (1670), 1 Mod. Rep. 58; 32 Digest 109, *1420* 773
Lancashire & Yorkshire Ry. Co., London & North Western Ry. Co. & Graeser, Ltd. *v.* MacNicoll (1918), 118 L.T. 596; 43 Digest 470, *99* 837,845
Lancaster Sheriff, *Ex p.*, *Ex p.* Gosling (1895), *Times* Newsp., Feb. 11 478
Lander *v.* British United Shoe Machinery Co., Ltd. (1933), 26 B.W.C.C. 411; Digest Supp. 631, 633, 634, 636
Lane *v.* Sterne (1862), 3 Giff. 629; 29 Digest 467, *161* 559, 560
Larkin *v.* Drysdale (1875), 1 V.L.R. 164 39, 40, 46, 47
Latham *v.* Johnson (R.) & Nephew, Ltd., [1913] 1 K.B. 398; 17 Digest 117, *268* 120, 125
Law *v.* Chartered Institute of Patent Agents, [1919] 2 Ch. 276; 36 Digest 857, *3443* 727, 742
Lawrence *v.* Matthews (George) (1924), Ltd., [1929] 1 K.B. 1; 21 B.W.C.C. 345; Digest Supp. 631, 634, 635
Leeson *v.* General Council of Medical Education and Registration (1889), 43 Ch. D. 366; 34 Digest 544, *30* 727, 741
Leigh's Settled Estates, *Re*, [1926] Ch. 852; 40 Digest 739, *2678* 354, 358, 359
Leitch *v.* Emmott, [1929] 2 K.B. 236; 14 Tax Cas. 633; Digest Supp. 349, 351, 352, 353, 667, 669, 670
Levene *v.* Inland Revenue Comrs., [1928] A.C. 217; 13 Tax Cas. 486; Digest Supp. 419, 421
Levy *v.* Rutley (1871), L.R. 6 C.P. 523; 13 Digest 184, *198* 114, 115
Liesbosch (Dredger) *v.* Edison (S.S.), [1933] A.C. 449; Digest Supp. 120, 129
Lilley *v.* Doubleday (1881), 7 Q.B.D. 510; 3 Digest 77, *163* 837,838
Lilley & Skinner, Ltd. *v.* Essex County Valuation Committee (1935), 153 L.T. 64; Digest Supp. 266, 273
Litchfield-Speer *v.* Queen Anne's Gate Syndicate (No. 2), Ltd., [1919] 1 Ch. 407; 28 Digest 405, *321* 394, 399
Liverpool Electric Cable Co., Ltd.'s, Application, *Re*, (1925), 46 R.P.C. 99; Digest Supp. 595, 599, 600
Lloyd *v.* Guibert (1865), L.R. 1 Q.B. 115; 12 Digest 372, *3094* 164, 186
Lloyd *v.* Pughe (1872), 8 Ch. App. 88; 3 Digest 187, *369* 236, 240
Lochgelly Iron & Coal Co., Ltd. *v.* M'Mullan, [1934] A.C. 1; Digest Supp. 68, 69
Locker & Woolf, Ltd. *v.* Western Australian Insurance Co., Ltd. (1935), 153 L.T. 334; Digest Supp. 194, 195, 201
Locker & Woolf *v.* Western Australian Insurance Co., [1936] 1 K.B. 408; Digest Supp. 767, 768
Loftus *v.* Roberts (1902), 18 T.L.R. 532; 12 Digest 54, *307* 578, 579

PAGES

London & North Eastern Ry. Co. v. Brentnall, [1933] A.C. 489; 26 B.W.C.C. 225; Digest Supp. .. 409, 411
London Assocn. for Protection of Trade *v.* Greenlands, Ltd., [1916] 2 A.C. 15; 32 Digest 120, *1521* .. 773, 774
London County Council *v.* A.-G., [1901] A.C. 26; 4 Tax Cas. 265; 28 Digest 73, *392* 674, 675
London County Council *v.* Erith Parish (Churchwardens, etc.) & Dartford Union Assessment Committee, [1893] A.C. 562; 38 Digest 429, *42* .. 299, 300, 315
London County Council *v.* Schewzik, [1905] 2 K.B. 695; 26 Digest 503, *2104* .. 778, 781
London Electric Supply Corpn., Ltd. *v.* Westminster Electric Supply Corpn., Ltd. (1913), 11 L.G.R. 1046; 20 Digest 217, *110* .. 699, 700
Long *v.* Watkinson, Long *v.* Long (1852), 17 Beav. 471; 23 Digest 470, *5387* 276, 277, 278, 280, 283
Lord Advocate *v.* Bogie, [1894] A.C. 83; 21 Digest 59, *386* .. 276, 277, 278, 280, 283
Lound *v.* Grimwade (1888), 39 Ch. D. 605; 12 Digest 263, *2152* .. 510, 515
Lowther *v.* Bentinck (1874), L.R. 19 Eq. 166; 43 Digest 789, *2280* .. 570, 571
Luchmun Lal Chowdhry *v.* Kanhya Lal Mowar (1894), L.R. 22 Ind. App. 51; 16 Digest 164, *671* .. 541, 544

MacDonald's Settlement, *Re*, O'Callaghan *v.* O'Callaghan, [1928] V.L.R. 421; Digest Supp. .. 39, 40
Macdonald (C.) & Co. *v.* Income Tax Comrs. (1934), 37 Bom. L.R. 126; 7 I.T.C. 466 292, 295, 296
M'Naghten's Case (1843), 10 Cl. & Fin. 200; 14 Digest 56, *229* .. 243, 246
Macnamara *v.* Macnamara (1929), 30 S.R. N.S.W. 245 .. 39, 40
Marchant, *Re*, *Ex p.* Frary (Frarey), [1908] 1 K.B. 998; Digest, Practice, 706, *3010* 478
Marland *v.* Inland Revenue Comrs. (1934), 79 L. Jo. 134; 19 Tax Cas. 467; Digest Supp. 2, 3, 9, 10
Marshal *v.* Crutwell (1875), L.R. 20 Eq. 328; 3 Digest 190, *391* .. 236, 239
Martinson *v.* Clowes (1885), 52 L.T. 706; 42 Digest 352, *4008* .. 497, 498
Mason *v.* Paynter (1841), 1 Q.B. 974; 21 Digest 588, *1666* .. 559, 560
Matheson *v.* Atkinson (1907), 26 N.Z.L.R. 145; 44 Digest 927, *7835 vii* .. 39, 40
Mathieson *v.* Pitman (Sir Isaac) & Sons, Ltd. (1930), 47 R.P.C. 541; Digest Supp. 114, 115
Mawe *v.* Pigott (1869), I.R. 4 C.L. 54; 32 Digest 60, *878 i* .. 204, 209
Maxwell *v.* Keun, [1928] 1 K.B. 645; Digest, Practice, 558, *2169* .. 646, 655
Mellody, *Re*, Brandwood *v.* Haden, [1918] 1 Ch. 228; 8 Digest 247, *70* .. 489, 490, 491
Mercantile Investment & General Trust Co. *v.* River Plate Trust, Loan & Agency Co., [1894] 1 Ch. 578; 11 Digest 462, *1187* .. 824, 827
Mercer *v.* Stanbury (1857), 2 H. & N. 155n.; 29 Digest 509, *603* .. 706
Mersey Docks *v.* Liverpool Overseers (1873), L.R. 9 Q.B. 84; 38 Digest 563, *1016* 299, 313, 315, 316
Mersey Docks & Harbour Board *v.* Birkenhead Assessment Committee, [1901] A.C. 175; 38 Digest 526, *735* .. 299, 300, 317
Michael, *Re*, *Ex p.* Michael (1891), 8 Morr. 305; 4 Digest 130, *1189* .. 260, 261
Middlesex County Valuation Committee *v.* West Middlesex Assessment Area Assessment Committee, [1937] 1 All E.R. 403; Digest Supp. .. 99, 103, 104
Miller *v.* Carntyne Steel Castings Co., Ltd., [1935] S.C. 20; 27 B.W.C.C. Supp. 101; Digest Supp. .. 795, 800
Mills, *Re*, *Ex p.* Mills, [1906] 1 K.B. 389; 4 Digest 127, *1167* .. 260, 261, 262
Milroy *v.* Lord (1862), 4 De G. F. & J. 264; 25 Digest 530, *206* .. 548, 549
Minet *v.* Johnson (1890), 63 L.T. 507; Digest, Practice, 391, *949* .. 559, 560
Mitchell, *Re*, Freelove *v.* Mitchell, [1913] 1 Ch. 201; 26 Digest 128, *915* .. 710, 713
Moorcock, The, (1889), 14 P.D. 64; 12 Digest 611, *5048* .. 256, 257
Moore (A. G.) & Co. *v.* Donnelly, [1921] 1 A.C. 329; 34 Digest 302, *2501* .. 69, 70
Morgan *v.* Amalgamated Anthracite Collieries, Ltd. (1935), 28 B.W.C.C. 358; Digest Supp. .. 158, 162
Moriarty *v.* Regent's Garage Co., [1921] 2 K.B. 766; 9 Digest 463, *3005* .. 361, 363
Morison, Pollexfen & Blair *v.* Walton (1909), cited [1915] 1 K.B. at p. 90; 3 Digest 74, *143* .. 384, 391
Morrice *v.* Morrice (1893), 14 N.S.W. L.R. Eq. 211 .. 39, 40, 44, 52, 53
Morris, *Re*, Mayhew *v.* Halton, [1922] 1 Ch. 126; 28 Digest 72, *378* .. 2, 3, 4
Morris *v.* Salberg (1889), 22 Q.B.D. 614; 21 Digest 549, *1236* .. 559, 560
Morritt *v.* North Eastern Ry. Co. (1876), 1 Q.B.D. 302; 8 Digest 49, *307* .. 837,838
Mosse *v.* Salt (1863), 32 Beav. 269; 3 Digest 266, *819* .. 2, 3
Mountain *v.* Whittle, [1921] 1 A.C. 615; 29 Digest 127, *799* .. 384, 388, 389
Munday (J. R.), Ltd. *v.* London County Council, [1916] 2 K.B. 331; Digest, Practice, 482, *1614* .. 134
Myroft *v.* Sleight (1921), 90 L.J.K.B. 883; 32 Digest 38, *346* .. 204, 209

National Insurance Act, 1911, *Re*, *Re* Employment of Church of England Curates, [1912] 2 Ch. 563; 19 Digest 428, *2645* .. 751, 752
Neale *v.* Electric & Ordnance Accessories Co., Ltd., [1906] 2 K.B. 558; 34 Digest 493, *4074* .. 68, 69
Netherseal Colliery Co. *v.* Bourne (1889), 14 App. Cas. 228; 34 Digest 730, *1107* 285, 286, 290
Neville, *Re*, Neville *v.* First Garden City, Ltd., [1925] Ch. 44; 44 Digest 736, *5913* 54, 56, 57
Neville *v.* London Express Newspapers, Ltd., [1919] A.C. 368; 9 Digest 626, *4145* 510, 517, 521, 523, 524
Norman *v.* Baltimore & Ohio Railroad Co. (1935), 294 U.S.R. 240 .. 164, 184, 185
North Western Mutual Life Insurance Co. *v.* Johnson (1920), 254 U.S.R. 96 .. 244, 253
North Western Mutual Life Insurance Co. *v.* McCue (1911), 223 U.S.R. 234 .. 244, 253
Norwich Yarn Co., *Re*, (1850), 12 Beav. 366; 10 Digest 820, *5338* .. 466, 468

Ogle's Settled Estates, *Re*, [1927] 1 Ch. 229; 40 Digest 726, *2572* .. 354, 358
Osborne *v.* Bradley, [1903] 2 Ch. 446; 40 Digest 329, *2780* .. 691, 694

PAGES
Parker's Settled Estates, *Re*, Parker *v.* Parker, [1928] 1 Ch. 247; 40 Digest 774, *3047* 354, 358
Parr *v.* Leigh Union (1905), 1 Konst. Rat. App. 211; 38 Digest 566, *1044* 326, 336
Partridge Jones & John Paton, Ltd. *v.* James, [1933] A.C. 501; 26 B.W.C.C. 277; Digest Supp. 795, 799, 800, 802, 805, 806
Patent Agents Institute *v.* Lockwood, [1894] A.C. 347; 42 Digest 613, *139* 365
Payne *v.* Deputy Federal Commissioner of Taxation, [1936] A.C. 497; Digest Supp. 80, 82, 89
Peagram *v.* Peagram, [1926] 2 K.B. 165; Digest Supp. 539, 540
Pearce *v.* Graham (1863), 1 New Rep. 507; 40 Digest 511, *566* 111
Pearman *v.* Dyer, [1935] 2 K.B. 149; Digest Supp. 637
Peebles *v.* Oswaldtwistle Urban District Council, [1897] 1 Q.B. 625; 33 Digest 22, *91*; *affd. sub nom.* Pasmore *v.* Oswaldtwistle Urban District Council, [1898] A.C. 387 727, 736
Penn *v.* Baltimore (Lord) (1750), 1 Ves. Sen. 444; 11 Digest 351, *363* 824, 827
Perrins *v.* Bellamy, [1899] 1 Ch. 797; 43 Digest 996, *4374* 808, 816
Perry *v.* United States (1935), 294 U.S.R. 330 164, 185
Peyrae *v.* Wilkinson, [1924] 2 K.B. 166; 35 Digest 174, *48* 80, 82
Phillips *v.* South Western Ry. Co. (1879), 4 Q.B.D. 406; on app. 5 Q.B.D. 78; 17 Digest 176, *784* 60, 61
Pitts, *Re*, Cox *v.* Kilsby, [1931] 1 Ch. 546; Digest Supp. 243, 248
Polemis and Furness, Withy & Co., *Re*, [1921] 3 K.B. 560; 36 Digest 29, *151* 120, 125
Policy No. 6402 of the Scottish Equitable Life Assurance Society, *Re*, [1902] 1 Ch. 282; 29 Digest 375, *3007* 548, 549
Pondicherry Ry. Co., Ltd. *v.* Income Tax Comrs. (1931), 58 L.R. Ind. App. 239; Digest Supp. 292, 294, 295, 296
Poole *v.* National Bank of China, Ltd., [1907] A.C. 229; 9 Digest 149, *842* 423, 426, 432, 459
Pope *v.* Whalley (1865), 6 B. & S. 303; 33 Digest 555, *377* 368, 374
Poplar Metropolitan Borough Assessment Committee *v.* Roberts, [1922] 2 A.C. 93; 38 Digest 520, *698* 299, 300, 320
Porter *v.* Freudenberg, Kreglinger *v.* Samuel (S.) & Rosenfeld, *Re* Morten's Patents, [1915] 1 K.B. 857; 2 Digest 140, *155* 573, 575
Powell *v.* Vickers, Sons & Maxim, Ltd., [1907] 1 K.B. 71; Digest, Practice, 490, *1668* 134, 137
Poyser *v.* Minors (1881), 7 Q.B.D. 329; 13 Digest 505, *562* 478, 479
Printing & Numerical Registering Co. *v.* Sampson (1875), L.R. 19 Eq. 462; 12 Digest 244, *1992* 286
Prior's Case (1368) *cited in* Spencer's Case (1583), 5 Co. Rep. 16 *a*; 31 Digest 144, *2798* 691, 697
Pritchard (Cardiff Revenue Officer) *v.* Lewis (William) & Sons, [1931] 1 K.B. 386; Digest Supp. 369
Pullman *v.* Hill & Co., [1891] 1 Q.B. 524; 32 Digest 76, *1069* 204, 205

Quebrada Railway, Land & Copper Co., *Re*, (1889), 40 Ch. D. 363; 9 Digest 162, *943* 424, 434, 437

R. *v.* Bateman (1925), 19 Cr. App. Rep. 8; Digest Supp. 553, 555, 556, 557
R. *v.* Board of Education, [1910] 2 K.B. 165; 42 Digest 614, *141*; *affd. sub nom.* Board of Education *v.* Rice, [1911] A.C. 179 727, 740
R. *v.* Brakenridge (1884), 48 J.P. 293; 33 Digest 372, *807* 99, 102
R. *v.* Bridge (1890), 24 Q.B.D. 609; 33 Digest 409, *1192* 369
R. *v.* Brixton Income Tax Comrs. (1913), 29 T.L.R. 712; 28 Digest 100, *602* 727, 735
R. *v.* Cheshire County Court Judge & United Society of Boilermakers, *Ex p.* Malone, [1921] 2 K.B. 694; 43 Digest 100, *1044* 559, 560
R. *v.* Coventry Canal Navigation Co. (1859), 1 E. & E. 572; 38 Digest 559, *978* 299, 312
R. *v.* Cresswell (1876), 1 Q.B.D. 446; 27 Digest 61, *428* 674, 675, 676
R. *v.* Customs & Excise Comrs., [1914] 2 K.B. 390; 30 Digest 20, *128* 325, 326, 328, 336
R. *v.* Essex JJ., *Ex p.* Perkins, [1927] 2 K.B. 475; Digest Supp. 99, 102, 108, 727, 735, 742
R. *v.* Glamorgan Appeal Tribunal, *Ex p.* Fricker (1917), 115 L.T. 930; 16 Digest 427, *2867* 727, 742
R. *v.* Grand Junction Ry. Co. (1844), 4 Q.B. 18; 38 Digest 539, *839* 299, 312
R. *v.* Holding (1934), 25 Cr. App. Rep. 28; Digest Supp. 62, 63
R. *v.* Lancashire Justices (1906), 75 L.J.K.B. 198; 33 Digest 299, *138* 727, 742
R. *v.* Leach, [1937] 1 All E.R. 319; Digest Supp. 552
R. *v.* Local Government Board, *Ex p.* Arlidge, [1914] 1 K.B. 160; 42 Digest 602, *15*; *on appeal, sub nom.* Local Board *v.* Arlidge, [1915] A.C. 120 727, 740
R. *v.* London & North Western Ry. Co. (1874), L.R. 9 Q.B. 134; 38 Digest 543, *878* 299, 300, 301, 314
R. *v.* London & South Western Ry. Co. (1842), 1 Q.B. 558; 38 Digest 540, *848* 299, 312
R. *v.* London County Council, *Ex p.* Akkersdyk, *Ex p.* Fermenia, [1892] 1 Q.B. 190; 33 Digest 103, *698* 727, 735, 741
R. *v.* London County Council, *Ex p.* Entertainments Protection Assocn., Ltd., [1931] 2 K.B. 215; Digest Supp. 727, 750
R. *v.* London School Board (1886), 17 Q.B.D. 738; 38 Digest 522, *713* 299, 300, 301, 315
R. *v.* Mann, [1914] 2 K.B. 107; 15 Digest 814, *8863* 243, 249
R. *v.* Milledge (1879), 4 Q.B.D. 332; 33 Digest 297, *118* 99, 102
R. *v.* North Worcestershire Assessment Committee, *Ex p.* Hadley, [1929] 2 K.B. 397; Digest Supp. 99, 101, 108
R. *v.* Paine (1696), 5 Mod. Rep. 163; 32 Digest 79, *1094* 204, 205
R. *v.* Rhymney Ry. Co. (1869), L.R. 4 Q.B. 276; 38 Digest 507, *616* 326
R. *v.* Shoreditch Assessment Committee, *Ex p.* Morgan, [1910] 2 K.B. 859; 38 Digest 564, *1028* 325, 327, 329, 338
R. *v.* Smith (1885), 55 L.J.M.C. 49; 25 Digest 54, *479* 325, 333
R. *v.* South-Eastern Essex Assessment Committee, *Ex p.* Patterson (1935), 153 L.T. 152; Digest Supp. 682, 688
R. *v.* South Staffordshire Waterworks Co. (1885), 16 Q.B.D. 359; 38 Digest 551, *920* 299, 312
R. *v.* Southampton Docks Co. (1851), 14 Q.B. 587; 38 Digest 527, *741* 299, 313
R. *v.* Stringer, [1933] 1 K.B. 704; Digest Supp. 552
R. *v.* Surrey Assessment Committee, North-Eastern Assessment Area, *Ex p.* Woolworth (F. W.) & Co., Ltd., [1933] 1 K.B. 776; Digest Supp. 99, 103, 104

PAGES
R. *v.* Sussex JJ., *Ex p.* McCarthy, [1924] 1 K.B. 256; 33 Digest 294, *97* .. 99, 102, 108, 727, 742
R. *v.* Taylor, R. *v.* Amendt., [1915] 2 K.B. 593; 30 Digest 35, *272* 326, 336, 338
R. *v.* Tewkesbury Corpn. (1868), L.R. 3 Q.B. 629; 20 Digest 132, *1056* 256, 258
R. *v.* West Middlesex Waterworks (1859), 28 L.J.M.C. 135; 38 Digest 450, *171* 299, 313
R. *v.* Williamson (1807), 3 C. & P. 635; 14 Digest 377,, *3972* 553, 555
Reed *v.* Kilburn Co-operative Society (1875), L.R. 10 Q.B. 264; 12 Digest 305, *2518* .. 80, 83
Richards *v.* Goskar (Receiver of Dulais Anthracite Collieries, Ltd.) (1935), 29 B.W.C.C. 357; Digest Supp. 757, 764
Richards *v.* Kessick (1888), 57 L.J.M.C. 48; 26 Digest 271, *102* 150, 151
Richardson, *Re*, Weston *v.* Richardson (1882), 47 L.T. 514; 25 Digest 516, *114* 548, 549
Ricketts *v.* Colquhoun, [1926] A.C. 1; 28 Digest 88, *519* 300, 301
Ritter *v.* Godfrey, [1920] 2 K.B. 47; Digest, Practice, 854, *4002* 134, 136, 137
Ritter *v.* Mutual Life Insurance Co. (1898), 169 U.S.R. 139 .. .. .. 244, 252, 253
Roberts *v.* Smith (1859), 4 H. & N. 315; 12 Digest 411, *3314* 578, 579
Roberts' (C. J.) Will, *Re*, (1929), 29 S.R.N.S.W. 562; Digest Supp. 39, 40
Robinson *v.* Robinson (1851), 1 De G.M. & G. 247; 17 Digest 132, *391* 578, 579
Rogers *v.* Hosegood, [1900] 2 Ch. 388; 40 Digest 312, *2164* 691, 696
Rolls-Royce, Ltd. *v.* Short (1925), 94 L.J.K.B. 849; 10 Tax Cas. 57; 28 Digest 94, *557* 21, 26
Rooke *v.* Plunkett, [1902] 1 I.R. 299; 40 Digest 603, *case 1396 i* 564, 568
Roper-Curzon *v.* Roper-Curzon (1871), L.R. 11 Eq. 452; 28 Digest 252, *1083* .. 570, 571
Rouch *v.* Alberty (1863), 3 New Rep. 137; 42 Digest 337, *3815* 496, 498
Roundwood Colliery Co., *Re*, Lee *v.* Roundwood Colliery Co., [1897] 1 Ch. 373; 10 Digest 964, *6616* 232, 233, 234
Rowett, Leaky & Co., Ltd. *v.* Scottish Provident Institution, [1927] 1 Ch. 55; 29 Digest 366, *2950* 244, 252
Rudd *v.* Elder Dempster & Co., Ltd., [1933] 1 K.B. 566; Digest Supp. 69
Rufford *v.* Bishop (1829), 5 Russ. 346; 3 Digest 266, *820* 2, 3, 9
Rush, *Re*, Warre *v.* Rush, [1923] 1 Ch. 56; 27 Digest 113, *906* 354, 359
Russell *v.* Rudd, [1923] A.C. 309; 34 Digest 440, *3588* 285, 286
Rutter *v.* Palmer, [1922] 2 K.B. 87; Digest Supp. 837, 838
Rye & Eyre *v.* Inland Revenue Comrs., [1935] A.C. 274; 19 Tax Cas. 164; Digest Supp. 2, 3

St. Cuthbert's Co-operative Assocn. *v.* Edinburgh Assessor, [1931] S.C. 386; Digest Supp. 369, 370, 375
Salbstein *v.* Isaacs & Son, [1916] 1 K.B. 1; 29 Digest 509, *600* 706, 708
Salford Union *v.* Dewhurst, [1926] A.C. 619; 37 Digest 215, *105* .. 285, 286, 414, 417
Samuel & Escombe *v.* Rowe (1892), 8 T.L.R. 488; 42 Digest 808, *160* 588, 593
Samuelson *v.* Producers Distributing Co., Ltd., [1932] 1 Ch. 201; Digest Supp. 114, 115, 116
Sassoon (E. D.) & Co. *v.* Western Assurance Co., [1912] A.C. 561; 29 Digest 199, *1584* 383, 387, 388, 389

Scheibler, *Re*, *Ex p.* Holthausen (1847), 9 Ch. App. 722; 11 Digest 350, *357* 824, 827
Seear *v.* Cohen (1881), 45 L.T. 589; 12 Digest 93, *570* 657, 662
Seyton, *Re*, Seyton *v.* Satterthwaite (1887), 34 Ch. D. 511; 43 Digest 576, *252* 548, 549
Shaw *v.* Medley (1909), 28 N.Z.L.R. 397 .. .. 39, 40
Sigsworth, *Re*, Bedford *v.* Bedford, [1935] Ch. 89; Digest Supp. 243, 248, 249
Simbro Trading Co., Ltd. *v.* Posograph (Parent) Corpn., Ltd., [1929] 2 K.B. 266; Digest, Practice, 707, *3019* 478
Simes *v.* Gibbs (1838), 6 Dowl. 310; 42 Digest 326, *3670* 496, 497, 500, 505
Simmons *v.* Liberal Opinion, Ltd., *Re* Dunn, [1911] 1 K.B. 966; 42 Digest 343, *3874* .. 496, 497
Singer *v.* Williams, [1921] 1 A.C. 41; 7 Tax Cas. 419; 28 Digest 78, *430* 349, 351
Smith *v.* Anderson (1880), 15 Ch. D. 247; 36 Digest 317, *8* 369
Smith *v.* Butcher (1878), 10 Ch. D. 113; 44 Digest 578, *3969* 39, 50
Smith *v.* Keal (1882), 9 Q.B.D. 340; 21 Digest 548, *1231* 559, 560
Smith *v.* Lion Brewery Co., Ltd., [1911] A.C. 150; 5 Tax Cas. 568; 28 Digest 57, *291* 664, 665
Smith *v.* Weguelin (1869), L.R. 8 Eq. 198; 43 Digest 628, *682* .. 164, 166, 167, 180, 186
Solicitor, *Re* A, *Ex p.* Law Society, [1912] 1 K.B. 302; 42 Digest 399, *4515* 496, 497
South Western of Venezuela (Barquisimeto) Ry., *Re*, [1902] 1 Ch. 701; 9 Digest 461, *2996* 506, 508
Sparey *v.* Bath Rural District Council (1931), 24 B.W.C.C. 414; Digest Supp. 369, 409, 412
Spencer's Case (1583), 5 Co. Rep. 16*a*; 31 Digest 144, *2798* 691
Stanton *v.* Brown, [1900] 1 Q.B. 671; 12 Digest 269, *2203* 286
Steel *v.* Cammell, Laird & Co., Ltd., [1905] 2 K.B. 232; 7 W.C.C. 9; 34 Digest 271, *2302* 795, 798, 803

Stephens *v.* Dudbridge Ironworks Co., [1904] 2 K.B. 225; 34 Digest 492, *4070* 68, 69, 73
Stephens *v.* Hill (1842), 10 M. & W. 28; 42 Digest 394, *4420* 496, 501
Stevens *v.* Boustead (E.) & Co., [1918] 1 K.B. 382; 28 Digest 45, *229* 21, 25
Stevens *v.* Walker, [1936] 2 K.B. 215; [1936] 1 All E.R. 892; Digest Supp. 646, 655
Stirk & Sons, Ltd. *v.* Halifax Assessment Committee, [1922] 1 K.B. 264; 38 Digest 581, *1157* 266, 272
Stockwell *v.* Southgate Corporation, [1936] 2 All E.R. 1343; Digest Supp. 394, 398
Stokes *v.* Little, [1935] 1 K.B. 182; Digest Supp. 637, 641, 642, 643
Stray, *Re*, *Ex p.* Stray (1867), 2 Ch. App. 374; 4 Digest 128, *1178* 260, 261, 262
Strong & Co., Ltd. *v.* Woodifield, [1906] A.C. 448; 5 Tax Cas. 215; 28 Digest 57, *290* 664, 665
Smart *v.* Smart (otherwise Hodgson), [1910] P. 246; 27 Digest 530, *5743* 264, 265
Sunderland, *Re*, [1911] 2 K.B. 658; 4 Digest 128, *1179* 260, 262
Sunderland Overseers *v.* Sunderland Union (1865), 18 C.B.N.S. 531; 38 Digest 566, *1048* 299, 301, 304, 318, 326
Svenssons (C. Wilh.) Travaruaktiebolag *v.* Cliffe S.S. Co., [1932] 1 K.B. 490; Digest Supp. 383, 385, 386, 390

Taylor *v.* Lock (1930), 23 B.W.C.C. 55, 444; Digest Supp. 403, 406
Teale *v.* Williams, [1914] 3 K.B. 395; 42 Digest 842, *3* 528, 529, 530, 531
Thairlwall *v.* Great Northern Ry. Co., [1910] 2 K.B. 509; 10 Digest 1160, *8207* .. 80, 83, 87
Thames & Mersey Marine Insurance Co. *v.* Gunford Ship Co., Southern Marine Mutual Insurance Assocn. *v.* Gunford Ship Co., [1911] A.C. 529; 29 Digest 123, *765* .. 767, 772

PAGES

Thames & Mersey Marine Insurance Co. *v.* Hamilton, Fraser & Co. (1887), 12 App. Cas. 484; 29 Digest 197, *1575* .. 383, 386, 387, 389
Thin *v.* Richards & Co., [1892] 2 Q.B. 141; 41 Digest 475, *3072* .. 848, 850, 855
Thompson *v.* London & North Eastern Ry. Co., [1935] 2 K.B. 90; 28 B.W.C.C. 95; Digest Supp. .. 756, 757, 761, 762
Thorley, *Re*, Thorley *v.* Massam, *Re* Thorley, Thorley *v.* Massam, [1891] 2 Ch. 613; 21 Digest 52, *345* .. 486, 487
Tin Line *v.* White Cross Insurance, [1921] 3 K.B. 327; 29 Digest 408, *3214* .. 244, 245, 254
Tischler & Co. *v.* Apthorpe (1885), 52 L.T. 814; 2 Tax Cas. 89; 28 Digest 32, *169* 419, 421, 422
Toogood & Sons, Ltd. *v.* Green, [1932] A.C. 663; Digest Supp. 368, 369, 371, 372, 373, 375, 376, 377
Townley Mill Co. (1919), Ltd. *v.* Oldham Assessment Committee, [1937] 1 All E.R. 11; Digest Supp. .. 299, 300, 310
Turpin *v.* Middlesbrough Assessment Committee & Bailey, [1931] A.C. 451; Digest Supp. .. 369, 374, 375, 376

Usher's Wiltshire Brewery, Ltd. *v.* Bruce, [1915] A.C. 433; 6 Tax Cas. 399; 28 Digest 56, *287* .. 664, 665, 666

Valdez's Trusts, *Re*, (1888), 40 Ch. D. 159; 44 Digest 493, *3131* .. 276, 278
Vanderpant *v.* Mayfair Hotel Co., Ltd., [1930] 1 Ch. 138; Digest Supp. .. 394, 396
Venner's Electrical Cooking & Heating Appliances, Ltd. *v.* Thorpe, [1915] 2 Ch. 404; 10 Digest 1014, *7042* .. 232, 233, 234
Vortigern, The, [1899] P. 140; 29 Digest 192, *1517* .. 848, 850, 852, 855

Waddle *v.* Sunderland Union, [1908] 1 K.B. 642; 38 Digest 565, *1031* 325, 327, 328, 332, 339, 340
Wade & Sons Co., Ltd. *v.* Cockerline & Co. (1905), 10 Comm. Cas. 115; 41 Digest 435, *2730* .. 383, 385, 386
Walker *v.* Hockney Brothers (1909), 2 B.W.C.C. 20; 34 Digest 273, *2311* .. 795, 799, 802
Wallwork *v.* Fielding, [1922] 2 K.B. 66; 37 Digest 180, *24* .. 727, 729, 730, 736, 739
Wainewright (or Wainwright) *v.* Bland (1835), 1 Mood. & R. 481; 29 Digest 345, *2781* 244
Warren *v.* Hedley's Colliery Co., Ltd. (1913), 6 B.W.C.C. 136; 34 Digest 296, *2460* 403, 405, 406
Wason *v.* Walter (1868), L.R. 4 Q.B. 73; 32 Digest 144, *1754* .. 773
Watson *v.* Petts, [1899] 1 Q.B. 54; Digest, Practice, 708, *3024* .. 478
Watson *v.* White, [1896] 2 Q.B. 9; 13 Digest 454, *49* .. 120, 124
Watt *v.* Barnett (1878), 3 Q.B.D. 183; Digest, Practice, 330, *490* .. 646, 655, 656
Weld-Blundell *v.* Stephens, [1919] 1 K.B. 520; [1920] A.C. 956; 17 Digest 114, *237* 510, 511, 513, 514, 516, 517, 519, 520, 522
Wentworth *v.* Humphrey (1886), 11 App. Cas. 619; 18 Digest 5, case *e* .. 39, 47
West Ham Union *v.* Edmonton Union, [1908] A.C. 1; Digest Supp. .. 299, 300, 303
West Yorkshire Darracq Agency, Ltd. *v.* Coleridge, [1911] 2 K.B. 326; 9 Digest 464, *3022* 361, 362
Westminster City Council *v.* Southern Ry. Co., [1936] A.C. 511; [1936] 2 All E.R. 322; Digest Supp. .. 299, 300, 302, 303, 320
Wheat, *Re*, [1932] K.B. 716; Digest Supp. .. 539, 540
Wheeler *v.* New Merton Board Mills, Ltd., [1933] 2 K.B. 669; Digest Supp. .. 68, 69
Whelan *v.* Alfred Leney & Co., Ltd., Loughnan *v.* Marston's Dolphin Brewery, [1934] 2 K.B. 511; [1936] A.C. 393; [1936] 1 All E.R. 468; Digest Supp. 299, 300, 301, 320, 321
White *v.* Bembridge, [1935] 1 K.B. 244; Digest Supp. .. 637
Whitfield *v.* Aetna Life Insurance Co. (1907), 205 U.S.R. 489 .. 244, 253
Whittle *v.* Ebbw Vale Steel, Iron & Coal Co., Ltd., [1936] 2 All E.R. 1221; 29 B.W.C.C. 179; Digest Supp. .. 795, 800, 806
Wicks *v.* Dowell & Co., Ltd., [1905] 2 K.B. 225; 7 B.W.C.C. 14; 34 Digest 266, *2265* 631, 632, 633, 634, 635
Wild *v.* Brown (John) & Co., [1919] 1 K.B. 134; 11 B.W.C.C. 237; 34 Digest 22, *20* .. 818, 821
Wilkinson (Taunton Revenue Officer) *v.* Sibley & Donovan, [1932] 1 K.B. 194; Digest Supp. .. 369
Williams, *Re*, Campbell *v.* Hill, [1926] N.Z.L.R. 762 .. 39, 40
Williams *v.* Bayley (1866), L.R. 1 H.L. 200; 12 Digest 92, *567* .. 510, 511, 514, 657, 661, 662
Williams *v.* Dorothea Slate Quarry Co. (1936), 29 B.W.C.C. 174; Digest Supp. .. 134
Williams *v.* Smith (1863), 14 C.B.N.S. 596; 21 Digest 468, *493* .. 559, 560
Wilson, Sons & Co. *v.* Xantho (Cargo Owners), The Xantho (1887), 12 App. Cas. 503; 41 Digest 414, *2573* .. 383, 386, 387, 388, 389
Wilton *v.* Chambers (1837), 7 Ad. & E. 524 .. 496, 502
Windhill Local Board of Health *v.* Vint (1890), 45 Ch. D. 351; 12 Digest 260, *2127* 510, 511, 515
Wing *v.* Dent Main Colliery Co., Ltd., [1924] 2 K.B. 389; 34 Digest 738, *1155* .. 582
Winn *v.* Quillan (1899), 2 F. (Ct. of Sess.) 322; 32 Digest 19, case *n* .. 204, 206
Woods *v.* De Mattos (1865), L.R. 1 Exch. 91 .. 710, 711
Woollen *v.* Wright (1862), 1 H. & C. 554; 21 Digest 550, *1244* .. 559, 560, 561
Wootton-Isaacson *v.* Wootton-Isaacson, [1902] P. 146; 27 Digest 530, *5742* .. 264, 265
Wright (deceased), In the Will of, Equity Trustees, etc., Co. *v.* Firth, [1922] V.L.R. 41 39, 40

Yager & Guardian Assurance Co., *Re*, (1912), 108 L.T. 38; 29 Digest 325, *2657* .. 194
Yenidge Tobacco Co., *Re*, [1916] 2 Ch. 426; 10 Digest 826, *5388* .. 466, 467, 468
Yonge *v.* Toynbee, [1910] 1 K.B. 215; Digest, Practice, 706, *3012* .. 478, 496, 497
Yool *v.* Great Western Ry. Co. (1870), 39 L.J. Ch. 562; 38 Digest 338, *492* .. 699, 700
Young Sid, The, [1929] P. 190; Digest Supp. .. 134, 136

CORRIGENDA.

Page 559, WILLIAMS, *v.* WILLIAMS AND NATHAN. *Gilbert Beyfus, K.C.*, and *W. E. P. Done* were counsel for the appellants Nathan & Co. and *W. E. P. Done* was counsel for the appellant Williams. The solicitors acting for the appellants Nathan & Co. were *William & T. Burchell*, and the solicitors acting for the appellant Williams were *Parfitt Cresswell & Williams.*

Page 577, ARMSTRONG, TAYLOR & WHITTAKER *v.* OLDHAM CORPORATION. *Taylor & Buckley*, Oldham, acted as solicitors for the solicitor plaintiffs.

Page 691, *Re* BALLARD'S CONVEYANCE. The first word in the second line of the headnote should be "with."

INDEX

PAGE

Accident, disease of gradual onset .. 795

Admissibility, evidence, article found in prisoner's home, in possession of servant 130

Adopted child, policy under Married Women's Property Act, 1882, s. 11 .. 548

Adultery, cross-examination after specific denial 470

Advancement, settlement on beneficiary and family 570

Affidavit, sufficiency, substituted service 572

Aggregation, estate in which deceased never had an interest, accumulations 485

AGRICULTURE.

Marketing scheme—Determination of prices—"Exceptional quotations"—"Average of mean prices"—Milk Act, 1934 (c. 51), s. 4 [UNITED DAIRIES (WHOLESALE), LTD. *v.* LEMON) .. 618

Allowance, non-resident housekeeper .. 792

Amount recoverable, damages, Employers' Liability Act, 1880 777

Apportionment, of costs, taxation .. 221

——, of tax, year of death 667

Assessment, tied house 298

——, uniformity of, procedure by instalments 266

Assessment committee, clerk, appointment of officer of county borough council 98

Assignee, insurance policy, amount recoverable by, sufficiency of stamp .. 91

Assignment, lease, approval of lease by solicitor 532

Assignment, statutory order to pay .. 807

Bailiff, high, irregularity in levy, liability, remoteness of damage 119

BAILMENT.

Motor car—Car park—Car left by owner—Ticket—Exception from liability—Delivery to third party without production of ticket—Liability of proprietors of car park [ASHBY *v.* TOLHURST] 837

BANKRUPTCY.

Deed of arrangement—Assent—Dealings with trustee—Estoppel—Action for debt [VICTOR WESTON (FABRICS), LTD. *v.* MORGENSTERNS (A FIRM)] 260

——, *Assignment of lease to debtor—Covenant of indemnity—Contingent liability to indemnify assignor—"Creditor"* [*Re* CASSE; ROBINSON *v.* GRIGG] 710

Notice—Substituted service—Affidavit in support—Sufficiency—Bankruptcy Rules, 1915, r. 156 [*Re* DE CESPEDES, THE DEBTOR *v.* PETITIONING CREDITOR AND OFFICIAL RECEIVER] 572

Benefices, union of, scheme opposed, "person interested," preliminary point 64

Benefit, advancement, settlement on beneficiary and family 570

Bets, liability to tax 475

Bicycle, employee riding, epileptic.. .. 631

PAGE

BILLS OF EXCHANGE.

Indorsement—Cheque—Rubber stamp—Various names of company—Intention of indorser [BIRD & CO. (LONDON), LTD. *v.* THOS. COOK & SON, LTD., AND THOS. COOK & SON (BANKERS), LTD.] 227

Bond, British government loan in America, law applicable 164

Borstal prosecutions, quarter sessions, procedure 62

Borstal treatment, report of Prison Commissioners 378

Building contract, guarantee of performance, mistake as to contracting party 255

Business, words relating to, slander .. 215

Calls, advance payments, deduction of tax 673

Capital, or annual payment, purchase of share in partnership, instalments .. 492

——, recoupment of interest from, by tenant for life 828

——, reduction, powers of company .. 422

Capitalisation of interest, liability to tax 1

Car park, liability of owner for loss of car 837

CARRIERS.

Railways—Exceptional rates—Competition with coastwise shipping—Right of shippers to appear on application to Railway Rates Tribunal—Railways Act, 1921 (c. 55), s. 37 (1) [GREAT WESTERN RAILWAY CO. *v.* UNITED KINGDOM CHAMBER OF SHIPPING] 138

Charity, money for recreation of employees of company 188

Cheque, indorsed by rubber stamp, various names 227

Child, eldest, entitled to estate tail .. 563

Children, no proceedings by, amount recoverable, Employers' Liability Act, 1880 777

——, trust for, omitted words supplied 545

CHOSES IN ACTION.

Assignment—Statutory order to pay—Notice—Treaty of Peace Order, 1919 (S. R. & O., 1919, No. 1517 (as amended)), s. 1 (17) [HOLLAND *v.* GERMAN PROPERTY ADMINISTRATOR] 807

Claim, insurance policy, fraud 193

Cleaning and dyeing, retail shop, repair work 368

Clerk, assessment committee, appointment of officer of county borough council 98

Collusion, foreign divorce 723

Committal, order for, appeal from .. 477

COMPANIES.

Directors—Governing director—Contract of service—Articles of association—Termination of employment—Liquidation of company [*Re* T. N. FARRER, LTD.] .. 505

——, *Remuneration—Resolution forgoing remuneration—Company acting on resolution—Estoppel of a director* [*Re* WILLIAM PORTER & CO., LTD.] .. 361

PAGE

Dividends — Interim dividend — Reserve fund used in the business—Reserve fund formed from profits and premiums on issue of shares—Whether available for dividend — Discretion of the court [Drown *v.* Gaumont-British Picture Corporation, Ltd.] 609

Meetings—Proxy—Proxy-holder — Extent of rights of voting—Proxy to act at the meeting and to vote for scheme of arrangement—Motion to defer consideration of scheme—Voting [*Re* Waxed Papers, Ltd.] 117, 481

Reduction and reorganisation of capital—Whether intra vires—Variation and extinguishment of rights of deferred shareholders—Separate class meeting—Form of directors' circular soliciting proxies—Confirmation of court—Companies Act, 1929 (*c.* 23), *ss.* 55, 56, 57 [Carruth *v.* Imperial Chemical Industries, Ltd.] 422

Statutory company—Winding up—Distribution of assets—Surplus assets—No provision in memorandum or articles—Original and additional share capital—Limited dividend—Distinction between classes of capital [*Re* Syston and Thurmaston Gas, Light and Coke Co., Ltd.] 322

Winding up—Private company—Transfer of shares—Directors' power to refuse registration—Decease of shareholder—Refusal to register transfer to executors—Grounds for winding up [*Re* Cuthbert Cooper & Sons, Ltd.] 466

——, *Voluntary winding up—Distress levied before commencement of winding up—Landlords also directors of company—Discretion of court to stay—Companies Act,* 1929 (*c.* 23), *s.* 252 [*Re* G. Winterbottom (Leeds), Ltd.] 232

——, ——, *Remuneration voted to liquidator—Compulsory winding up superseding voluntary winding up—Review of remuneration voted to liquidator in voluntary winding up—Companies Act,* 1929 (*c.* 23), *ss.* 175, 232, 241—*Companies (Winding up) Rules,* 1929, *r.* 192 (*i*) [*Re* Mortimers (London), Ltd.] .. 364

Company, floating charge over property in Scotland 823
——, loan to, whether released by will 54
——, undue influence, guarantee given to avoid prosecution 657
Compensation, compulsory purchase by public authority, notice to treat by public authority after transfer from railway company 12

COMPULSORY PURCHASE.

Assessment of compensation—Power to purchase given to railway company, subject to modification under Lands Clauses Act—Transfer to public authority—Notice to treat by public authority after transfer—Compensation assessed under Acquisition of Land (Assessment of Compensation) Act, 1919 (*c.* 57) [Drapers Company *v.* London Passenger Transport Board] 12

Concurrent findings of fact, historical documentary evidence 541

CONFLICT OF LAWS.

Bond—Issued by British Government in America — Law applicable — Intention [R. *v.* International Trustee for the Protection of Bondholders Akt.] 164

PAGE

Company—Registered in England with property in Scotland—Floating charge on whole undertaking ranking as first charge—Validity of charge in respect of property in Scotland—Companies Act, 1929 (*c.* 23), *s.* 270 [*Re* Anchor Line (Henderson Bros.), Ltd.] 823

Foreign judgment—Cause of action—Judgment of Supreme Court of Ontario—Stay—Appeal to Privy Council—Administration of Justice Act, 1920 (*c.* 81), *s.* 9 (1)—*Foreign Judgments (Reciprocal Enforcement) Act,* 1933 (*c.* 13), *ss.* 1, 6, 7—*Privy Council Appeals Act (Revised Statutes of Ontario,* 1927, *c.* 86), *ss.* 2, 3 (*d*)—*Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order,* 1933 (*S.R. & O.,* 1933, *No.* 1073) [Yukon Consolidated Gold Corporation, Ltd. *v.* Clark] 343

Contingent liability, right of proof, deed of arrangement 710

CONTRACT.

Assignment of lease—" Subject to purchaser's solicitor approving the lease "—Conditional contract—Conduct of solicitor—Unreasonableness [Caney *v.* Leith] 532

Illegality — Public policy — Undertaking not to disclose to trade union a member's confession of wrongdoing—Measure of damages [Howard *v.* Odhams Press, Ltd.] 509

Payment of solicitors' costs—Action against local government officer—Corporation undertaking to assist in paying or contributing to costs of action—Settlement of action—Enforceable contract—Vagueness [Armstrong, Taylor & Whittaker *v.* Oldham Corporation] .. 577

Undue influence—Third party—Contract by limited company—Suggested prosecution of brother of director—Effect on father's health [Mutual Finance, Ltd. *v.* John Wetton & Sons, Ltd.] 657

Convictions, non-disclosure, discovery against insurance company 767
——, previous, decision of justices not announced before evidence of 671

COPYRIGHT.

Infringement — Film—Song—Authorship wrongly stated—Screen credit [Miller *v.* Cecil Film, Ltd.] 464

Play—Title—Film unconnected with play—Same title—Rights of owner of copyright in play [O'Gorman *v.* Paramount Film Service, Ltd.] 113

Costs, admission of negligence, denial of liability, costs after date of payment into court, discretion of court 133
——, apportionment of, success on some issues 221
——, personal liability of solicitor, application for 496
——, resolution of local authority to pay costs of servant sued for libel 577

COUNTY COURTS.

Execution—High bailiff—Irregularity in levy—Liability—Remoteness of damage [Domine *v.* Grimsdall] 119

County valuation committee proceeding by instalments to secure uniformity .. 266
Court, discretion of, costs after date of payment into court 133
Cover, continuation of shares, implied contract 588

PAGE

CRIMINAL LAW.

Borstal treatment—Suitability of case—Report of Prison Commissioners—Reasons—Prevention of Crime Act, 1908 (*c.* 59), *s.* 1 (1) [R. *v.* NAYLOR] 378

Evidence—Articles in possession of accused—Article found in accused's home in possession of servant—Admissibility [R. *v.* KURASCH] 130

Manslaughter—Reckless driving of motor car—Judge's direction to jury—Road Traffic Act, 1930 (*c.* 43), *s.* 11—*Road Traffic Act*, 1934 (*c.* 50), *s.* 34 [ANDREWS *v.* DIRECTOR OF PUBLIC PROSECUTIONS] 552

Currency, gold clause, loan in America 164

Damage, remoteness of, high bailiff, irregularity in levy, liability 119
Damages, action for personal injuries, appeal on quantum of damages 60
Dangerous machine, obligation of workman to use guard, instruction by employer 68
Debentures, interest, payable in foreign currency, fixed rate of exchange, deduction of income tax 79
——, tax on, paid by company but recoverable from debenture holders, double taxation, relief 20
Decontrol, whether 1933 Act retrospective, recontrol 637
Deduction, income tax, annual payment, part of consideration on purchase of business 291
——, yearly interest, capital sum 626
Deed of arrangement, assent, dealings with trustee 260
——, proof for contingent liability 710
Denial of liability, negligence admitted, costs after date of payment into court, discretion of court 133
Descent, gavelkind land, vested in lunatic in 1925 17
Devise of realty to "heir-at-law," assimilation of devolution of realty and personalty, construction 38
Director, terminal payment on retirement or death, income tax 400
Directors, forgoing remuneration, estoppel 361
Disclosure, duty, fire insurance 193

DISCOVERY.

Action by insurance company to avoid a policy—Non-disclosure of convictions of motoring-offences—Application for discovery of documents in similar cases—Road Traffic Act, 1934 (*c.* 50), *s.* 10 (3) [MERCHANTS' AND MANUFACTURERS' INSURANCE CO., LTD. *v.* DAVIES] .. 767

Discretion, right of appellate court to interfere 646

Disqualification, driving licence, indefinite period 380

Distress, stay of, winding up, directors the landlords of company's premises .. 282

DISTRIBUTION AND DESCENT.

Cases subject to special rules—Lunatic surviving 1925 *and dying without recovering testamentary capacity—Gavelkind land—Whether descent according to custom or to common-law heir* [*Re* HIGHAM, HIGHAM *v.* HIGHAM] 17
Distribution of assets, company with fixed dividends 322
Dividend, out of reserve fund used in the business 609

PAGE

DIVORCE.

Evidence—Cross-examination of respondent—Denial by respondent limited to charge of adultery with one co-respondent—Cross-examination restricted to charge specifically denied—Evidence Further Amendment Act, 1869 (*c.* 68), *s.* 3—*Supreme Court of Judicature* (*Consolidation*) *Act*, 1925 (*c.* 49), *s.* 198 [MORTON *v.* MORTON, DALY AND MCNAUGHT] 470
Foreign decree in favour of husband—Parties domiciled abroad at time of decree—Collusion—Fraud not touching the jurisdiction—Wife's petition to test validity of decree [CROWE *v.* CROWE] .. 723
Variation of settlement—Petition by guilty wife—Consents of persons interested—Interests of unborn persons [BOWLES *v.* BOWLES] 263
Double taxation, relief 20

ECCLESIASTICAL LAW.

Union of benefices—Scheme made by the Ecclesiastical Commissioners—Opposition—"Person interested"—Preliminary point—Necessity for determination of the preliminary point before the hearing of the main appeal—Provision for such hearing in the Order in Council—Union of Benefices Act, 1860 (*c.* 142), *s.* 16 [*Re* ALL HALLOWS, LOMBARD STREET] 64
Elector, communication to member of parliament, privilege 772

ELECTRICITY SUPPLY.

Powers of undertakers—Supply outside area of supply—Amalgamated railway company—Electrification of part of railway undertaking outside area of supply—Electrified part previously owned by company absorbed into amalgamated company—Electric Lighting Act, 1909 (*c.* 34), *s.* 5 (1)—*Electricity* (*Supply*) *Act*, 1926 (*c.* 51), *ss.* 12, 47 [ATTORNEY-GENERAL *v.* LIVERPOOL CORPORATION AND LONDON, MIDLAND AND SCOTTISH RAILWAY CO.] 698
Employer's instructions to workman not to use guard on dangerous machinery, workman's obligation to use guard .. 68
Epileptic, riding bicycle, accident arising out of employment 631

ESTATE DUTY.

Aggregation — Settlement — Accumulation of interest during life of settlor—Accumulations to form part of settled fund—Finance Act, 1894 (*c.* 30), *s.* 4 [ATTORNEY-GENERAL *v.* DICKINSON AND BARON] 485
Estoppel, deed of arrangement, dealings with trustee 260
Evidence, articles in possession of accused, possession of servant, admissibility 130
——, cross-examination as to adultery .. 470
Exceptional rates, railway, objection by competitors 138
Exchange, fixed rate of, interest on debenture, deduction of income tax .. 79

EXECUTION.

Garnishee—Wife debtor—Bank account—Account in wife's name—Payments in made by husband—Resulting trust in favour of husband [HARRODS, LTD. *v.* TESTER] 236
Wrongful and irregular execution—Writ of possession—Judgment in respect of whole premises—Portion alleged protected by Rent Acts—Failure of landlord to warn sheriff's officer of protection—Whether officer landlord's agent [WILLIAMS *v.* WILLIAMS AND NATHAN] 559

PAGE

Execution, high bailiff, irregularity in levy, liability, remoteness of damage .. 119
——, wrongful, claim in interpleader .. 706
Executors, of husband, liability under separation deed 715

FACTORIES AND SHOPS.

Dangerous machine—Obligation of workman to use guard—Instruction by employer—Election by infant plaintiff to take workmen's compensation—Factory and Workshop Act, 1901 (*c.* 22), *s.* 10—*Woodworking Machinery Regulations*, 1922 (*S. R. & O.* 1922, *No.* 1196), *regs.* 17, 23 [MURRAY *v.* SCHWACHMAN, LTD.] 68

Film, screen credit, authorship of song .. 464
——, unconnected with play, same title, rights of owner of copyright in play .. 113
Floating charge, property in Scotland, validity 823
Foreign divorce, validity, collusion 723
Foreign judgment, enforcement, judgment in dominion 343
Foreign law, contract by government .. 164
Frontager, injunction, improper user of road 393

Garnishee, account in wife's name, wife's debt 236
Gavelkind land, lunatic surviving 1925 and dying without recovering testamentary capacity, descent 17
Geographical word, as trade mark .. 594
Golfer, private bets, liability to tax .. 475
Governing director, cesser of office on winding up 505

GUARANTEE.

Indemnity—Bond—Indemnity in respect of bond in favour of rural district council—Bond given in favour of county council—Knowledge of guarantors—Estoppel [PROVIDENT ACCIDENT & WHITE CROSS INSURANCE CO., LTD. *v.* DAHNE AND WHITE] 255

Guarantee, to prevent prosecution, father's health 657

Heeling of ship when loading, peril of the sea 383
Heir-at-law, devise of realty to, assimilation of devolution of realty and personalty, construction 38

HIGHWAYS.

Improper user—Injunction—Damage to support action by frontager without joinder of A.-G. [MEDCALF *v.* R. STRAWBRIDGE, LTD.] 393
Streets—Taking over by local authority—Description of street in order—Part of street outside the area of the authority included—Private Street Works Act, 1892 (*c.* 57), *s.* 20 [NEWTON *v.* LAMBTON HETTON & JOICEY COLLIERIES, LTD.] 150

Housekeeper, non-resident, income tax 792
Husband, liability to tax on wife's prenuptial income 349
——, non-resident, assessment to tax upon wife's income 418

HUSBAND AND WIFE.

Insurance policy—For benefit of wife and children—Adopted child—No legal adoption—Married Women's Property Act, 1882 (*c.* 75), *s.* 11 [*Re* CLAY'S POLICY OF ASSURANCE, CLAY *v.* EARNSHAW] 548
Maintenance—Provisional order made in South Africa—Confirmation by court of summary jurisdiction in England—Appeal to Probate, Divorce and Admiralty Division — Jurisdiction — Maintenance Orders (Facilities for Enforcement) Act, 1920 (*c.* 33), *s.* 4 (7) [HAGUE *v.* HAGUE] 541

PAGE

Separation deed—Payment of weekly sum to wife "during her life"—Death of husband — Whether husband's estate liable for payments—Law of Property Act, 1925 (*c.* 20), *s.* 80 (1) [KIRK *v.* EUSTACE] 715

Illegality, agreement contrary to mining statute 285

INCOME TAX.

Assessment — Allowance — Non-resident housekeeper—Finance Act, 1924 (*c.* 21), *s.* 22 [BROWN *v.* ADAMSON (INSPECTOR OF TAXES)] 792
Assessment of non-resident—War Loan interest and bank interest receivable by wife—Wife resident in United Kingdom—Wife living with husband within All Schedules Rules, r. 16—*Husband in United Kingdom part of each year—Place of assessment—Income Tax Act*, 1918 (*c.* 40), *s.* 102 (3), *Sched. D, Misc. Rules, r.* 4 (5) [DUCKWORTH *v.* LOWE (INSPECTOR OF TAXES)] 418
Assessment on executrix—Untaxed income of deceased not returned by him—Assessment including deceased wife's income—Assessment in respect of years preceding year of death—Apportionment—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, rr.* 16, 18 [PALMER *v.* CATTERMOLE (INSPECTOR OF TAXES)] 667
Computation of husband's liability to tax—Wife's income from foreign possessions—Three years' average—Wife's prenuptial income—Income Tax Act, 1918 (*c.* 40), *Sched. D., Cases IV and V, All Schedules Rules, r.* 16 [ELMHIRST *v.* INLAND REVENUE COMMISSIONERS] .. 349
Deduction—Interest on payments in advance of calls on shares—Rate of interest fixed by articles—Payment at full rate without deduction for tax—Presumption of agreement for payment at higher rate [NOEL *v.* TRUST & AGENCY CO. OF AUSTRALASIA, LTD.] 673
Deduction by occupier from rent—Relief under Sched. A in respect of unlet tenements—Disagreement between landlord and tenant as to deduction—Reference to General Commissioners—Finality of decision of General Commissioners—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 22—*Finance Act*, 1930 (*c.* 28), *s.* 21 ([ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* SACKVILLE ESTATES, LTD.] 720
Double taxation—Relief—Dominion tax—Allowances and deductions—Tax on debenture interest paid by company but recoverable from debenture holders [NATIONAL MORTGAGE & AGENCY CO. OF NEW ZEALAND, LTD. *v.* INLAND REVENUE COMMISSIONERS] 20
Exemption—Money expended for charitable purposes only—Land conveyed to trustees as recreation ground for employees of a limited company—Money expended on recreational facilities—Income Tax Act, 1918 (*c.* 40), *s.* 37 (1) (*b*) [TRUSTEES OF SIR HAROLD A. WERNHER'S CHARITABLE TRUST *v.* INLAND REVENUE COMMISSIONERS] 488
Interest on debentures—Payable in foreign currency at fixed rate of exchange—Deduction of income tax—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 21 [RHOKANA CORPN., LTD. *v.* INLAND REVENUE COMRS.] 79

PAGE

Mortgage interest—Mortgage of reversionary interest—Interest added to principal—Capitalisation of interest—Interest ultimately received as part of purchase price on sale of mortgaged property—Liability to tax [INLAND REVENUE COMRS. *v.* LAWRENCE, GRAHAM & CO.] 1

Profits from employment or vocation—Professional golfer—Bets on private games — Gratuities — Organisation — Income Tax Act, 1918 (*c.* 40), *Sched. D, Case II* [DOWN (INSPECTOR OF TAXES) *v.* COMPSTON] 475

——, *Sum payable on termination of office—Death—Assessment on executors—Income Tax Act*, 1918 (*c.* 40)—*All Schedules Rules, r.* 18—*Finance Act*, 1927 (*c.* 10), *s.* 45 (5), (6) [ALLEN AND MURRAY *v.* TREHEARNE (INSPECTOR OF TAXES)] 400

Surtax—Deduction—Purchase price of deceased partner's share in partnership—Capital or annual payment [INLAND REVENUE COMMISSIONERS *v.* LEDGARD] 492

Trade expenses—Difference between rent paid for buildings and rent received from sub-tenants—Control of buildings essential to trade—Printers of newspapers—Distribution of newspapers—Income Tax Act, 1918 (*c.* 40), *Sched. D, Cases I and II, r.* 3 (*a*) [ALLIED NEWSPAPERS, LTD. *v.* HINDSLEY (INSPECTOR OF TAXES)] 663

Yearly interest—Deduction—Adjustment between local authorities—Added sum called "interest" [SOUTHPORT BOROUGH COUNCIL *v.* LANCASHIRE COUNTY COUNCIL] 626

Income tax, deductions, annual payment, part of consideration on purchase of business 291

Indorsement by rubber stamp, varying form of name 227

Industrial hereditament, retail shop, cleaning and dyeing 368

Injunction, at suit of frontager, improper use of road 393

Injuries, personal, action for, appeal on quantum of damages 60

INSURANCE.

Life assurance — Exception — Suicide "within one year from commencement of assurance"—Suicide nine years after issue—Public policy [BERESFORD *v.* ROYAL INSURANCE CO., LTD.] 243

Life insurance—Assignment of policy—Sufficiency of stamp—Amount recoverable by assignee—Interest [*Re* WATERHOUSE'S POLICY] 91

Policy—Disclosure—Claims on other policies in respect of other subject-matter—Exaggerated claim—Fraud [EWER *v.* NATIONAL EMPLOYERS' MUTUAL GENERAL INSURANCE ASSOCIATION, LTD.] 193

Policy moneys—Trust—Benefit of wife and named daughter—Named person an adopted child [*Re* CLAY'S POLICY OF ASSURANCE, CLAY *v.* EARNSHAW] .. 548

Insurance, action to avoid policy, discovery 767

Interest, added to principal, ultimately received as part of purchase price on sale of mortgaged property, liability to tax 1

——, debentures, payable in foreign currency at fixed rate of exchange, deduction of income tax 79

——, policy moneys, life insurance .. 91

PAGE

INTERPLEADER.

Claim—Subsequent action by claimant for wrongful execution — Whether action barred — County Courts Act, 1867 (*c.* 142), *s.* 31—*County Courts Act*, 1934 (*c.* 53), *s.* 133 [WEST *v.* AUTOMATIC SALESMAN, LTD.] 706

Judge at chambers, appeal from 477

Judgment by default, setting aside .. 646

Landlord, failure to notify sheriff of protection of Rent Acts, irregular execution 559

LANDLORD AND TENANT.

Rent restriction—Decontrol—House decontrolled before 1933, *let again after* 1933—*Whether house recontrolled—Retrospective effect of statutes—Rent and Mortgage Interest Restrictions (Amendment) Act*, 1933 (*c.* 32), *s.* 2 (BROOKS *v.* BRIMECOME] 637

Lapse, statutory exception, expectancy, inclusion in residue 110

——, substituted gift to personal representatives of deceased legatee 276

Lease, assignment, subject to purchaser's solicitor's approval of lease 532

Legacy to personal representatives of deceased legatee, lapse 276

LIBEL AND SLANDER.

Accusation of report of crime to police—Whether defamatory—Publication—Proprietary club—Proprietors permitting defamatory statement to remain on club wall [BYRNE *v.* DEANE] 204

Privileged occasion—Allegation of improper conduct by public official—Communication to member of parliament seeking interview with Minister [R. *v.* RULE] .. 772

Slander—Words spoken in relation to conduct of business—Special damage [DE STEMPEL *v.* DUNKELS] 215

Licence, driving, disqualification, indefinite period 378

Licensed premises, rating, monopoly value, deduction 325

——, tied house, assessment 298

Loan of servant, no request for services 605

Loan to company, whether released by phrase in will 54

Local authority, street partly outside area, taking over 150

Local government officer, undertaking to pay costs of 577

Lunatic surviving 1925 and dying without recovering testamentary capacity, gavelkind land, descent 17

MAGISTRATES.

Procedure—Conviction—Previous convictions—Justices' decision not announced before inquiry into accused's previous history [DAVIES *v.* GRIFFITHS] 671

Quarter sessions—Borstal prosecutions—Procedure—Criminal Justice Administration Act, 1914 (*c.* 58), *s.* 10 [R. *v.* RIORDAN] 62

Maintenance order, confirmation of colonial order 539

Manslaughter, reckless driving 552

MASTER AND SERVANT.

Contract of service—Termination—Notice—Commercial contract for an indefinite term—Reasonable notice [DE STEMPEL *v.* DUNKELS] 215

Loan of servant—What amounts to loan—No request for services—Liability of master [CLELLAND *v.* EDWARD LLOYD, LTD.] 605

PAGE

Superannuation—Public authorities—War bonus—Basis of calculation of pension [TIBBALS *v.* PORT OF LONDON AUTHORITY] 413

Meeting, separate shareholders meeting 422

MINES.

Coal mine—Statutory regulation—Provision of refuge holes—Proceedings against manager by person other than inspector of mines and without consent in writing of Secretary of State—Coal Mines Act, 1911 (*c.* 50), *ss.* 44, 75, 102 (5) [DAVIES *v.* MAY] 582

Mines, agreement in contravention of statute, enforceability 285

MONEY.

Currency — Bond — Issued by British government — Law applicable — Gold clause—American legislation—Effect of option to pay in England [R. *v.* INTERNATIONAL TRUSTEE FOR THE PROTECTION OF BONDHOLDERS AKT.] 164

Monopoly value, rating of licensed premises 325

Mortgage of reversionary interest, interest added to principal, liability to tax .. 1

Motor, car park, liability for loss of car 837

NEGLIGENCE.

Damages—Action for personal injuries—Loss of both hands—£10,000 *awarded—Appeal on quantum of damages* [HEAPS *v.* PERRITE, LTD.] 60

Negligence of fellow servant causing death —Statutory liability—Proceedings by widow of deceased but not by children—Amount recoverable by widow—Fatal Accidents Act, 1846 (*c.* 93), *ss.* 1, 2, 5—*Fatal Accidents Act,* 1864 (*c.* 95), *s.* 1—*Employers' Liability Act,* 1880 (*c.* 42), *ss.* 1, 3 [AVERY *v.* LONDON & NORTH EASTERN RAILWAY CO.] 777

Occupier of premises—Scaffold erected by servant of occupier—Injury to employee of independent contractor [CLELLAND *v.* EDWARD LLOYD, LTD.] 605

Notice, reasonable, contract of service, indefinite term 215

NUISANCE.

Public nuisance—Damage to unadopted road — Frontagers — Special damage [MEDCALF *v.* R. STRAWBRIDGE, LTD.] 393

Obstruction, street, order restricting validity 528

Payment into court, denial of liability, admission of negligence, discretion as to costs 133

Peril of the sea, unexplained heeling of ship 383

Personal representatives, of deceased legatee, gift to, lapse 276

Play, title, film unconnected with play, same title, rights of owner of copyright in play 113

POLICE.

Borough police force—Sergeant—Resignation — Acceptance — Cancellation — Dismissed after expiration of notice—Validity—Power to dismiss—Right to declaration — Municipal Corporations Act, 1882 (*c.* 50), *s.* 191 (4)—*Police Act,* 1919 (*c.* 46)—*Police Pensions Act,* 1921 (*c.* 31)—*Police Appeals Act,* 1927 (*c.* 19) [COOPER *v.* WILSON] 726

Police, information to, libel 204

Policy, for benefit of wife and daughter, adopted daughter 548

——, life insurance, assignment of, sufficiency of stamp, amount recoverable by assignee 91

Portion, who is elder child entitled to first estate tail 563

PRACTICE.

Costs — Running-down action — Payment into court—Admission of negligence — Denial of liability—Costs after date of payment into court—Discretion of court —R.S.C., Ord. 22, *r.* 6—*R.S.C., Ord.* 65, *r.* 1 [BROWN *v.* NEW EMPRESS SALOONS, LTD.] 133

——, *Taxation—Apportionment—Practice since repeal of R.S.C., Ord.* 65, *r.* 2 [ADAMSON *v.* BIRKENHEAD CORPN.] .. 221

Judgment by default — Setting aside judgment—Discretion of judge—Power of Court of Appeal to interfere with discretion exercised by judge in chambers —R.S.C., Ord. 13, *r.* 10; *Ord.* 27, *r.* 15 [EVANS *v.* BARTLAM] 646

Jurisdiction—Court of Appeal—Appeal from judge at chambers in King's Bench Division—Matters of practice and procedure—Order for committal—R.S.C., Ord. 54, *r.* 23 [LEVER BROTHERS, LTD. *v.* KNEALE] 477

Premiums on issue of shares, whether capital 609

Prison Commissioners, reasons for recommending Borstal treatment 378

Privilege, communication to member of parliament 772

PRIVY COUNCIL.

Australia—Mines—Gold mine—Tributer's agreement—Payment regulated by statute —Agreement for payment at less than statutory minimum—Illegality—Retrospective effect—Mining Acts, Western Australia, 1904-23, *ss.* 152, 156 [LAKE VIEW & STAR, LTD. *v.* COMINELLI] .. 285

Canada — Practice — Ownership of river bed—Historical documentary evidence—Concurrent findings of fact [ST. FRANCIS HYDRO ELECTRIC CO., LTD. *v.* R.] .. 541

India—Income tax—Business—Expenditure—Annual payment made as part of consideration of purchase of business—Distinguished from one for the purpose of producing profits [TATA HYDRO-ELECTRIC AGENCIES, LTD (BOMBAY) *v.* INCOME TAX COMMISSIONER, BOMBAY PRESIDENCY AND ADEN] 291

New Zealand — Will — Construction — Devise of realty to " heir-at-law " of survivor of two beneficiaries—Whether heir at common law or successors to real estate of an intestate dying in New Zealand subsequent to 1874—*Real Estate Descent Act, No.* 84 *of* 1874, *ss.* 3, 18—*Administration Act, No.* 49 *of* 1879, *ss.* 6, 10—*Administration of Estates Act, No.* 3 *of* 1908, *ss.* 4, 11 [MACLEAY *v.* TREADWELL] 38

Proof, contingent liability, deed of arrangement 710

Property tax, dispute between landlord and tenant, finality of decision of General Commissioners.. 720

Proposal, insurance, disclosure 193

——, variation of valuation list, by rating authority 681

Proxy, proxy-holder, extent of rights of voting 117, 481

——, right to vote for adjournment 117, 481

PAGE

Public authority, notice to treat by public authority after transfer, assessment of compensation 12
Public policy, disclosure of member's wrongdoing to trade union 509
——, suicide, insurance 243
Publication, libel attached to premises .. 204

Quarter sessions, Borstal prosecutions, procedure 62

Railway, exceptional rates, objection by coastwise shipping 138

RATES AND RATING.

Assessment — Licensed property—"Tied house"—Parochial Assessments Act, 1836 (c. 96), s. 1—Rating and Valuation Act, 1925 (c. 90) [ROBINSON BROTHERS (BREWERS), LTD. *v.* HOUGHTON AND CHESTER-LE-STREET ASSESSMENT COMMITTEE] 298
——, *—Uniformity—County valuation committee—Right to proceed by instalments* [R. *v.* CORNWALL COUNTY VALUATION COMMITTEE, *Ex p.* FALMOUTH BOROUGH COUNCIL] 266
Assessment committee—Clerk—Appointment of officer of county borough council —Rating and Valuation Act, 1925 (c. 90), s. 55 [R. *v.* SALFORD ASSESSMENT COMMITTEE, *Ex p.* OGDEN] 98
Industrial hereditament—User as a retail shop—Cleaners and dyers—Work of the same nature as repair work—Articles received from and delivered to customers themselves — Rating and Valuation (Apportionment) Act, 1928 (c. 44), s. 3 (4) [RITZ CLEANERS, LTD. *v.* WEST MIDDLESEX ASSESSMENT COMMITTEE] 368
Licensed premises—Monopoly value—Capital payment—Rent the hypothetical tenant would pay—Licensing (Consolidation) Act, 1910 (c. 24), s. 14 (2)—Rating and Valuation Act, 1925 (c. 90), s. 68 [APPENRODT *v.* CENTRAL MIDDLESEX ASSESSMENT COMMITTEE] 325
Quinquennial valuation list—Amendment of current valuation list—Numerous hereditaments wrongly valued in current list—No change in conditions effecting general rise in values—Revaluation by rating authority—Whether new list—"Person aggrieved"—Rating and Valuation Act, 1925 (c. 90), s. 37 (1), (3) [R. *v.* WORTHING BOROUGH COUNCIL AND HORSHAM AND WORTHING ASSESSMENT COMMITTEE, *Ex p.* BURGESS, R. *v.* HORSHAM AND WORTHING ASSESSMENT COMMITTEE, *Ex p.* BURGESS] .. 681

Realty, devise of, to "heir-at-law", assimilation of devolution of realty and personalty, construction 38
Reciprocal enforcement of judgments, dominion judgment 343
Reckless driving, manslaughter 552
Refuge holes, proceeding against manager 582
Regulation of traffic, traffic sign, validity 525
Remuneration, directors forgoing, estoppel 361
——, liquidator, voluntary liquidation superseded 364
Rent restriction, recontrol 637
Reserve fund used in business, whether available for dividend 609
Residue, gift, "everything I die possessed of" 110
Resignation, police officer, subsequent dismissal 726
Restrictive covenants, extent of land benefited 691
Retail shop, cleaning and dyeing 368

REVENUE.

Stamp duties—Assignment of insurance policy—Stamp Act, 1891 (c. 39), ss. 88 (2), 118 (1) [*Re* WATERHOUSE'S POLICY] 91

PAGE

Road, unadopted, improper user, frontager's right to injunction 393
Rubber stamp, indorsement in various names 227

SALE OF LAND.

Restrictive covenants—Land benefited—Conflicting clauses in deed—Land too extensive to be benefited [*Re* BALLARD'S CONVEYANCE] 691

Salvation Army officer, "workman" .. 751
Scaffold erected by servant of occupier, injury to employee of independent contractor 605
Scheme of arrangement, right of proxy-holder to vote for adjournment .. 117, 481
Screen credit, authorship wrongly stated 464
Seaworthiness, provision of bunker coal 847
Separation deed, liability of husband's estate 718

SETTLEMENT.

Beneficial interests— Trusts for issue — Females attaining 21 or marrying under that age—Omitted words supplied [*Re* HARGRAVES' TRUSTS, LEACH *v.* LEACH] 545
Jointure and interest on portions—Charged primarily on income—Charged also on capital—Deficiency of income—Paid voluntarily by tenant for life—Recoupment from capital [*Re* WARWICK'S SETTLEMENT TRUSTS, GREVILLE TRUST CO. *v.* GREY] 828
Person having powers of tenant for life—Compound settlement—Person named in last deed of compound settlement as tenant for life of that settlement—Settled Land Act, 1925 (c. 18), s. 23 (1) (a) [*Re* BEAUMONT SETTLED ESTATES, *Re* THE SETTLED LAND ACT, 1925] 353
Portions—Children entitled—Trust for children other than first or only son entitled for first estate in tail male—Disentail and resettlement by son entitled in remainder to estate tail—Death before life tenant—Whether entitled to portion [*Re* LEEKE'S SETTLEMENT TRUSTS, BOROUGH *v.* LEEKE] 563

Settlement, variation of, petition by guilty wife 263
Shareholders, deferred, separate meeting, procedure 422
Shares, calls, advance payments, deduction of tax 673

SHIPPING.

Bill of lading—Negligence—Perils of the sea—"Charterers' risk"—Unexplained heeling of ship and loss of cargo when loading [THE STRANNA] 383
Seaworthiness—Voyage in stages—Sufficiency of coal—Water Carriage of Goods Act, 1910 (Canada) [E. TIMM & SON, LTD. *v.* NORTHUMBRIAN SHIPPING CO., LTD.] 847

Silicosis, contracted in coal mine, right to compensation 157
Slander, words relating to business .. 215

SOLICITOR.

Litigation—Misconduct—Application for solicitor to pay costs personally—Summary jurisdiction—Solicitor ceasing to be on the record—Form of application—Solicitors Act, 1932 (c. 37), s. 5 (1) [BRENDON *v.* SPIRO] 496
Solicitor, contract to pay costs of, vagueness 577
Solicitors' costs, undertaking to pay .. 577
Stamp, assignment of life insurance policy, amount recoverable by assignee 91
Statutory company, limited dividends, distribution of assets 322

PAGE

STOCK EXCHANGE.

Course of business—Continuation on agreed cover—Implied agreement—Right to close account—Length of notice [SAMSON *v.* FRAZIER, JELKE & CO.] 588
Street, taking over, part outside area of authority 150

STREET TRAFFIC.

Driving licence — Disqualification — Indefinite period—Road Traffic Act, 1930 (*c.* 43), *s.* 15 [R. *v.* FOWLER] 380
Regulation of traffic—Prevention of obstruction of streets—Order restricting sale of confectionery, etc.—Restricted hours not specified—Validity—Town Police Clauses Act, 1847 (*c.* 89), *s.* 21 [ETHERINGTON *v.* CARTER] 528
Traffic sign—" Stop, Road Traffic Officer "—Regulation of movement of traffic—Validity of authorisation by Minister of Transport—Road Traffic Act, 1930 (*c.* 43), *ss.* 48, 49 [LANGLEY CARTAGE CO., LTD. *v.* JENKS, ADAMS *v.* JENKS] .. 525
Substituted service, bankruptcy, sufficiency of affidavit 572
Suicide, payment of policy moneys .. 243
Superannuation, inclusion of war bonus 413
Supply outside area, electricity 698
Surplus assets, company with fixed dividends 322

Taxation, apportionment of general costs 221
Tenant for life, person stated to have such powers 353
——, right to recoup, payment of interest 828
Terminal payment on retirement or death, income tax 400
Ticket, car park, exemption from liability 837
Tied house, assessment 298
Trade expenses, expenses to secure freedom of traffic 663

TRADE MARKS.

Rectification of register—Geographical word—" Adapted to distinguish "—" Glastonburys "—Trade Marks Acts, 1905-1919, *ss.* 3, 9, 11, 19, 44 [*Re* CLARK, SON & MORLAND, LTD.'S, TRADE MARK] .. 594
Trade union, disclosure of member's wrongdoing 509

TRUSTS AND TRUSTEES.

Settlement—Life tenant—Power to raise capital to establish life tenant in business or otherwise for his benefit or advancement—Settlement on tenant for life and his wife and children—" Benefit " [*Re* HALSTED'S WILL TRUSTS, HALSTED *v.* HALSTED] 570

Undue influence, company, prosecution of brother of director 657

Valuation list, proposal to alter, by rating authority 681
Variation of settlement, petition by guilty wife 263
Voting, company meeting, proxy-holder, extent of rights of voting 117, 481
Voyage in stages, unseaworthiness .. 847

Watch committee, dismissal of police officer 726
Widow, proceedings by, no proceeding by children, amount recoverable under Employers' Liability Act, 1880 .. 777
Wife, pre-nuptial income of, assessment of, three years' average 349
——, separate account in name of, payments in made by husband, garnishee 236
Wife's income, assessment of tax on executrix of husband 667

PAGE

WILL.

Construction—" Everything I die possessed of "—Testator's share in father's residuary estate—Death of testator before father—Testator's children surviving father—Wills Act, 1837 (*c.* 26), *s.* 33 [*Re* HAYTER, HAYTER *v.* TRANTER] 110
——, *" I forgive and release all sums owing to me "—Loan to company—Release* [MIDLAND BANK EXECUTOR & TRUSTEE CO., LTD. *v.* YARNERS COFFEE, LTD.] 54
Lapse — Substituted gifts — Legacy to personal representatives of deceased legatee [*Re* COUSEN'S WILL TRUSTS, WRIGHT *v.* KILLICK] 276
Will, devise of realty to " heir-at-law " of survivor of two beneficiaries 38
Winding up, just and equitable, refusal of transfers 466
——, stay of distress 232
——, termination of employment of governing director 505

WORKMEN'S COMPENSATION.

Accident—Disease of gradual onset—No specific event to which injury referable [ORMOND *v.* C. D. HOLMES & CO., LTD.] 795
Accident " arising out of and in the course of the employment "—" For the purposes of and in connection with the employer's trade or business "—Van-driver leaving van to get intoxicating liquor—Prohibition against consuming intoxicating liquor while on duty—Driver killed while remounting van—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 (1), (2) [KNOWLES *v.* SOUTHERN RAILWAY COMPANY] 403
Accident arising out of the employment—Epileptic riding bicycle on employer's business [MARTIN *v.* FINCH] 631
Compensation—Average weekly earnings—Concurrent contracts of service—Collier acting as sub-checkweighman and collector of union subscriptions—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 10 (ii) [UNSWORTH *v.* PEASE & PARTNERS, LTD.] 817
——, *Two accidents—Total incapacity from first accident—Second accident supervening—Right to compensation for second accident* [WHEATLEY *v.* LAMBTON, HETTON & JOICEY COLLIERIES, LTD.] 756
Course of employment Interruption of employment—Railwayman in lodgings away from home—Accident between lodgings and railway station—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1 [ALDERMAN *v.* GREAT WESTERN RAILWAY CO.] 408
Fatal accident—Compensation—Proceedings by children but not by widow of deceased—Amount recoverable by children—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 8 [AVERY *v.* LONDON & NORTH-EASTERN RAILWAY CO.] .. 777
Industrial disease—Silicosis—Process—" Any operation underground in any coal-mine "—Workman not exposed to dust from silica rock—Various Industries (Silicosis) Scheme, 1931 (*S. R. & O.*, 1931, *No.* 342), *para.* 2—*Various Industries (Silicosis) Amendment Scheme*, 1934 (*S. R. & O.*, 1934, *No.* 1155) [WRAGG *v.* SAMUEL FOX & CO., LTD.] 157
Workman—Salvation Army officer—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 3 [ROGERS *v.* BOOTH] 751
Workmen's compensation, election of infant, benefit 68

STATUTES, ETC., REFERRED TO

	PAGES
Wills Act, 1837 (*c.* 26), *s.* 33	110
Fatal Accidents Act, 1846 (*c.* 93), *ss.* 1, 2, 5	777
Town Police Clauses Act, 1847 (*c.* 89), *s.* 21	528
Union of Benefices Act, 1860 (*c.* 142), *s.* 16	64
Fatal Accidents Act, 1864 (*c.* 95), *s.* 1	777
County Courts Act, 1867 (*c.* 142), *s.* 31	706
Evidence Further Amendment Act, 1869 (*c.* 68), *s.* 3	470
Employers' Liability Act, 1880 (*c.* 42), *ss.* 1, 3	777
Municipal Corporations Act, 1882 (*c.* 50), *s.* 191 (4)	726
Stamp Act, 1891 (*c.* 39), *ss.* 88 (2), 118 (1)	91
Private Street Works Act, 1892 (*c.* 57), *s.* 20	150
Finance Act, 1894 (*c.* 30), *s.* 4	485
Factory and Workshop Act, 1901 (*c.* 22), *s.* 10	68
Trade Marks Act, 1905-1919, *ss.* 3, 9, 11, 19, 44	594
Prevention of Crime Act, 1908 (*c.* 59), *s.* 1 (1)	378
Electric Lighting Act, 1909 (*c.* 34), *s.* 5 (1)	698
Licensing (Consolidation) Act, 1910 (*c.* 24), *s.* 14 (2)	325
Coal Mines Act, 1911 (*c.* 50), *ss.* 44, 75, 102 (5)	582
Criminal Justice Administration Act, 1914 (*c.* 58), *s.* 10	62
Income Tax Act, 1918 (*c.* 40), *s.* 37 (1) (*b*)	488
——, *s.* 102 (3)	418
——, Sched. D, Case II	475
——, Sched. D, Cases I and II, r. 3 (*a*)	663
——, Sched. D, Case IV	349
——, Sched. D, Case V	349
——, Sched. D, Misc. Rules, r. 4 (5)	418
——, All Schedules Rules, r. 16	349, 667
——, ——, r. 18	400, 667
——, ——, r. 21	79
——, All Schedules Rules, r. 22	720
Police Act, 1919 (*c.* 46)	726
Acquisition of Land (Assessment of Compensation) Act, 1919 (*c.* 57)	12
Maintenance Orders (Facilities for Enforcement) Act, 1920 (*c.* 33), *s.* 4 (7)	539
Administration of Justice Act, 1920 (*c.* 81), *s.* 9 (1)	343
Police Pensions Act, 1921 (*c.* 31)	726
Railways Act, 1921 (*c.* 55), *s.* 37 (1)	138
Finance Act, 1924 (*c.* 21), *s.* 22	792
Settled Land Act, 1925 (*c.* 18), *s.* 23 (1) (*a*)	353
Law of Property Act, 1925 (*c.* 20), *s.* 80 (1)	715
Supreme Court of Judicature (Consolidation) Act, 1925 (*c.* 49), *s.* 198	470
Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1	408
——, *s.* 1 (1), (2)	403
——, *s.* 3	751
——, *s.* 8	777
——, *s.* 10 (ii)	817
Rating and Valuation Act, 1925 (*c.* 90), *s.* 37 (1), (3)	681
——, *s.* 55	113
——, *s.* 68	325
Electricity (Supply) Act, 1926 (*c.* 51), *ss.* 12, 47	698
Finance Act, 1927 (*c.* 10), *s.* 45 (5), (6)	400
Police (Appeals) Act, 1927 (*c.* 19)	726
Rating and Valuation (Apportionment) Act, 1928 (*c.* 44), *s.* 3 (4)	368
Companies Act, 1929 (*c.* 23), *ss.* 55, 56, 57	422
——, *ss.* 175, 232, 241	364
——, *s.* 252	232
Finance Act, 1930 (*c.* 28), *s.* 21	720
Road Traffic Act, 1930 (*c.* 43), *s.* 11	552
——, *s.* 15	380
——, *ss.* 48, 49	525
Solicitors Act, 1932 (*c.* 37), *s.* 5 (1)	496
Foreign Judgments (Reciprocal Enforcement) Act, 1933 (*c.* 13), *ss.* 1, 6, 7	343
Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (*c.* 32), *s.* 2	637
Road Traffic Act, 1934 (*c.* 50), *s.* 10 (3)	767
——, *s.* 34	552
Milk Act, 1934 (*c.* 51), *s.* 4	618
County Courts Act, 1934 (*c.* 53), *s.* 133	706
Real Estate Descent Act (New Zealand), No. 84 of 1874, *ss.* 3, 18	38
Administration Act (New Zealand), No. 49 of 1879, *ss.* 6, 10	38
Administration of Estates Act (New Zealand), No. 3 of 1908, *ss.* 4, 11	38
Water Carriage of Goods Act, 1910 (Canada)	847
Privy Council Appeals Act (Revised Statutes of Ontario, 1927, *c.* 86), *ss.* 2, 3 (*d*)	343

PAGE
Mining Acts, Western Australia, 1904-23, *ss.* 152, 156 .. 285
R.S.C., Ord. 13, r. 10 .. 646
——, Ord. 22, r. 6 .. 113
——, Ord. 27, r. 15 .. 646
——, Ord. 54, r. 23 .. 477
——, Ord. 65, r. 1 .. 138
——, Ord. 65, r. 2 .. 221
Bankruptcy Rules, 1915, r. 156 .. 572
Companies (Winding up) Rules, 1929, r. 192 (i) .. 364
Treaty of Peace Order, 1919 (S.R. & O., 1919, No. 1517 (as amended)), *s.* 1 (17) .. 807
Woodworking Machinery Regulations, 1922 (S.R. & O., 1922, No. 1196), regs. 17, 23 .. 68
Various Industries (Silicosis) Scheme, 1931 (S.R. & O., 1931, No. 342), para. 2 .. 157
Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933 (S.R. & O., 1933, No. 1073) .. 343
Various Industries (Silicosis) Amendment Scheme, 1934 (S.R. & O., 1934, No. 1155) .. 157

WORDS AND PHRASES

PAGE
Any operation underground in any coal-mine .. 157
Average of mean prices .. 618
Benefit .. 570
Creditor .. 710
Everything I die possessed of .. 110
Exceptional quotations .. 618
For the purposes of and in connection with the employer's trade or business .. 403
Glastonburys .. 594
I forgive and release all sums owing to me .. 54
Person aggrieved .. 681
Person interested .. 64
Stop, Road Traffic Officer .. 525
Subject to purchaser's solicitor approving the lease .. 532

THE
ALL ENGLAND
LAW REPORTS
ANNOTATED

INLAND REVENUE COMMISSIONERS *v.* LAWRENCE, GRAHAM & CO.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.), **February 1, 2, 3, March 3, 1937.**]

Income Tax—Mortgage interest—Mortgage of reversionary interest—Interest added to principal—Capitalisation of interest—Interest ultimately received as part of purchase price on sale of mortgaged property—Liability to tax.

The respondents had acted as solicitors to the Legal and General Assurance Society, Ltd. A mortgagor mortgaged to the society on Jan. 13, 1925, his reversionary interests under a will to secure a loan of £10,000, and agreed to pay interest half-yearly at 5½ per cent. per annum after deduction of tax, reducible on punctual payment to 4½ per cent. The mortgage also provided that any periodical payment not made at the agreed date should be added to the principal and carry interest at the original rate, and that unpaid interest should become accumulated in the way of compound interest with half-yearly rests. The mortgagor borrowed £25,000 more on two deeds of further charge. These deeds contained the same provisions for accumulation of interest. The total amount added in respect of interest calculated to Jan. 10, 1932, was £2,378 19*s*. On Mar. 14, 1932, the society sold the reversionary interests for £30,500. Of this sum the respondents were assessed under All Schedules Rules, r. 21, to income tax upon the sum paid in respect of the accumulated interest :—

HELD : (i) in these circumstances it was impossible to treat the interest in the present case as having been paid by the mortgagor half-yearly out of the sums advanced to him for this purpose by the society. (ii) In each half-year the net interest after deduction of tax by the mortgagor had been added to the capital and the society had accepted the additional capital charge in full satisfaction of interest after such deduction. The payment by the respondents after completion of the sale of the sum in respect of accumulated interest was payment of a sum that had already suffered tax and the respondents were under no liability to make any further deduction. The sum so paid was a net amount resulting from the deduction of tax from the interest and was not interest within All Schedules Rules, r. 21 (2).

Decision of LAWRENCE, *J., affirmed.*

The reasoning in Carnarvon (Earl) v. *I.R.C.* (6) *cannot be supported and Marland* v. *I.R.C.* (7) *was wrongly decided.*

[**EDITORIAL NOTE.** In this case the solicitors of the mortgagees were sought to be assessed under All Schedules Rules, r. 21 (2) as persons who had received taxable interest included in the purchase price on the sale of mortgaged property. This explains the particular form of the present case, but the real question is whether, when interest is capitalised under the form of deed here used, the mortgagees are liable for tax upon the lump sum received in respect of such interest. The deed was drafted after the decision in *Re Morris* (9) in a form especially adopted to effect this purpose. In this form of deed the half-yearly interest after deduction of tax is added to the principal. This form of deed is commonly adopted in the case of mortgages of reversionary interests, where the borrower is often not in a position to, or not desirous of, paying interest as it falls due, and the lender is content to receive both principal and accumulated interest when the reversion falls in. By the provisions of the deed the interest suffers deduction of tax when capitalised, and there can be no further charge of tax upon it. The lump sum is not interest but a net sum—a new and different sum arrived at by deduction of tax from the interest. The cases of *Carnarvon* (*Earl*) v. *I.R.C.* (6) and *Marland* v. *I.R.C.* (7) are carefully analysed with the result stated at the foot of the headnote and the case of *I.R.C.* v. *Holder* (1) and the effect of the practice whereby bankers add interest to an overdraft are fully considered. It is to be noted that although the first two of these cases are dissented from, the same result is reached, and the case of *I.R.C.* v. *Holder* (1) is distinguished and explained.

As to the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 17, pp. 234, 235, para. 474 ; and for Cases, see DIGEST, Vol. 28, pp. 71, 72, Nos. 377-380.]

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Holder*, [1932] A.C. 624 ; 16 Tax Cas. 540 ; Digest Supp.
(2) *Clancarty* (*Lord*) v. *Latouche* (1810), 1 Ball & B. 420 ; 35 Digest 662, *3965 vi.*
(3) *Ex p. Bevan* (1803), 9 Ves. 223 ; 35 Digest 663, *3974.*
(4) *Howard* v. *Harris* (1683), 1 Vern. 190 ; 35 Digest 351, *929.*
(5) *Rufford* v. *Bishop* (1829), 5 Russ. 346 ; 3 Digest 266, *820.*
(6) *Carnarvon* (*Earl*) v. *Inland Revenue Comrs.* (1934), 79 L. Jo. 134 ; 19 Tax Cas. 455 ; Digest Supp.
(7) *Marland* v. *Inland Revenue Comrs.* (1934), 79 L. Jo. 134 ; 19 Tax Cas. 467 ; Digest Supp.
(8) *Rye & Eyre* v. *Inland Revenue Comrs.*, [1935] A.C. 274 ; 19 Tax Cas. 164 ; Digest Supp.
(9) *Re Morris, Mayhew* v. *Halton*, [1922] 1 Ch. 126 ; 28 Digest 72, *378.*
(10) *Re Jauncey, Bird* v. *Arnold*, [1926] Ch. 471 ; 32 Digest 407, *860.*
(11) *Eaton* v. *Bell* (1821), 5 B. & Ald. 34 ; 3 Digest 245, *706.*
(12) *Fergusson* v. *Fyffe* (1841), 8 Cl. & Fin. 121 ; 3 Digest 195, *412.*
(13) *Crosskill* v. *Bower* (1863), 32 Beav. 86 ; 3 Digest 265, *816.*
(14) *Mosse* v. *Salt* (1863), 32 Beav. 269 ; 3 Digest 266, *819.*
(15) *Fenton's Trustee* v. *Inland Revenue Comrs.*, [1936] 1 All E.R. 116 ; Digest Supp.
(16) *Brooke* v. *Price*, [1917] A.C. 115 ; 28 Digest 75, *409.*

Appeal by the Inland Revenue Commissioners from a judgment delivered by Lawrence, J., on Apr. 29, 1936. The facts are fully stated in the judgment of Romer, L.J.

The Attorney-General (*Sir Donald Somervell, K.C.*), *J. H. Stamp* and *Reginald P. Hills* for the appellant commissioners.

A. M. Latter, K.C., and *Cyril King* for both respondents.

The Attorney-General : Where a mortgage deed contemplates that the mortgagor should not have to pay interest for a number of years, in any year where there is no charged income against which the payment can be made, he would have to be held accountable to the Revenue A for the notional deduction of tax on a notional payment, no money having passed out of his pocket. Moreover, if a mortgagor becomes insolvent and the mortgaged property is sold for a substantial sum enabling an interest payment to be made, and if the mortgagor has no charged income to cover the payment, then the Crown has not secured B the tax on the yearly interest which has to be paid, and unless the purchase price more than covers the principal and interest and the full claim of the second mortgagee, no part of that price is available to meet the interest the tax on which is admittedly due to the Crown.

It is immaterial that for purposes of compound interest a net sum C has been taken calculated on the income tax at the rates current in those years. The mortgagee was never entitled to more than the net sum under either rule 19 or rule 21. " By or through whom " are general words, to be construed in a general way, and if the payment is found to have been made by a particular person, then rule 21 applies : *Rye* D *& Eyre* v. *Inland Revenue Comrs.* (8). The test is how the sum in question first originated. If a solicitor receives a cheque for interest and merely passes it on to a client, he may be a mere conduit pipe ; but if out of some general fund he draws a cheque, earmarks it as interest and sends it to the client, the section will apply, whether outside the transaction E he was agent for the mortgagor or the mortgagee. He need not be the agent of the payer : *Rye & Eyre* v. *Inland Revenue Comrs.* (8). The Crown relies on the decision of the main point in *Re Morris, Mayhew* v. *Halton* (9), and on the observations thereon of Russell, J., in *Re Jauncey, Bird* v. *Arnold* (10). The judgments of Singleton, J., in *Earl* F *of Carnarvon* v. *Inland Revenue Comrs.* (6) and *Marland* v. *Inland Revenue Comrs.* (7), wrongly proceeded on the basis that the principle applied by the Court of Appeal in *Inland Revenue Comrs.* v. *Holder* (1), which dealt with an ordinary bank overdraft, ought to be applied also to mortgage transactions.

G Romer, L.J. : Even before the repeal of the usury laws an agreement for compound interest was good in equity on a mortgage of reversionary interests : Coote on Mortgages, 7th Edn., p. 142 ; *Howard* v. *Harris* (4).

The Attorney-General : A number of authorities clearly distinguish mortgages from bank accounts : *Ex p. Bevan* (3) ; *Eaton* v. *Bell* (11) ; H *Rufford* v. *Bishop* (5) ; *Fergusson* v. *Fyffe* (12). These show that as soon as the ordinary relation of banker to customer ceases, compound interest ceases to run. *Crosskill* v. *Bower* (13) and *Mosse* v. *Salt* (14) illustrate how closely the distinction is related to an implication arising out of the current business. In *Inland Revenue Comrs.* v. *Holder* (1) there were two main questions: whether the amount, having been paid by guarantors, was therefore outside sect. 36; and whether it was to be deemed to be paid by a fresh advance, The House of Lords decided the case on the first point and therefore expressed no opinion on the second. Their decision largely depended on the special relationship which exists A between banker and customer and its historical basis, and the case distinguishes between bank and mortgage loans. [Counsel also referred to *Fenton's Trustee* v. *Inland Revenue Comrs.* (15).]

Stamp followed for the Crown.

Latter, K.C., (1) If the purchase-money involved a payment B of interest at all, that payment was one from which tax had already been deducted and no obligation was imposed on any intermediary to deduct any further tax in handling it. There is a tax-free fund, and none of the statutory provisions about the deduction of tax applies to it. (2) The interest was notionally paid when it was added C to capital, and the moneys received by the society in 1932 were capital. (3) Whatever the nature of the money received by the society, the money paid by the purchasers was a purchase price and there never was a payment of interest; moreover, it was paid to the society and not through the respondents. The payment was completed when the purchase price D was handed over to the agent of the society.

The sum covenanted to be paid was a gross sum less tax. Such an agreement would be void under rule 23, so the parties agreed that interest should be charged at a rate which represented interest after tax had been deducted. The total interest claim of the society is therefore a E net sum, a sum after tax has been deducted. According to *Morris's* case (9), that is the only way in which the transaction can be effected. The respondents were not obliged to make any further deduction of tax, either because the net sum was not interest chargeable under Sched. D, or because it had already been charged, and to require tax to be charged F or deducted twice is contrary to the scheme of the Act. In *Brooke* v. *Price* (16) the plaintiff had charged a settlement in which she was interested in favour of her divorced husband to the extent of one-quarter of the income of the trust fund, and there was a provision that if that fraction fell below £2,500 the husband should nevertheless receive that G sum. The one-quarter actually fell below £2,500, and the plaintiff contended that tax ought to be deducted from that sum, because otherwise the agreement contravened rule 23. The House of Lords held that the rules about deduction of tax could not apply when the income which was being divided had already suffered tax. If the court finds that a H calculation has been made which involves the deduction of tax and in accordance with which tax has already been deducted, none of the rules governing deduction applies. This deed was drafted after the decision in *Morris's* case (9) and in accordance with it, and the solicitors are not persons to whom rule 21 applies. If solicitors were under any obligation in such a case, it would be almost impossible for them to calculate what sums ought to be carried forward. There has been no payment of interest to bring rule 21 into operation. The purchaser of the reversion paid £31,000, and if he did not pay interest, no one paid it. He paid a purchase price, and it is no answer to say that out of that purchase price, the society could have paid itself the interest which was due on its mortgage. Although it may have received interest, there has been no payment of interest by anyone. Under this deed there is a complete capitalisation, and the interest obligation is discharged, another obligation being substituted for it.

The Attorney-General, in reply.

ROMER, L.J. [reading the judgment of the court]: By a mortgage dated Jan. 13, 1925, a reversionary interest was assigned to the Legal & General Assurance Society (hereinafter referred to as the society) to secure a sum of £10,000. The deed contained a covenant by the mortgagor to repay the sum advanced and also a covenant to pay half-yearly such a rate of interest thereon that after deduction of income tax from each periodical payment there would remain a net sum equivalent to interest for the same period on the principal money for the time being remaining due at the rate of 5½ per cent. per annum, reducible on punctual payment to 4½ per cent. The mortgage also provided in cl. 5 (*b*) that in case before the death of the survivor of the two life tenants (therein named) on whose deaths the reversions were expectant

> any interest on the principal money hereby secured or on any accumulations of interest arising under this present provision and added to principal money should not be paid on any half-yearly day hereinbefore appointed for payment of interest or within 30 days after such half-yearly day then from and after such default in payment and until the death of the survivor of the two life tenants (but without prejudice to the right of the society to require payment or the right of the borrower after due notice to make payment of the principal moneys and interest and accumulations of interest hereby secured) the sum due in respect of the half-year's interest so unpaid shall be converted into and become principal money as from the half-yearly day on which it becomes due and be added to the principal money hereby secured and shall carry interest at the rate aforesaid from the half-yearly day on which such half-year's interest became due and the interest upon all sums so converted into principal money shall be payable on the half-yearly days aforesaid but so that all interest unpaid on the original principal sum hereby secured and on all sums converted into principal money under this present provision shall become accumulated in the way of compound interest with half-yearly rests and the accumulated fund as well as the original principal sum hereby secured and the interest on such fund and sum shall constitute a charge upon the premises hereby mortgaged and the premises hereby mortgaged shall not be redeemed except upon payment of all principal moneys hereby secured and all interest and accumulations made as aforesaid of interest on such principal money and accumulations.

By two deeds of further charge dated Dec. 14, 1926, and July 4, 1928, respectively, further advances were made by the society to the mortgagor, bringing the total sum advanced up to £25,500. Except that in the case of the latter of these two deeds the net rate of interest was £5 12*s.* 6*d.* per cent. per annum, reducible on punctual payment to £4 12*s.* 6*d.* per cent., the further advances were made on precisely the same terms as applied to the original advance. Default was made by the mortgagor in paying the half-yearly interest due on Apr. 15, 1930, and all the interest that fell due after that date down to Jan. 10, 1932. Such interest was accordingly added to the principal money under the provisions of cl. 5 (*b*) of the mortgage deed of Jan. 13, 1925, which provision had been incorporated in the deeds of further charge. The amount so added to the principal was the net amount of the interest calculated at the lower rates mentioned in the deeds after deducting therefrom income tax at the appropriate rate. The total amount so added to the principal sum of £25,500, calculated to Jan. 10, 1932, was £2,378 19*s.*

In the meantime, by deed dated Oct. 14, 1929, the mortgagor had created a second mortgage on the reversionary interest to secure a principal sum advanced by a second mortgagee and interest there on as therein mentioned. By deed dated Mar. 14, 1932, the society, in exercise of its power of sale as mortgagee, assigned the reversionary interest to a purchaser for the sum of £30,500. Of this sum it was agreed that £25,500 should remain on mortgage, with the result that, upon completion of the sale, a sum of over £6,000, representing the balance of the purchase money with certain interest thereon, became payable by the purchaser. It was not, however, paid to the society but to the respondents, Messrs. Lawrence, Graham & Co., as the society's solicitors. The respondents thereupon paid the society the sum of £2,378 19*s.* and a further sum representing net interest accruing to the society but not yet added to capital, and after paying the costs of the sale, paid the balance of the money received from the purchaser to the second mortgagees. The sum representing net interest accruing under the society's mortgage and not added to capital was less than the interest paid by the purchaser on his purchase money, and this latter interest had been paid by the purchaser after deducting income tax thereon. Moreover, as already stated, the interest that had been added to the principal money due to the society was net interest only, that is to say, the gross interest after deduction of tax.

In these circumstances it would not at first sight appear that the society, and still less the society's solicitors, could be assessed to income tax in respect of any of the money received by the society out of the proceeds of sale of its mortgage security. An assessment was nevertheless made upon the solicitors for the year 1931/1932, it being sought to justify such assessment under the provisions of the Income Tax Act, 1918, All Schedules Rules, r. 21, as amended by the Finance Act, 1927, s. 26. That rule, so far as is material, is in these terms :

> (1) Upon payment of any interest of money . . . charged with tax under Sched. D . . . not payable, or not wholly payable, out of profits or gains brought

into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

(2) Where any such payment as aforesaid is made by or through any person, that person shall forthwith deliver to the commissioners of inland revenue, for the use of the special commissioners, an account of the payment, or of so much thereof A as is not made out of profits or gains brought into charge, and of the tax deducted out of the payment or out of that part thereof, and the special commissioners shall assess and charge the payment of which an account is so delivered on that person.

(2A) The special commissioners may, where any person has made default in delivering an account required by this rule, or where they are not satisfied with the account so delivered, make an assessment according to the best of their judgment.

B It is not necessary for the purposes of this judgment to state the precise amount of the assessment or the way in which it was calculated; for the calculation was complicated by the fact that credit was given for certain profits and gains of the mortgagor that had been brought into charge and by the payment of interest on the purchase money. But C assuming, for the sake of simplicity, that these complications did not exist, the contention on the part of the Crown can be stated as follows: when the sum of £2,378 19*s.* was paid to the society out of the purchase money, there was a payment of interest, within the meaning of rule 21, not payable out of profits or gains brought into charge; the respondents D were persons by or through whom such payment was made, and are therefore liable to be assessed in an amount arrived at by "grossing" the said sum.

The respondents in due course appealed against the assessment and the appeal was allowed by the special commissioners. They held, E purporting to follow a decision of this court and two decisions of SINGLETON, J., to which we refer later, that the interest was, or must be deemed to have been, paid by the mortgagor at the respective dates when it was added to the capital out of fresh advances made to him by the society for that purpose and that, to this extent, there was no F payment of interest when the property was sold. They accordingly discharged the assessment. They were, however, of opinion, in case they were wrong in holding that the interest had been paid by the mortgagor (treating again the complications above referred to as non-existent): (i) that the society was paid the interest by the respondents G out of the purchase money; (ii) that the society received it under deduction of tax; (iii) that the respondents were the persons through whom the interest was paid to the society; and (iv) that the respondents having deducted tax from the interest were liable to account for the tax so deducted.

H The case was then taken by way of appeal to LAWRENCE, J., who affirmed the decision of the commissioners that the interest had been paid by the mortgagor, holding himself bound by the three cases which the commissioners had purported to follow. He expressed no opinion upon the liability of the respondents to assessment should it be held that the interest had not been paid by the mortgagor. From that decision of LAWRENCE, J., an appeal has been taken to this court and now falls to be decided.

For the purpose of our decision it becomes necessary, in the first place, to consider the cases on which the commissioners and LAWRENCE, J., relied. The first of these is *Inland Revenue Comrs.* v. *Holder* (1). That was a case in which a company had been allowed an overdraft by its bankers, on which overdraft the bank was entitled to charge interest. In accordance with the usual practice of bankers the balance of principal and interest was struck at the end of each half-year and the aggregate sum was introduced as the first item in the subsequent half-yearly account, and interest calculated upon it. In other words, the company was charged compound interest. In these circumstances this court held that the bank must be regarded as having made, each half-year, an advance to the customer of a capital sum equal in amount to the interest then falling due which sum had been applied by the customer in paying that interest. There had been no express agreement between the parties as to the charging of compound interest by the bank. The bank, in charging it, had merely followed the ordinary practice of bankers, and the customer had acquiesced in its doing so. But that practice of bankers is an old one dating back to long before the repeal of the usury laws, and could not, therefore, have been legal unless it was consistent with those laws. Now before the repeal of those laws a contract to allow the charging of compound interest was illegal. The legality of the practice of bankers was, however, upheld by the courts by treating the bank as making a fresh advance to its customer at the end of each year or half-year as the case might be: see *Lord Clancarty* v. *Latouche* (2). There is nothing contrary to the usury laws in such an arrangement: see *Ex p. Bevan* (3). It is plain that upon the repeal of those laws an agreement to pay compound interest became lawful. In *Holder's* case (1), however, there was no agreement to pay it. The bank had merely pursued an old practice of bankers upon which an interpretation had been put by the courts. The fact that this had been done at a time when the laws against usury were in force appeared to this court to be immaterial. The practice continued after the repeal of those laws and the repeal could not affect the nature of the practice.

But a stipulation in a mortgage deed for payment of compound interest stands upon a different footing. Before the repeal of the usury laws such a stipulation would have been illegal, except perhaps in the case of a mortgage of a reversionary interest, in which case there is some ground for thinking that even in those days it would have been supported. (See *Howard* v. *Harris* (4), at p. 194.) The question whether since the repeal of the usury laws effect would be given to such a stipulation in a mortgage, not being one of a reversionary interest, has caused some difference of judicial opinion. The matter is elaborately discussed in Coote on Mortgages (7th Edn., Vol. 1, pp. 139-143), but need not be discussed here. For even if such a stipulation would still be ineffectual as between mortgagor and mortgagee if the former should choose to dispute it, the difficulty would not be got over by treating the stipulation as one that provided for fresh capital advances being made by the mortgagee from time to time. The stipulation would not, by being so construed, become any the less objectionable. The cases relating to the practice of bankers in charging compound interest have not, therefore, any application to mortgage transactions: see, too, *Rufford* v. *Bishop* (5).

It was, however, with mortgage transactions that Singleton, J., was concerned in the other two authorities upon which the special commissioners and Lawrence, J., relied in the present case. These two authorities were *Earl of Carnarvon* v. *Inland Revenue Comrs.* (6) and *Marland* v. *Inland Revenue Comrs.* (7). In the first of them the mortgagor agreed to pay interest on a named day in each year, and it was agreed that if such interest were not paid on the due date it should be deemed to be a new loan and should be capitalised and added to the principal sum and should thenceforth carry interest. As each instalment of interest fell due the net amount thereof, after deducting income tax, was added by the lenders to the principal sum in accordance with the agreement. A question subsequently arose between the borrower and the Crown as to whether he had paid the interest in each year so as to be entitled to deduct it in computing his income for the purpose of surtax. Singleton, J., held that the interest had been paid. He said, at p. 465:

> Under the loan agreement interest was payable. True, the interest was in fact capitalised. This was done as a result of the provision of the agreement as to what should happen if the interest was not paid on the due date. I find it difficult to draw a distinction between such a case and the method in which the account was kept by the bank in *Holder's* case (1); and it seems to me that the same reasoning applies as that of Romer, L.J., which I have already cited: "The company must be deemed to have paid each half-year the accruing interest by means of an advance made for that purpose by the bank to the company." It is true that that was a case as between banker and customer; but I do not see why, under the agreement in the present case, the appellant should not be deemed to have paid the interest by reason of an advance made for that purpose by the insurance company.

It is not material for the present purposes to consider whether or not the decision of the learned judge can be supported upon other grounds. We are, however, for the reasons already given, unable to agree with him that the decision in *Holder's* case (1) justified his conclusion. The question before him was purely one of the proper construction to be placed upon an express agreement between a mortgagor and his mortgagee. That agreement provided in terms for the addition of interest to the capital sum as a new loan. We do not think that when that provision was carried into effect the mortgagor could properly be regarded as paying the interest out of the new loan.

The facts in *Marland's* case (7) were slightly different. The principal sum and interest chargeable annually were secured on a policy of insurance, and the loan agreement provided that compound interest was to be charged on all interest remaining unpaid for more than one month. The borrower was not to be personally liable for the payment of either principal or interest, but the borrower could, if he thought fit, pay the interest within one month after it fell due. He did not on any occasion pay the interest within one month after it fell due, and in each case the net amount was added to the loan by the mortgagees and interest thereafter was charged upon it. The same question arose between the borrower and the Crown as had arisen in the *Earl of Carnarvon's* case (6), and was again decided by Singleton, J., in favour of the borrower upon the authority of *Holder's* case (1). In our opinion that decision cannot be supported. In that case there was not even any provision for capitalisation of interest in the strict sense, but merely a provision for charging compound interest. There is not, in our judgment, any justification, either in principle or in authority, for treating the latter provision as one that involves a notional payment of the interest at each yearly or half-yearly rest as the case may be. In these circumstances it is, in our opinion, impossible to treat the interest in the present case as having been paid by the mortgagor half-yearly out of the sums advanced to him for the purpose by the society.

But this by no means disposes of the matter. It is still necessary to examine the transactions between the parties for the purpose of seeing whether the respondents are persons by or through whom any payment of interest has been made within the meaning of rule 21 (2). Turning once more to the rule, it will be seen that it imposes on every such person an obligation to deduct out of the interest a sum representing the tax thereon. It is plain that this does not necessitate the actual setting aside of cash to meet the tax. A deduction in account is sufficient. If instead of paying the full amount of the interest the debtor pays to his creditor the interest less the tax, he has fulfilled his obligation, even though the payment exhausts his cash in hand or, if paid by cheque, leaves nothing standing to his credit at his bankers. So long as the net interest and no more reaches the hands of the creditor, the Crown has no cause for complaint. Nor can the Crown be concerned with the form in which the net interest reaches the hands of the creditor. The creditor may, if he thinks fit, agree to accept in full satisfaction of the net amount a bill or a bond or a chattel provided that the money value of what he gets in exchange does not exceed the net interest due. If this be so, a mortgagor and a mortgagee may validly agree that, in the event of failure by a mortgagor to pay the net interest as it falls due, the mortgagee

will from time to time accept in full discharge of the mortgagor's liability
to pay it, a capital charge for a like amount upon the mortgage security.
As and when each charge takes effect the tax will have been deducted
within the meaning of the rule, for the capital charge merely takes the
A place of a payment by the mortgagor of the net amount and can never
exceed that net amount in money value.

In our judgment the arrangement that was made between the mortgagor
and the society in the present case was of that nature. It is true that
by the deeds of mortgage and further charge, the mortgagor covenanted
B to pay the gross interest. But whether such interest was payable out
of profits and gains brought into charge or not, the mortgagor could not
have been compelled by the mortgagee to pay more than the net amount.
When, therefore, it was provided by cl. 5 (*b*) of the mortgage deed that
if any interest should not be paid on any half-yearly day appointed for
C its payment, or within 30 days thereafter, the sum due in respect of the
half-year's interest so unpaid should be converted into and become
principal money, the sum due must mean the net amount of the interest
after deduction of tax. The thing that is to be converted into principal
money is the sum that could otherwise have been recovered from the
D mortgagor ; that is the net amount. In this connection it is to be
noticed that it is not "the interest" that has to be converted into
principal money, but "the sum due," a change of language that must
have been intentional. In our opinion, in each half-year that net interest
was added to the capital the mortgagor deducted the tax as required
E by rule 21 and the society accepted the capital charge in full satisfaction
of the interest after such deduction had been made. This being so,
when the respondents paid to the society out of the purchase money
the sums that had been so added to the principal moneys secured, they
were paying a sum that had already suffered tax, and were under no
F liability to make any further deduction. It is plain that such a sum
is not interest within the meaning of the rule.

In these circumstances it is unnecessary to express any opinion upon
the question whether, in view of the respondents' position in the matter,
they could in any case be properly described as persons by or through
G whom the interest had been paid. The appeal fails and must be dismissed
with costs.

Appeal dismissed with costs.

Solicitors : *Solicitor for Inland Revenue* (for the appellants) ; *Lawrence, Graham & Co.* (for the respondents).

H [*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

DRAPERS COMPANY *v.* LONDON PASSENGER TRANSPORT BOARD.

[Chancery Division (Luxmoore, J.), **February 24, 25, 1937.]**

Compulsory Purchase—Assessment of compensation—Power to purchase given to railway company, subject to modified compensation under Lands Clauses Act—Transfer to public authority—Notice to treat by public authority after transfer—Compensation assessed under Acquisition of Land (Assessment of Compensation) Act, 1919 (*c.* 57).

The defendant board in Oct., 1935, gave to the plaintiff company notice to treat for certain property owned by the company, stating that the board intended to purchase the property in the exercise of its statutory powers. By the London Electric Metropolitan District and Central London Railway Companies (Works) Act, 1931, power was conferred upon the Central London Railway Co. to enter upon, take and use certain lands, including the property in question. By the London Passenger Transport Act, 1933, the Central London Railway Co., including all lands, works and other property, assets, powers, rights and privileges held and enjoyed in connection therewith, was transferred to the defendant board, as from July 1, 1933. The board was by the Act of 1933 established as a public authority. The plaintiff company contended that the compensation payable for the property ought to be ascertained in accordance with the provisions of the 1931 Act, i.e., under the Lands Clauses Acts as modified by that Act. The defendant board contended that the compensation ought to be ascertained under the Acquisition of Land (Assessment of Compensation) Act, 1919, as it was a public authority within sect. 12 (2) of that Act:—

Held: as the notice to treat was given after July 1, 1933, the compensation payable to the plaintiff company for the compulsory purchase of the property was to be ascertained under the Acquisition of Land (Assessment of Compensation) Act, 1919. There was no need for special words in the 1933 Act abrogating the compensation clauses in the 1931 Act.

[EDITORIAL NOTE. The plaintiff company in the present case was anxious to secure compensation under the Land Clauses Act, 1845, as modified by the 1931 Act, as the assessment thereunder would be more favourable to it than under the 1919 Act. Where, however, an Act makes an authority a public authority, compensation in respect of purchases, where a notice to treat is served after the passing of the Act creating the authority, is to be assessed under the 1919 Act. There may be cases where, as in *Blackpool Corpn.* v. *Starr Estate Co., Ltd.* (1), the compensation is specially provided for in a special Act, and the special provisions will be applicable and not those of the general Act.

As to Effect of Acquisition of Land (Assessment of Compensation) Act, 1919, on Existing Acts, see HALSBURY, Hailsham Edn., Vol. 6, pp. 22, 23, para. 19; and for Cases, see DIGEST, Supp., Compulsory Purchase, Nos. 650, 650*a*, 2225*v*-2225*d*.]

Case referred to:

(1) *Blackpool Corpn.* v. *Starr Estate Co., Ltd.*, [1922] 1 A.C. 27; Digest Supp,

Action for a declaration that the plaintiff company was entitled to have the value of certain premises, known as Nos. 2 and 3, Cheapside, in the City of London ascertained in the manner provided by the Lands Clauses Acts, as modified by the London Electric Metropolitan District and Central London Railway Companies (Works) Act, 1931. Notice to treat

in respect of the compulsory acquisition of the premises was served by the defendant board on the plaintiff company on Oct. 2, 1933. The defendant board counterclaimed for a declaration that it was entitled to have the compensation payable assessed under the provisions of the Acquisition
A of Land (Assessment of Compensation) Act, 1919. There was no dispute as to the facts.

Fergus Morton, K.C., and *G. P. Slade* for the plaintiff company.

W. E. Tyldesley Jones, K.C., and *J. Ramsay Willis* for the defendant board.

B

LUXMOORE, J.: The plaintiff company is the estate owner, in fee simple, of Nos. 2 and 3, Cheapside, in the City of London. On Oct. 2, 1935, the defendant board gave to the plaintiff company a notice to treat, stating that, in the exercise of its statutory powers, it intended
C to purchase Nos. 2 and 3, Cheapside, and was willing to treat with the plaintiff company for the purchase thereof. On Oct. 14, 1935, the defendant board, as it was entitled to do, gave a further notice to the plaintiff company that it would, after the expiration of 14 days from the service of the notice, enter into possession of Nos. 2 and 3, Cheapside.
D The defendant board has, in virtue of this notice, entered on and taken possession of Nos. 2 and 3, Cheapside. The compensation to be paid to the plaintiff company by the defendant board has not yet been fixed, because a controversy has arisen with regard to the method by which it is to be determined. The plaintiff company contends that the com-
E pensation falls to be ascertained in accordance with the provisions of the Lands Clauses Act, as modified by the London Electric Metropolitan District and Central London Railway Companies (Works) Act, 1931, to which I will refer as the Act of 1931. The defendant board contends that the compensation falls to be ascertained under the provisions of the
F Acquisition of Land (Assessment of Compensation) Act, 1919, to which I will refer as the Act of 1919. There is no dispute of fact. The notice to treat was given by the defendant board under the London Passenger Transport Act, 1933, to which I will refer as the Act of 1933. This Act, by sect. 1, established the defendant board as a public authority, one
G of the objects of the Act being to transfer to the defendant board a number of passenger transport undertakings in an area defined in the Act as the London Passenger Transport Area. The undertaking of the Central London Railway Co. was one of the undertakings vested in the defendant board by sect. 5 (1) and Sched. 2 of the Act. By sect. 5 (2),
H it is provided that the transfer effected by that section shall extend to the whole undertaking transferred, including all lands, works, and other property, assets, powers, rights, and privileges held and enjoyed in connection therewith. Sect. 5 (4) provides that the defendant board may exercise and enforce all the rights, powers, and privileges which

were, immediately before the appointed day, vested in the Central London Railway Co. as one of the undertakers referred to in respect of its undertaking. By sect. 107, the appointed day is defined, in the case of the Central London Railway Co., as being July 1, 1933. Amongst the powers conferred upon the Central London Railway Co., in existence on July 1, 1933, was a power, conferred upon it by sect. 27 of the Act of 1931, to enter upon, take, and use, certain lands, which included Nos. 2 and 3, Cheapside. The time for the exercise of this power was limited by the Act of 1931 to Oct. 31, 1934. But this was extended to Oct. 31, 1937, by the London Passenger Transport Act, 1934, s. 68. The defendant board's contention is that it is a public authority, authorised to serve a notice to treat to secure lands, including Nos. 2 and 3, Cheapside, compulsorily, and, therefore, the provisions of the Act of 1919 apply to the acquisition by the board of that particular property. The Act of 1919, which is described in its title as an Act to amend the law as to the assessment of compensation in respect of land acquired compulsorily for public purposes and the costs in proceedings thereon, provides, so far as it applies to this case, by sect. 1:

> (1) Where by or under any statute (whether passed before or after the passing of this Act) land is authorised to be acquired compulsorily by any . . . public authority, any question of disputed compensation . . . shall be referred to and determined by the arbitration of such one of a panel of official arbitrators to be appointed [as therein mentioned].

Sect. 7 provides:

> (1) The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect.

Pausing there, it would appear that the defendant board has brought itself within the provisions of the Act of 1919. The board is authorised to acquire Nos. 2 and 3, Cheapside, compulsorily. It has served a notice to treat, and it is admittedly a public authority.

The plaintiff company argues that the Act of 1919 does not apply to it, and it bases its argument on three separate grounds. The first ground on which it relies is based on the provision of sect. 5 (4) (*b*) of the Act of 1933. That subsection provides that the defendant board shall, to the exclusion of the undertakers—in this case, the Central London Railway Co.—be subject to all the liabilities and obligations, whether arising by statute or otherwise howsoever, to which the undertakers were subject immediately before the appointed day, in respect of the undertaking. It says that, immediately before the appointed day—that is, July 1, 1933—the Central London Railway Co., if it had purchased the property compulsorily, could have done so only on the terms that the purchase price should be ascertained and fixed as provided by the Lands Clauses Act, as modified by the Act of 1931, and that this was a liability or obligation of the Central London Railway Co. I think that the fallacy of this argument becomes manifest when it is realised that the Central London Railway Co. had not, on that date, served any notice to treat, and therefore there was no liability or obligation of the Central London Railway Co. towards the plaintiff company to which the defendant board could be subject. It is impossible, I think, to construe the words " liability or obligation " in this subsection as including liability to pay compensation if a notice to treat should subsequently be served, not by the Central London Railway Co., but by the defendant board, for the Central London Railway Co. would not be under any liability in respect of a notice to treat given, not by them, but by the defendant company at a later date. I think, therefore, that the point has no substance in it.

The second point on which the plaintiff company relies is based upon the provisions of the London Passenger Transport Act, 1934, s. 68. As I understand the argument, it is this. The time limited by the Act of 1931 for the exercise of the compulsory powers was extended by this section, and it is only by virtue of these provisions that the defendant board can exercise the powers of compulsory purchase. The section provides that the extension is to be subject to the provisions for the benefit of all bodies and persons in those Acts which are mentioned, one of the Acts being the Act of 1931. It is then said that the provisions with regard to the assessment of compensation, in the case of a compulsory purchase, are provisions for the protection or benefit of the plaintiff company, and that the provisions of the Act of 1931 with regard to compulsory purchase are, therefore, preserved. This ground seems to me to have as little foundation as the first, and it is completely destroyed when it is realised that the Act of 1931 contains a series of sections which are expressed to be for the protection of, and in one case for the protection and benefit of, a number of bodies such as the London County Council, the Metropolitan Water Board, and the Gas, Light and Coke Co. I refer to sects. 50 to 54, inclusive, of the Act of 1931. The expression in an Act of Parliament, " provisions for the protection or benefit of " a particular body of persons, is in common use, and obviously refers to such provisions as are contained in the sections to which I have just referred. They are not apt words to refer to general provisions contained in an Act of Parliament, although such general provisions may confer benefits on persons affected by those general provisions. It is sufficient to say that there is no section in the Act of 1931 expressed to be for the protection and benefit of the plaintiff company.

The third ground upon which the plaintiff company relies is that the provisions of the Act of 1931, under which compensation, in the event of a compulsory purchase of the plaintiff company's property, would have to be fixed, as provided by the Lands Clauses Act, as modified by

the Act of 1931, cannot be altered, by reason of the provisions of the Acts of 1933 and 1934, in the absence of clear words showing that it was the intention of the two later Acts to abrogate the Act of 1931. In support of this contention, reliance is placed upon the decision of the House of Lords in the case of *Blackpool Corporation* v. *Starr Estate* A
Co., Ltd. (1). It seems to me that this ground is based upon a misconception of the decision in the *Blackpool* case (1). In that case, the Blackpool Corporation had acquired power to purchase land compulsorily from a number of different persons under an Act passed in 1917. The Act contained special provisions with regard to the purchase of land— B
in particular, with regard to that of the Starr Estate Co., Ltd. After the passing of the Act of 1917, the Act of 1919 was passed. This, of course, is a general Act. It was claimed, on behalf of the corporation, that the Act of 1919 replaced special provisions relating to the purchase of the land from the particular company, namely, the Starr Estate Co., C
Ltd. The speeches in that case show quite plainly that the maxim *generalia specialibus non derogant* applies to cases where a particular subject has been dealt with by the legislature, and provision has been made for it by the earlier Act, and there is no clear manifestation of any intention to interfere with that provision by the subsequent Act. There D
is, I think, no room for its application in cases where the earlier statute is of general application. In the present case, there is no special provision or individual treatment of the plaintiff company by the Act of 1931. The plaintiff company is placed in precisely the same position as any of the other land-owners whose lands are to be taken compulsorily E
under the Act of 1931, and there is no possible ground for any contention on its part, such as was successfully contended in the *Blackpool* case (1), that Nos. 2 and 3, Cheapside, would not have been compulsorily purchased. In my judgment, each of the plaintiff company's contentions fails, and the action must be dismissed. The defendant board is entitled F
to a declaration on the counterclaim that the compensation payable by it to the plaintiff company must be ascertained under and in accordance with the provisions of the Act of 1919. The plaintiff company must pay the defendant board's costs of the action and of the counterclaim.

Action dismissed with costs. Judgment for defendant board on the G
counterclaim with costs. Declaration as in counterclaim.

Solicitors: *Baker & Nairne* (for the plaintiff company); *J. S. Anderson* (for the defendant board).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

H

Re HIGHAM, HIGHAM *v.* HIGHAM.

[CHANCERY DIVISION (Clauson, J.), **February 26, 1937.**]

Distribution and Descent—Cases subject to special rules—Lunatic surviving A *1925 and dying without recovering testamentary capacity—Gavelkind land —Whether descent according to custom or to common law heir.*

An intestate, who was, at the date of her death, a spinster of full age had, since before Jan. 1, 1926, been a person of unsound mind. She died in 1933, possessed of land in Kent which had, before 1926, been subject to the custom of gavelkind. The Administration of Estates Act, 1925, s. 51 (2), which applied to the case, requires that the land B shall "devolve in accordance with the general law in force before" 1926 :—

HELD : the requirement that the land should devolve in accordance with the general law prevented the application of the special custom of gavelkind, and the land devolved upon the heir-at-law according to the common law.

C **[EDITORIAL NOTE.** The Administration of Estates Act, 1925, s. 51 (2), retains the old law of intestacy in the case of land belonging before 1926 to a person who was of unsound mind when the new law of property came into force, and has not recovered testamentary capacity since that date. The decision here, however, creates a partial exception to that rule. Where the land is subject to a special custom, it does not pass according to that custom, but to the common law heir. D This is the effect of the words "according to the general law."

AS TO THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 10, pp. 592, 593, para. 856 ; and FOR CASES, see DIGEST, Supp., Descent, Nos. 283 *c*, 283 *d*.]

Case referred to :

E (1) *Re Chenoweth, Ward* v. *Dwelley*, [1902] 2 Ch. 488 ; 18 Digest 15, *138*.

ADJOURNED SUMMONS for the determination of the question whether the heir-at-law, or the persons entitled under the rules of descent relating to land held by gavelkind tenure, was or were entitled to the real estate, situate in Kent, of Rosina Higham, who died intestate on Feb. 1, 1933. F At the date of her death, the intestate was a spinster, of full age, and was, and had been since before Jan. 1, 1926, a person of unsound mind, not so found by inquisition. She was survived by a brother, born in 1857, to whom letters of administration to her estate had been granted, two sons of a brother born in 1852, the elder of whom was the first G defendant to the present summons and the intestate's heir-at-law, and the six surviving children of her deceased sister.

D. Ll. Jenkins, for the plaintiff, the administrator of the intestate's estate, and entitled, under the rules of gavelkind, to the intestate's real estate in Kent, stated the facts.

H *H. Ll. Williams*, for the first defendant, the heir-at-law of the intestate : The Administration of Estates Act, 1925, s. 51 (2), applies to this case. That section says that estates shall devolve in accordance with the general law, and general law is clearly distinguished from any special custom. In the result, as sect. 51 (2) does not authorise devolution, in the circumstances of the present case, in accordance with any special custom, the intestate's heir-at-law must be entitled to this property.

J. A. Reid, for the last defendants, interested as tenants in gavelkind: There are really three kinds of gavelkind. Class (*a*) relates to copyholds. Copyhold tenure is descended from tenure in villeinage, but, as greater A
security of tenure developed, customs arose, sometimes taken from the general law and sometimes from the custom of the manor. Accordingly, gavelkind tenure, so far as it relates to copyholds, is obviously to be described as customary. Class (*b*) relates to freeholds in parts of the country other than Kent. This is also custom, which, before the B
Norman Conquest, existed over the whole country, but which after the Conquest, was superseded by the common law, which in certain places, has been superseded again by custom. Class (*c*) relates to freeholds in Kent. Here gavelkind is the common law, *i.e.*, the common law of Kent: see *Re Chenoweth, Ward* v. *Dwelley* (1). As it was the common C
law which, before the commencement of the Act, was applicable to freehold land in Kent, it is the law which, under sect. 51 (2), must be applied in this case.

CLAUSON, J.: This is an interesting point, turning on the true D
construction of certain sections of the Administration of Estates Act, 1925. Sect. 45 (1) of that Act provides as follows:

> With regard to the real estate and personal inheritance of every person dying after the commencement of this Act, there shall be abolished (*a*) All existing modes rules and canons of descent, and of devolution by special occupancy or otherwise, E
> of real estate, or of a personal inheritance, whether operating by the general law or by the custom of gavelkind or borough english or by any other custom of any county, locality, or manor, or otherwise howsoever . . .

The lady whose land is in question in this summons died after the commencement of the Act. She was seised of freehold land in Kent, and apart from this section, and apart from the other considerations which I shall F
come to later, upon her death her freehold land in Kent would have devolved in accordance with the custom of gavelkind; but it seems quite clear that sect. 45 (1) abolishes that, and, accordingly, if the matter turned on this section alone, it would seem to be equally clear that, on the death of this lady in 1932, her land in Kent devolved as G
directed by this Act, instead of devolving as it would have devolved, but for this Act, in accordance with the rules of gavelkind. The lady, however, at the time of the commencement of the Act, was a person of unsound mind, and of full age, and unable, by reason of her incapacity, to make a will. I understand that that is not disputed. She has died H
intestate in respect of the beneficial interest in her real estate, and the effect of the Administration of Estates Act, 1925, s. 51 (2), has to be considered. That section provides:

> (2) The foregoing provisions of this part of this Act [which includes in particular

> sect. 45] do not apply to any beneficial interest in real estate (not including chattels real) to which a lunatic or defective living and of full age at the commencement of this Act, and unable, by reason of his incapacity, to make a will, who thereafter dies intestate in respect of such interest without having recovered his testamentary capacity, was entitled at his death.

So that the point which we have got at the present is this, that sect. 45 does not apply in a case such as this, and, if there were nothing more in it than that, presumably this lady's land would pass in accordance with the rules of gavelkind. But the section does not stop there. The section goes on to say what is to be done with the beneficial interest in the land to which a person in the position of this lady is entitled, and the words are these:

> Any such beneficial interest (not being an interest ceasing on his death) shall, without prejudice to any will of the deceased, devolve in accordance with the general law in force before the commencement of this Act applicable to freehold land, and that law shall, notwithstanding any repeal, apply to the case.

Now it will be observed that one effect of that section is this, that in the case of a person coming within its terms who was entitled to copyhold land, it would seem that that land would, under the section, devolve, not in accordance with the new system of descent enacted by this Act, nor in accordance with the system of devolution applicable before the Act to that particular kind of land, but in accordance with the general law in force before the commencement of the Act applicable to freehold land. That means the law in force generally in England, and not by way of exception, before the commencement of this Act. The general law relating to descent operated according to what are commonly called the common law rules of descent, and though it is true that, in an exceptional area, namely Kent, *prima facie* descent was to be traced according to gavelkind rules, in my view, general law in sect. 45 has the meaning which I have indicated.

The argument the other way is put like this. It is suggested that gavelkind was in fact the common law in Kent. In a sense, no doubt, that is perfectly true. But the reference in the section is not to the common law, but to the general law. The words "general law in force before the commencement of this Act" as to descent seem to me to indicate descent according to the common law system. But there is some assistance to be got from the Act itself in support of the view which I have indicated. The words "general law" occur in sect. 45 (1) (*a*), where it is said that:

> all existing modes . . . of devolution . . . whether operating by the general law or by the custom of gavelkind or borough english or by any other custom of any county, locality, or manor, or otherwise howsoever—

shall be abolished. It is true that descent in Kent in relation to freehold land was not due to a custom, in the sense that the descent of copyhold land in manors is, or may be, governed by the custom of the manor, but it appears to me that the word custom in that clause would cover, not only cases of gavelkind descent under the custom of the manor, but also cases of gavelkind descent of freehold land according to what has been called the custom of Kent. After all it must be borne in mind that the common law itself is custom, in the sense that it is the embodiment of customs reaching far back, and it appears to me clear A that, in sect. 45, " general law " is a phrase which is used to draw a distinction between such law and the law prevailing in particular localities. That seems to support the view which I have already indicated as to the meaning of general law in sect. 51 (2). It follows that I must declare, in the events which have happened, that the real estate of the intestate B (subject to bearing its rateable share of the funeral and administration expenses, debts, and liabilities of the said intestate) is transferable to the said defendant George Edwin Higham, as being the heir-at-law of the intestate, according to the common law in force before Jan. 1, 1926. Costs of all parties as between solicitor and client to come out of the C estate.

Solicitors: *Dollman & Pritchard*, agents for *Hayward, Smith & Mackey*, Rochester (for the plaintiff and last defendants); *Ivor Gwynne Jones* (for the first defendant).

[*Reported by* C. M. Young, *Barrister-at-Law.*] D

NATIONAL MORTGAGE AND AGENCY CO. OF NEW ZEALAND, LTD. *v.* INLAND REVENUE COMMISSIONERS.

E

[Court of Appeal (Lord Wright, M.R., Romer and Greene, L.JJ.), **January 25, 26, 27, February 11, 1937.**]

Income Tax—Double taxation—Relief—Dominion tax—Allowances and deductions—Tax on debenture interest paid by company but recoverable from debenture holders.

F

A company, incorporated under the Companies Act in England, and controlled in England, carried on in New Zealand a business of lending money on mortgages and short loans. The company occupied certain land in New Zealand for the purposes of its business, and in respect thereof was allowed in New Zealand a special deduction from its assessable income of 5 per cent. There was a similar special deduction of interest payable on debenture capital employed in the production G of the assessable income. In round figures the United Kingdom assessment was £70,000, of which items amounting to £25,000 were not brought into the New Zealand assessment at all. The remaining items were assessed at £45,000 in the United Kingdom and at £26,000 in New Zealand. The special allowances in respect of land and debenture interest above referred to amounted to £45,000. It was contended H for the Crown that in calculating the income subject to double taxation this £45,000 should be deducted from the United Kingdom assessment in addition to the £25,000 in respect of items not included in the New Zealand assessment. The company was, however, assessed in respect of the debenture interest under a separate section of the New Zealand statute which provided that the company was to be the agent of the debenture holders for the purposes of the income tax statute and assessable in respect of interest paid to them accordingly. The sum so paid was £34,779 :—

HELD : (i) applying the decision in the *Assam* case (1), the figure of £26,000 was, subject to the decision on the question of debenture interest hereinafter stated, the figure on which relief from double taxation should be based.

(ii) no deduction should be made from the £26,000 in respect of allowances or deductions from the statutory income in New Zealand, *i.e.*, on the special allowances in respect of land and debenture interest amounting to £45,000.

(iii) the £34,779 paid in respect of debenture interest was, as no deduction was permissible in this respect in the United Kingdom, a sum upon which both Dominion and United Kingdom income tax had been paid and relief in respect of this sum ought also to be allowed. This was so, although the New Zealand tax on the debenture interest was paid by the company as agent of the debenture holders.

Assam Railways & Trading Co., Ltd. v. *Inland Revenue Comrs.* ([1935] A.C. 445) *applied.*

Decision of FINLAY, J., *reversed.*

[EDITORIAL NOTE. The first point in this case was decided in the *Assam* case (1). The rule is that one has to eliminate from the United Kingdom assessment sources of income not taxed in the Dominion. Having thus arrived at notional figures of the income tax both in the United Kingdom and in the Dominion, relief is granted in respect of the notional income in the Dominion. If this notional figure in the Dominion in respect of income doubly taxed should exceed the United Kingdom figure, then it would appear that relief is due in respect of the latter figure. This figure, however, is to be fixed by the assessable income of the company, and no account may be taken of deductions and allowances from the assessable income. The third point is peculiar to this case, and carries the question of relief from double taxation a stage further. The company had paid tax on the debenture interest, but only as agent for the debenture holders, and had in New Zealand a statutory right of recovery against the debenture holders. It is now held that this debenture interest can be included in the sum in respect of which relief is claimed.

AS TO RELIEF FROM DOUBLE TAXATION, see HALSBURY, Hailsham Edn., Vol. 17, pp. 323, 324, paras. 642, 643 ; and FOR CASES, see DIGEST Supp., Income Tax, Nos. 557*a*-557*d*.]

Cases referred to :

(1) *Assam Railways & Trading Co., Ltd.* v. *Inland Revenue Comrs.*, [1935] A.C. 445 *affg.* [1933] 2 K.B. 576 ; Digest Supp.

(2) *Inland Revenue Comrs.* v. *Dalgety & Co.*, [1930] A.C. 527 ; Digest Supp.

(3) *Stevens* v. *Boustead* (*E.*) *& Co.*, [1918] 1 K.B. 382 ; 28 Digest 45, *229*.

(4) *Birmingham Corpn.* v. *Inland Revenue Comrs.*, [1930] A.C. 307 ; Digest Supp.

(5) *Howe* (*Earl*) v. *Inland Revenue Comrs.*, [1919] 2 K.B. 336 ; 28 Digest 111, *683*.

(6) *Rolls-Royce, Ltd.* v. *Short* (1925), 94 L.J. K.B.849 ; 10 Tax Cas. 57 ; 28 Digest 94, *557*.

APPEAL from a judgment of FINLAY, J., delivered on July 31, 1935.

The National Mortgage and Agency Co. of New Zealand, Ltd., was a company incorporated in England. From time to time it issued debentures secured upon its uncalled capital. The business of the company mainly consisted in lending money in New Zealand on mortgages and short loans, generally secured on farm chattels and on land. The greater part of its income was derived from the interest on these loans. The company owned its business premises and had investments in New Zealand War Loan and in ordinary and preference shares in New Zealand companies, also in companies in the United Kingdom, this income being subject to deduction of United Kingdom income tax at the source. The company was assessed to income tax in the United Kingdom under Sched. D. In computing its liability under Case I the debenture interest paid by the company was not allowed as a deduction from the profits, and was consequently included in the assessment.

By the Land and Income Tax Act, 1923, of New Zealand, assessable income includes all interest, dividends, annuities and pensions (sect. 79 (1) (*g*)). In calculating it, no deduction is to be made in respect of interest, except interest payable on capital employed in the production of assessable income (sect. 80 (1) (*h*)). A company is for the purposes of the Act the agent of all debenture-holders in respect of all income derived by them from the debentures (sect. 116 (1)). Sect. 130 lays down that when an agent pays any tax he may recover the amount so paid from his principal, or deduct if from any moneys in his hands belonging or payable to his principal.

When the assessable income of the company was computed in New Zealand, a deduction was allowed under sect. 80 (1) (*h*) for the interest on so much of the debenture capital as had been employed in the production of the assessable income: £37,861 and £37,779 for the two years, out of the total debenture interest paid by the company of £40,261 and £39,322. There were also deducted under sect. 83 (1) sums of £9,999 and £9,998 by way of special exemption as representing 5 per cent. of the value of the land owned by the company and used by it for the purpose of its business. The dividends from New Zealand companies, the interest on New Zealand War Loan and certain incomes earned in London were excluded from the assessable income. The computation for the year 1927/28 resulted in a loss, and no New Zealand income tax was payable direct by the company for that year in respect of its assessable income. The computation for the year 1928/29 showed an assessable income of £26,592, on which the New Zealand income tax payable was £5,983 4*s*. The company's investments in New Zealand companies consisted almost entirely of ordinary and preference shares in a company referred to as X. X. was assessed to New Zealand income tax on its profits, and the dividends paid to the company were not again assessed to New Zealand income tax in the company's hands. No New Zealand tax was deducted by X. from the preference dividends. The company was also assessed as agent in New Zealand for its debenture-holders for each of the two years in respect of the debenture interest applicable to New Zealand. The interest on the debentures being payable under a contract made in the United Kingdom, the company had no power to deduct, and did not in fact deduct, any New Zealand income tax therefrom, notwithstanding that it had been assessed to, and had paid, that tax as agent for the debenture-holders. The items of tax in dispute were therefore :

(1) The debenture interest applicable to New Zealand.

(2) The allowance of 5 per cent. on the value of the land owned by the company and used by it for the purposes of its business.

(3) The dividends on preference shares of X. from which no New Zealand tax had been deducted.

(4) The New Zealand War Loan interest.

The Crown admitted the claim to relief in respect of the dividends on the ordinary shares of X. The company contended that :

(1) The relief must be based on the amount of the income as computed for the purpose of the United Kingdom tax ; and that the method by which the New Zealand assessment was computed and the deductions allowed in arriving at that assessment were immaterial.

(2) Accordingly the fact that the debenture interest applicable to New Zealand, and the allowance of 5 per cent. on the land owned by the company and used in its business, were allowed as deductions in computing the New Zealand assessment should not be taken into account, and the relief should be allowed on the United Kingdom figures without any deduction for these two items.

(3) X. having paid New Zealand income tax on the profits out of which its preference dividends were paid, the company should be allowed relief on those dividends.

(4) Alternatively, the company, having paid New Zealand tax on the debenture interest as agent for the debenture holders and having been obliged to bear this tax, was entitled to relief in respect of the tax so paid.

The Crown contended that :

(1) The company had not paid any New Zealand tax direct for 1927/28 in respect of its assessable income.

(2) The New Zealand War Loan interest, the debenture interest and the allowance of 5 per cent. on the value of the land had been specifically excluded and exempted from the subjects of taxation in New Zealand and had not borne tax in New Zealand as part of the company's profits, and that consequently no relief was due thereon.

(3) No New Zealand tax had been paid by the company on the preference dividends from X., and therefore no relief was due thereon.

(4) On the alternative contention the company was only assessed to tax on the debenture interest as agents for the debenture-holders, and this tax was not paid by the company on its income.

The commissioners decided as follows :

Where under Dominion income tax law parts of the Dominion income are separately treated for income tax, they were bound to discriminate between those different parts and see whether Dominion income tax had been paid in respect of each of them or not. In the present case the income applied in payment of the debenture interest for which allowance had been made had been specifically excluded from the profits on which the company had been assessed to New Zealand income tax, and consequently no New Zealand income tax had in fact been paid in respect of the profits so applied under the assessments made on the appellant company in respect of its business profits. On the other hand, the company had been separately assessed as agent for its debenture holders in respect of the debenture interest paid by it, and had paid the tax so charged at the rates appropriate to the respective debenture holders' incomes. It had not been able to reimburse itself by deduction of this tax from its debenture holders. In view of the specific separation of the income applied in payment of the debenture interest for which allowance had been made from the rest of the income, the commissioners regarded the income so applied as a separate part of the company's income. They therefore held that the appellant company was entitled to relief in respect of the New Zealand income tax on the profits of its business less the profits applied in payment of debenture interest for which allowance had been made ; but that it was also entitled to relief in respect of the income tax which it had paid on the debenture interest at the rates appropriate to the respective incomes of the debenture holders, such interest being treated as its income under the decision in the case of the *Inland Revenue Comrs.* v. *Dalgety & Co.* (2). The commissioners also held that the appellant company was not entitled to relief in respect of its income from New Zealand War Loan, as it had paid no New Zealand income tax on it. Nor had it paid New Zealand income tax in respect of 5 per cent. of the capital value of the land used by the company for the purposes of its business, and therefore no relief was due in respect of this part of its profits. Although New Zealand income tax had been paid by X. on its profits out of which the dividends on the preference shares had been paid, no New Zealand income tax had been paid or suffered by the company on those dividends, and no relief was due to it on them. The parties were unable to agree as to the method of computation of relief to be allowed in respect of the New Zealand income tax which the company had paid on the debenture interest. At a further meeting the commissioners decided that the debenture interest as a whole formed one part of the company's income and that the rate of relief to be allowed in respect of the tax paid on the debenture interest was to be computed by dividing the total tax paid in respect of the interest by the total amount of the debenture interest, including that part which had been exempted from the New Zealand income tax. They further held that the United Kingdom income which had been applied in payment of the debenture interest had suffered both United Kingdom income tax and New Zealand income tax, and that relief should be allowed thereon accordingly.

Both parties appealed to Finlay, J., who affirmed the decision of the special commissioners except as to the debenture interest. On the cross-appeal he held that the company was not entitled to the allowance claimed of tax paid on the debenture interest in New Zealand because it was paid as agent for the debenture holders and could not be regarded as a payment of tax on part of its own income. He therefore did not deal with the two questions concerning the method of computing the relief in respect of the New Zealand income tax which the company had paid on the debenture interest.

The company appealed.

A. M. Latter, K.C., and *Cyril L. King* for the appellant company.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondents.

Latter, K.C.: The *Assam* case (1) decides that the company cannot have more relief than on £26,000, but not that they should have less. A sum of at least £45,000 is left in as part of the profits taxed in the United Kingdom as arising from the New Zealand trade. There is no ground for saying that the debenture interest and the 5 per cent. of the unimproved value of the land are separate parts of the income. The £39,000 total debenture interest paid in 1926/27 is not a separate part of the income. The commissioners have taken from the British figure sums which the company had applied out of its trade income in paying debenture-holders. Rowlatt, J., in *Inland Revenue Comrs.* v. *Dalgety & Co.* (2), said that the use of income in a certain way, such as the payment of interest on borrowed money, did not make it part of the income for the purpose of the section. Here the income is derived from the trade, which is one and indivisible. Therefore no part of the income earned in New Zealand can be said to be represented by an amount which goes out in paying interest to creditors. The *Assam* case (1) did not decide in terms that A the money spent for any particular purpose was a part of the income separable for the purposes of the section.

The unimproved value of the land is not to be taken as a separate income for the purposes of sect. 27. This is an outgoing, not part of the income. Both in England and in new Zealand the principle is recognised B that, in arriving at the profit of a trade, a deduction is made on account of the value of the land which is occupied by the owner for the purposes of the trade : in New Zealand by sect. 83 (1), and in England by Sched. D. Cases I and II, r. 5, which was enacted as a result of the decision in *Stevens* v. *Boustead (E.) & Co.* (3), that a trader abroad could deduct C the full amount of the annual value of the land, although he did not pay tax on it under Sched. A.

On the company's appeal for relief in respect of the tax paid as agent for the debenture-holders, the company's argument is alternative and based on the hypothesis that this sum is a separate part of the income D for the purposes of the section and therefore part of its income on which it has paid tax, so that it is entitled to the appropriate relief. The word "income" must be given the meaning it bears in England. The court decided in *Inland Revenue Comrs.* v. *Dalgety & Co.* (2), that a person's income includes the whole sum on which he is called upon to E pay income tax. In the present case the debenture interest is a part of the company's income, and it is not *ad rem* to say that in New Zealand it is regarded as not being income. Nor is it correct to say, as FINLAY, J., said, that the position is very different in the two countries. While *Inland Revenue Comrs.* v. *Dalgety & Co.* (2) was under con- F sideration the House of Lords repeated, in *Birmingham Corpn.* v. *Inland Revenue Comrs.* (4), that when a person indebted for interest pays tax on his total profits and then pays over the interest to the creditor, that interest is the income of the creditor and not of the debtor. That principle is common to the English and the New Zealand systems. In G *Howe (Earl)* v. *Inland Revenue Comrs.* (5), the court held that the part of the total profits which comes to the debenture holder is his income and not the income of the debtor.

King followed for the appellant company.

The Solicitor-General : In looking for the figure of British tax on H which relief can be given, the court must first exclude from the profits assessed all separate items which can be shown to have borne no Dominion tax. If any item is not included in the computation of income for assessment in both countries, the amount attributable to that item must be excluded from the relief to be given. This case is wholly covered by the decision in the *Assam* case (1). The contention that their Lordships directed the revenue merely to look at the figure arrived at in New Zealand ignores the express terms of the opinions in that case, and especially that of Lord Wright. The principle that the revenue must look at the ingredients of the figure is explicit in the opinion of Lord Wright and implicit in those of both the other learned Lords. Income, wherever it is mentioned in sect. 27, is a notional figure. The section contemplates a British notional income arrived at by the application of British law, and a Dominion notional income arrived at according to Dominion law. If the two figures were not notional, they would always be the same. The term "income" can never be equally applicable to British and to New Zealand income, though there may be parts of each of those incomes which are the same.

In deciding the figure of British tax upon which relief can be given, the court must first exclude from the profits assessed all separate items which can be shown to have borne no Dominion tax. It must regard the items making up the income from the same source which is assessable in each country. Any item which is not included in the assessment of both countries must be excluded from relief. The income which went to pay the debenture interest is a separable item under the *Assam* decision (1). The company in the *Assam* case (1) was a trading company; *a fortiori* in the present case where the company is a finance company, making its profits by lending money. This company has not shown anything which enables it to say that it is taxed on the same part of its income in New Zealand as that on which it is being taxed in the United Kingdom. According to the *Assam* case (1), "part" is apt to include both quantity and source, and the court must look at both in order to identify the origin of the quantity: *Rolls-Royce, Ltd.* v. *Short* (6). The company was, under the New Zealand law, agent for the debenture holders, and these persons are entitled to relief. They do not receive their relief in respect of the company's total income but in respect of their own. The only function of the company is, under the absentee section of the New Zealand Act, to be responsible to account for the absentees' tax.

The case of *Inland Revenue Comrs.* v. *Dalgety & Co.* (2) can be distinguished. In that case the whole profits of the company out of which debenture interest was paid were subject to tax in both countries. The company said that, this being so, it did not matter whether that tax had been recovered. The Crown contended that the company must show that it had ultimately borne the tax. The case was decided on the ground that the totality of the income out of which the debenture interest had been paid had borne tax under assessments in both countries, so that the company had suffered dual taxation. The ultimate bearing of the tax is not the test; the test is, does the total income out of which this income is paid come into taxation under the two systems? If it does not, then it has not come into double taxation.

Hills followed for the Crown.

Latter, K.C., in reply.

A

LORD WRIGHT, M.R. [read by ROMER, L.J.]: I have read the judgments prepared and about to be delivered by ROMER, L.J., and GREENE, L.J. I am so fully in agreement with these judgments in every respect, as regards both reasoning and conclusions, that it is a work of B supererogation to add any observations of my own. But I may perhaps say that, as I read the subsection, the protean and ambiguous word "income," as there used, means the figure of income or part of income as assessed for tax purposes in either jurisdiction. The income or part of income—that is, the figure so assessed—is that on which the person C has paid, or become liable to pay, tax within the words of the section, in the United Kingdom and in the Dominion respectively. Once it is established, on the principles expounded by my brethren, that the same part of income is assessed in the Dominion as that assessed in the United Kingdom, "double taxation" is *pro tanto* established, on the basis of, D and to the extent of, the smaller assessment; the figures of assessment respectively are the material figures of income for this purpose.

ROMER, L.J.: On this appeal, the court is once more invited to consider and apply the provisions of the Finance Act, 1920, s. 27 (1). E As the section has been recently discussed and explained by the House of Lords in the case of *Assam Railways & Trading Co., Ltd.* v. *Inland Revenue Commissioners* (1), it becomes necessary to examine the facts and the judgments given in that case in some detail.

The facts, so far as material for the present purpose, were as follows: F The company concerned was an English company carrying on a business in India, from which business the whole of its income was (with a small exception) derived. It was controlled by its board in England, and was, accordingly, taxed under the Income Tax Act, 1918, Sched. D, Case I, on the whole of the profits arising from its business in India. Under G the rules applicable to that case, the tax on its income for the year ending Apr. 5, 1929, fell to be computed on the company's profits for its financial year ending on Mar. 31, 1928. The profits so computed amounted to the sum of £186,750. Under the Indian Income Tax Act, the tax for the year 1928/29 had to be computed on the profits for the same H financial year, but those profits, when ascertained in accordance with that law, amounted only to £129,365. This was due to the following facts: (1) According to the Indian Act, the sum paid by the company as interest on its debentures, and amounting to £42,500, was a permissible deduction, whereas it was not so in the United Kingdom. (2) The profits derived by the company from a certain tea-garden, amounting to £8,343, were excluded from the Indian computation, but were included in that of the United Kingdom. (3) Other divergencies between the two systems of taxation resulted in a net excess of £6,542 in the profits as ascertained in the United Kingdom over the profits as ascertained in India. The company in due course paid United Kingdom income tax, calculated at the appropriate rate, on £186,750, and paid Indian income tax, at the appropriate rate, on £129,365. In these circumstances, it was plain that the company was entitled to relief under sect. 27 (1). The question to be determined was as to the basis upon which such relief was to be calculated. The contention of the company was this :

> The subject of taxation both in India and in the United Kingdom is the income derived from the business carried on in India during the year of assessment ending on Apr. 5, 1929. According to the law of each country, the tax on that income is ascertained by taking a notional sum that bears no relation to the actual income in fact, and applying the appropriate rate to that notional sum. The fact that the notional sums are different in the two countries is immaterial. The notional sums are only brought into notional existence for the purpose of ascertaining what income tax should be charged in the respective countries on the profits of the business earned in the year of assessment. Having served that purpose, they need not be considered further. We have paid income tax for the year of assessment both in the United Kingdom and in India on precisely the same income, and are entitled to relief under the section upon that footing.

It is an attractive argument, and none the less so because it involves the proposition that, throughout the subsection, the word "income" means "income," and nothing else. Had it been accepted, the company would have been entitled to be relieved to the extent of, but not exceeding, half the United Kingdom rate on the sum of £186,750. For the purpose of ascertaining the rate, the actual income from the Indian business would no doubt have to be ascertained. But this should present no difficulties to a competent accountant. If any such difficulty should occur, it would have to be settled by the appropriate tribunal. The actual profit having been ascertained, the Indian rate and the United Kingdom rate, for the purposes of the section, would be ascertained by dividing the amount paid in tax in the two countries respectively by the amount of the actual profit. This contention on the part of the company failed, however, to find acceptance at the hands of the commissioners for the special purposes of the Income Tax Acts, Finlay, J., the Court of Appeal, or the House of Lords, and must now be regarded as unsound.

The special commissioners held that the company was entitled to relief in respect of the sum of £135,907. This sum was arrived at by deducting from the sum of £186,750 the two sums of £42,500 and £8,343. They treated the sum of £186,750 as being the taxable income in the United Kingdom, and £129,365 as being the taxable income in India. They then analysed these two sums, and found that, inasmuch as no debenture interest had been deducted in the United Kingdom computation, and had been deducted in the Indian computation, £42,500, part of the United Kingdom taxed income, had not been taxed in India. They further found that £8,343 had been included in the United Kingdom taxed income, but had not been taxed in India. The reason why they A did not also find that £6,542, further part of the £186,750, had not been taxed in India would seem to have been that they had not been asked to do so by the inspector of taxes. Attention was called to this omission, in para. 7 of the respondent's case, when the matter eventually came before the House of Lords. On an appeal by the company to FINLAY, J., B that learned judge affirmed the decision of the commissioners, and, as I read his judgment, upon the same grounds as those on which the commissioners had proceeded. Pausing there, it is to be observed that the question whether, and to what extent, income tax in this country or in India would ultimately fall on the debenture holders in respect of C the interest paid to them, was immaterial. Income tax on the £42,500 had been paid by the company here, and had not been paid by the company in India, and that is all that mattered. For it had been decided by the House of Lords, in *Inland Revenue Comrs.* v. *Dalgety & Co.* (2), that the word " paid " in the section means " paid," and not " ultimately D paid."

The decision of FINLAY, J., was affirmed by the Court of Appeal, but on somewhat different grounds. They agreed with the learned judge in treating the sum of £186,750 as the income from the Indian business that had been taxed in the United Kingdom, and not merely E as a notional sum arrived at for the purpose of calculating the tax to be paid on the real income for the year of assessment. They also treated the £129,365 as representing the part of the £186,750 that had been taxed in India, and as representing, therefore, the only part of the company's income from the Indian business that had borne tax in both F countries. They made no analysis of the two figures. They rejected, indeed, the idea that any such analysis ought to be made. LORD HANWORTH, M.R., said, at p. 593 :

> When we come to consider what is to be the relief, it has to be shown by the taxpayer that on a part of the income which is his statutory income in the United G Kingdom he has paid Dominion income tax for that year. Now are we to re-open and to readjust the figures in each country ? Are we to set side by side the items which compose the total assessable income for which the man is to be charged first in the Dominion and afterwards in the United Kingdom ? To my mind, not so. You have to deal with the results which have been attained by following the legislative directions in each country, and you have to deal with the total result when the exemptions or deductions or abatements have been allowed, and you cannot scrutinise those abatements or deductions by a comparison with a different H system in the other part of the Commonwealth ; and it falls upon the taxpayer to prove that he has paid income tax for that year in respect of the same part of his income.

The Court of Appeal accordingly held that the company was entitled to relief in respect only of £129,365. But, as the Crown was content with the figure of £135,907 arrived at by the commissioners, the appeal was merely dismissed. The matter was then taken to the House of Lords, who unanimously affirmed the decision of the Court of Appeal. Lord Warrington of Clyffe, in his opinion, summed up the conclusions as follows, at p. 454:

> In the present case the part of his income on which the taxpayer has paid tax in England is £186,750. In India he has paid tax on a smaller part numerically of the same income.

This was precisely the view of the case that had commended itself to the Court of Appeal. Lord Wright also agreed with that view. He said, at p. 456:

> The Court of Appeal in confirming (in substance) the ruling of the special commissioners, took the view (rightly as I think) that the true amount on which relief should be given was £129,365.

I would call attention to the words "in substance." Later on, he said, at p. 460:

> On the words of the section it seems that appellants can only show double taxation in regard to £129,365, which is a part of the £186,750.

Lord Blanesburgh, Lord Atkin and Lord Thankerton agreed with the judgments of Lord Warrington of Clyffe and Lord Wright.

The case seems to establish the following conclusions: (i) that the word "income" in the section does not mean the real income, but the "statutory" or "notional income," by means of which the tax is calculated; (ii) that if this statutory income in the Dominion is £A, and in the United Kingdom the statutory income from the same source is £(A + B), relief will be given in respect of £A; (iii) that an analysis of the two statutory incomes, for the purpose of comparing, for example, the respective allowances for repairs or depreciation, is inadmissible. It is in regard to the two latter conclusions that the view taken by the special commissioners and by Finlay, J., differed from that taken by the higher tribunals. The difference is one of vital importance. If the two statutory incomes are to be dissected, as was done by the special commissioners, every item appearing on the debit side in the Dominion account that does not appear on the debit side of the United Kingdom account must be regarded as having borne income tax in the United Kingdom, and not in the Dominion, and *vice versa*. If, for instance, in the Dominion, £1,000 be allowed for depreciation, and nothing for bad debts, and in the United Kingdom £1,000 be allowed for bad debts, and nothing for depreciation, then, although the statutory incomes in the two countries might be equal (say £10,000), relief could only be given in respect of £9,000. The same result would occur in the case of a difference in relation to receipts of the business. The receipts of the business might, in the Dominion, be treated as being worth £50 less than the value at which the same receipts are brought into account in

the United Kingdom. The total statutory incomes might be the same, and yet relief would only be given in respect of the statutory income less the £50. In cases where the statutory incomes of the two countries are the incomes, or average of incomes, over different periods of time,
A hopeless confusion would result. In the United Kingdom, the statutory income is that of or for the year preceding the year of assessment, In the Dominion, it might be that of the year of assessment. In such a case, no relief could be granted at all, even though the statutory income in the Dominion were equal to that in the United Kingdom.
B For no item on either side of the two accounts would be the same. The view taken by the Court of Appeal and the House of Lords in the *Assam* case (1) would, however, lead to no such difficulty. Nothing need be regarded except the two statutory incomes of the business, taking care, of course, to see that neither includes income from any other source.
C Relief will then be given to the extent of the smaller of the two sums, without inquiry into the reasons for the difference between them. The statutory income is in such case to be treated as the taxable income for the year of assessment. Both sums must be treated as representing income derived from the same source and for the same period, namely,
D the year of assessment. It necessarily follows that the smaller sum is a part of the larger sum, as was pointed out both by LORD WARRINGTON OF CLYFFE and by LORD WRIGHT in the *Assam* case (1). But, just as it is necessary to see that the statutory incomes do not include any receipts from sources other than the business, so also is it necessary
E to see, in each case, that no profits of the business are being taxed otherwise than through the medium of the statutory income. For what has to be ascertained, for the purpose of the section, is how much tax has been paid by the company on its profits in this country and in the Dominions respectively.

F It only remains to apply these considerations to the present case, taking, for that purpose, the year of assessment 1928/29. The United Kingdom statutory income from the whole of the company's business for that year was £70,017. This figure, however, included certain receipts from sources other than the business of the company in New Zealand,
G amounting together to £25,549, leaving the statutory income for the last-mentioned business £44,468. The New Zealand statutory income was £26,592. The appellant company is therefore entitled to relief in respect of that sum. That would be the only relief to which the company is entitled if, under the New Zealand law, the profits from the New Zealand
H business are only taxed by reference to the New Zealand statutory income. It appears, however, that the effect of the Land and Income Tax Act, 1923, of New Zealand, is to exclude from the statutory income a sum equal to the interest on debentures, the money secured whereby has been employed in the production of the assessable income, and to

tax such sum in the hands of the company. The profits of the New Zealand business are not therefore taxed merely by reference to the statutory income, but partly by reference to that income and partly by reference to the amount of interest payable in respect of its debentures. The amount taxed under this latter head is the sum of £34,779, and on this sum the company is also entitled to relief. It is true that, as regards such last-mentioned part of the company's profits, the company has only been assessed as agents for the debenture holders; but this is immaterial. In order to get relief under the section, it is sufficient for the company to show that it has paid the New Zealand tax on that part of its profits. The question in what capacity it has paid it, and the question whether the tax falls ultimately on the company or the debenture holders, are both beside the point. The company has paid United Kingdom income tax on a part of its income, namely, £34,779, and has proved that it has paid Dominion tax in respect of the very same thing. In accordance with the plain words of the Finance Act, 1920, s. 27 (1), it is entitled to relief on that sum.

For these reasons, I am of opinion that both appeals should be allowed.

Greene, L.J.: The Finance Act, 1920, s. 27 (1), provides as follows:

> If any person who has paid, by deduction or otherwise, or is liable to pay, United Kingdom income tax for any year of assessment on any part of his income proves to the satisfaction of the special commissioners that he has paid Dominion income tax for that year in respect of the same part of his income, he shall be entitled to relief from United Kingdom income tax paid or payable by him on that part of his income—

at a rate to be determined as therein mentioned. The language of this provision appears at first sight to be reasonably clear. The first thing to consider is whether the person claiming relief is liable to United Kingdom income tax "on any part of his income." His income, for the purposes of United Kingdom income tax, may comprise a number of elements, derived from different sources, and taxable under different schedules. Any one of these elements may be a "part of his income" for the purposes of this limb of the subsection. The next question for consideration is whether he has paid Dominion income tax for the year in question "in respect of the same part of his income." It is said that, in strictness, the word "same" is necessarily inappropriate to convey the meaning intended, since income, as assessed for United Kingdom income tax, is a notional sum, and the income on which Dominion income tax is paid cannot be the "same." This, to my mind, presents no practical difficulty in construing the subsection, nor am I prepared to find in its language such abstruse metaphysical difficulties as were suggested in the arguments for the Crown. The subsection says that identity exists, and, as a practical matter, I find no difficulty in treating the assessed income which is taxed in a Dominion as being the "same" as that taxed in the United Kingdom. Now, even if the matter had been devoid of authority, I should have thought that the character of the identity postulated by the words "the same part of his income" was not difficult of ascertainment. If the income is derived from dividends on shares or interest on debentures, and it is taxed in both countries, A the identity is apparent. If the income is derived from a business, the question is more complicated, but not, in my opinion, any more difficult to answer. In such a case, in order to ensure the identity which the subsection requires, the first thing to do is to see that the income taxed in the Dominion is the same as that taxed in the United Kingdom, B in the sense that each includes, and includes only, income (that is to say, incoming profits or gains) which is common to both, and any adjustments of the accounts necessary to ensure this result must be made. To take a single example: if an English company carries on from England business both in England and in a Dominion, its assessment C here will be on the amount of the profits of the entire business. But in the Dominion it will be assessed only on the profits of the business so far as carried on in the Dominion. It is, accordingly, necessary, in order to achieve the primary identity of the two incomes, to dissect the United Kingdom assessment, and eliminate from it that portion D which represents the profits of the English business. This is a perfectly simple and intelligible operation, and presents no difficulty in principle. But it will be noticed that the only matters to be eliminated from the United Kingdom or the Dominion assessment (as the case may be) are incoming profits or gains which are not common to both assessments. E It is, in my judgment, essential to the proper understanding of this case to appreciate the fundamental distinction between sums which truly represent incoming profits and gains, and sums which represent allowances, or permissible deductions, in arriving at the assessable income. For reasons which will appear later, it is only the former which must F be eliminated, not the latter. But the process of arriving at the identity of the two incomes does not stop at the point where incoming profits or gains not common to both assessments have been eliminated. When this has been done, the resultant figures for the United Kingdom income and the Dominion income will, in all probability, be different, by reason G of differences in the two methods of arriving at assessable income. It must have been present to the mind of the legislature that uniformity in the method of assessing business profits is not to be found throughout the Empire. The rules for the deduction or non-deduction of expenses, or the allowance for wear and tear (to take some examples), which operate H in the United Kingdom, may differ widely from those in force in a Dominion. Here it is necessary to see that what I may call a secondary identity is attained. If, after the elimination of incoming profits or gains which are not common to both assessments, the income from the Dominion business is, for the purpose of the United Kingdom assessment, let me say, £10,000, and, for the purpose of the Dominion assessment, £8,000, it is only in respect of £8,000 that the identity exists. £8,000 is not "the same part" of the company's income as £10,000, even though each figure represents an assessment in respect of the same incoming profits or gains. The relief given by the subsection is therefore A to be ascertained on the footing that the only part of the business income in respect of which tax is exigible in both countries is £8,000. In the converse case, if the figures are reversed, the only part of the company's income on which tax is eligible in the United Kingdom will be £8,000, and the additional £2,000 in the Dominion assessment will B not entitle the company to any relief.

In support of the views expressed above, I may quote some words from the speech of Lord Wright in the *Assam* case (1), at pp. 459, 460:

> C It seems clear that there must be a definite part of income brought into question, and that can only be expressed in a sum of money. As income *ex vi termini* must be expressed in a sum of money, the words "the same part of his income" must involve a comparison between two sums of money, which prove to be the same. The contention of the appellants is to the contrary: it is said on their behalf that the words "the same part of his income" refer solely to what is called the source, and that identity of amount is immaterial and does not come into question except for the purpose of ascertaining the rate of tax to be allowed for. I cannot agree D with this argument. No doubt, questions of source, as it has been called, that is, such questions as where the income comes from, are essential to identify, so far as that aspect goes, what is taxed in the United Kingdom with what is taxed in the Dominion; but in addition the income itself, that is, the amount of money, must also be identified. I think the words "the same part of his income" are apt to include both elements of comparison and identification.

Lord Blanesburgh, at p. 452, expresses the same view in a different E way. In order to apply these principles to the present case, it is necessary to examine shortly the facts relating to the two assessments. There are some variations in the figures in the various documents, due to certain adjustments which have been made, but I will take round sums which will readily be recognisable. The figure of the United Kingdom assess- F ment for the year 1928/29 is £70,000. This includes, in addition to the profits of the business in New Zealand, the following items of incoming profits or gains: (i) United Kingdom profits; (ii) New Zealand War Loan interest; (iii) New Zealand Preference dividend; (iv) ordinary dividends on shares in "X.," amounting in round figures to £25,000. G Now, none of these items is brought into the New Zealand assessment, and the first step necessary to secure identity between the two incomes is to deduct them from the United Kingdom assessment, which will then give the figure of £45,000, as representing that part of the United Kingdom assessment which is exclusively referable to the part of the H income which is taxed in both countries. This is what Lord Wright, in the *Assam* case (1), at p. 460, describes as:

> [identification of] what is taxed in the United Kingdom with what is taxed in the Dominion.

Now, the New Zealand assessment in respect of that part of the income is £26,000 only, and it is in respect of this figure that what LORD HANWORTH, M.R., describes as "identification of the income itself, that is, the amount of money," exists. The result, in my opinion, is that the appellant company is entitled to relief, upon the basis that, to the extent of the assessment of £26,000, it has paid Dominion tax upon the profits of the New Zealand business, which are the same subject matter of taxation as those covered by the United Kingdom assessment, as adjusted in the way which I have described. This result appears to me to accord with the language of the subsection, with the construction placed upon it by the House of Lords in the *Assam* case (1), and with good sense.

Upon the view of the meaning of the subsection which I have expressed, differences between the rules prevailing in the two countries, as to such matters as allowances and deductions of expenses, are entirely disregarded. To take a simple example: let me assume that the method of arriving at the assessable profits of a Dominion business is identical both in principle and in the matter of amount in both countries, with the exception of wear and tear allowance, and gives for each country a figure of £10,000 before deducting that allowance. Let me assume, then, that the allowance in the United Kingdom is £750 (giving a United Kingdom assessment of £9,250) and in the Dominion £1,000 (giving a Dominion assessment of £9,000). The business income on which Dominion tax has been paid will be £9,000, that on which United Kingdom tax has been paid will be £9,250, and relief will be given accordingly. It is quite illegitimate, in my opinion, to treat the difference between the two allowances, namely, £250, as in some sense a part of the business income which has not suffered tax in the Dominion, and as, therefore, for the purposes of the subsection, to be deducted from the United Kingdom assessment, under the guise of eliminating from that assessment a piece of income which has not borne tax in the Dominion. In truth, what has borne tax in the Dominion, in such a case, is the business profits as assessed, not merely a part of those profits ascertained after deducting the excess of the Dominion allowance over the United Kingdom allowance. Nor is the position, in my opinion, any different if one of the countries makes an allowance or permits a deduction of a kind not recognised in the other country. Again, let me take a simple example. I will assume that all figures are identical in the two countries, except that, in the United Kingdom, an allowance is given which is not given in the Dominion—for example, an allowance of £500 in respect of bad debts—giving an assessment of £9,500, and a deduction is permitted in the Dominion which is not permitted in the United Kingdom—for example, a deduction of £500 in respect of certain expenses of the business—giving an assessment of £9,500. The two figures which are comparable, for the purposes of relief, under the subsection, will be £9,500 and £9,500—not £9,000 and £9,000, as they would have to be if the £500 in each case were to be treated as an untaxed part of the business profits.

It is at this point that what, in my opinion, is the fallacy underlying the Crown's argument on this part of the case emerges. It is due to a failure to distinguish between two things fundamentally different, namely, an incoming profit and an allowance or deduction. I have already referred to the items of incoming profit which are included in the United Kingdom assessment but not in the New Zealand assessment, and shown how these must be deducted from the United Kingdom assessment, for the reason that that assessment is *pro tanto* referable to these items. But the Crown seeks to treat, on the same basis as these items, certain sums representing allowances or deductions made in New Zealand, namely: (i) debenture interest; (ii) 5 per cent. unimproved value of land allowance, amounting in round figures to £45,000. These sums, it is said, must be deducted from the United Kingdom assessment, on the basis that they are pieces of income, not taxed in New Zealand, to which *pro tanto* the United Kingdom assessment is referable. The result is to reduce the United Kingdom assessment to nothing, or a minus quantity, for the purpose of the subsection, and to destroy the claim to relief. But it is to be noticed that the effect of these allowances and deductions is in itself to reduce the amount of the New Zealand assessment, and so to reduce the area of double taxation in respect of which relief may be claimed. To use them again, for the purpose of still further reducing that area, is, in my opinion wholly illegitimate.

The Crown's argument here is, in my judgment, based on a misconception of the effect of the decision in the *Assam* case (1). I have had the advantage of reading the analysis of that decision contained in the judgment which my brother Romer, L.J., has just read, and I entirely agree with it. I wish to add only one observation of my own. In the *Assam* case (1), the appellants were endeavouring to write back into the Indian assessment two sums which had not entered into that assessment at all, one of which was an item of incoming profit not taxed in India, namely, the Bogapani tea-garden account, and the other of which was a deduction in respect of debenture interest. For the purpose of the decision in that case, the difference in character of these two items was irrelevant; it was equally inadmissible to add back the one and the other in order to *write up the Indian assessment above its true figure.* But this is a thing entirely different from saying that the fact that a particular deduction, which is not allowed in the United Kingdom, is allowed in a Dominion, can be used in order to *write down the United Kingdom assessment below its true figure*, which is what the Crown claims to be able to do in this case.

I have so far dealt only with the New Zealand assessment in respect of business profits, and, for that purpose, I have treated the deduction of a sum equal to the debenture interest as what, for the purpose of that assessment, it in fact is, namely, a true deduction of a business expense. But the company was assessable, and was, in fact, assessed, in respect of what it paid for this interest, under a different provision of the New Zealand statute, namely, sect. 116. Under that section, a company is to be the agent of the debenture holders for the purposes of the Act, and is assessable in respect of interest paid to them accordingly. The appellant company contends that, as no deduction was permissible in respect of the debenture interest for the purposes of the United Kingdom assessment, it has paid United Kingdom income tax upon it; that it has also paid New Zealand income tax upon it; that the fact that, under the New Zealand Act, this tax is chargeable under a different section, is irrelevant, since all that the Finance Act, 1920, s. 27 (1), requires is that Dominion tax shall have been paid; and that the fact that, under the New Zealand statute, it is to be deemed to have paid as agent, and has in New Zealand a statutory right of recovery against the debenture holders—a right which is not enforceable in this country—is also irrelevant. In my opinion, the argument of the appellant company upon this point is right. Whether or not the part of the company's income, in respect of which it has paid tax in the Dominion, is the same as the part of its income on which it is chargeable to United Kingdom income tax, is, in my judgment, to be decided by reference to English law alone; and the fact that, for purposes of its own, the New Zealand legislature has chosen to treat the sum paid away in interest as in a different tax category to that in which it is treated here, cannot, in my opinion, affect the matter. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Freshfields, Leese & Munns* (for the appellant company); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

MACLEAY *v.* TREADWELL

[PRIVY COUNCIL (Lord Blanesburgh, Lord Maugham, Lord Salvesen, Sir John Wallis, Sir Lancelot Sanderson), **October 29, 30, 1936, February 12, 1937.**] A

Privy Council—New Zealand—Will—Construction—Devise of realty to "heir-at-law" of survivor of two beneficiaries—Whether heir at common law or successors to real estate of an intestate dying in New Zealand subsequent to 1874*—Real Estates Descent Act, No.* 84 *of* 1874, *ss.* 3, 18*—Administration Act, No.* 49 *of* 1879, *ss.* 6, 10*—Administration of Estates Act, No.* 3 *of* 1908, *ss.* 4, 11. B

The testator, a Scot by origin, at the time of his death in 1895 was resident in and domiciled in New Zealand. By his will, made in 1891, the testator devised all his real estate to his executors upon trust for his brother and his brother's son and the survivor of them for life and, at the expiration of 21 years after the death of such survivor, upon trust to convey and transfer the whole of the testator's real estate to "the heir-at-law of such survivor" absolutely, "the true intent of C this my will being that the heir-at-law of such survivor shall ultimately take the whole of the corpus of my real estate and upon further trust until such conveyance and transfer to pay the rent and profits after the death of such survivor to such heir-at-law for his absolute use and benefit." The testator died in 1895 and was survived by both his brother and his brother's son. The son, who was the "survivor," died in 1931. The law of New Zealand was not, at the date of the will, D the personal law of either the testator's brother or the brother's son. The whole of the testator's real estate consisted of a farm of 500 acres in New Zealand:—

HELD: (i) in the circumstances the New Zealand heir-at-law of the survivor and no other was the heir selected by the testator as ultimate devisee.

(ii) the Real Estates Descent Act, 1874, the Administration Act, E 1879, and the Administration of Estates Act, 1908, which assimilated the descent of realty to the distribution of personalty, did not repeal the Inheritance Act, 1833, and did not in New Zealand put an end to the common law heir-at-law, but merely deprived him of his right to take beneficially by descent.

(iii) upon the construction of the will as a whole, the testator's real F estate passed to the appellant as the New Zealand heir-at-law of the survivor.

Majority decision of the Court of Appeal of New Zealand ([1935] N.Z.L.R. 463) *reversed.*

[EDITORIAL NOTE. The point raised here is of very general interest, since the descent of real property to the heir-at-law has now been abolished almost G throughout the British Empire. In the case here considered the legislation assimilating the devolution of real and personal property did not repeal the Inheritance Act, 1833. The position is the same in England where that Act is repealed except so far as may be necessary for certain purposes, one of those being the determination of the heir by purchase. In parts of the Empire where the Act has been repealed without any reservation, there may be a question whether the heir has to be H traced by the old common law rules in force before the Act of 1833, or whether the statutory next of kin take in his place. The question as treated in the present case is not purely one of the effect of legislation, but also one of construction of the will, it being material that a single person seemed to be designated rather than a class.

As to Heir by Purchase, see HALSBURY, Hailsham Edn., Vol. 10, p. 592, para. 855; and for Cases, see DIGEST, Vol. 44, pp. 861-868, Nos. 7167-7237.]

Cases referred to:

(1) *Morrice* v. *Morrice* (1893), 14 N.S.W. Eq., 211; 44 Digest 862, case *h*.
A (2) *Larkin* v. *Drysdale* (1875), 1 V.L.R. 164.
(3) *Re Griggs, Ex p. School Board for London*, [1914] 2 Ch. 547; 23 Digest 66, *492*.
(4) *Wentworth* v. *Humphrey* (1886), 11 App. Cas. 619; 18 Digest 5, case *c*.
(5) *Jones* v. *Ogle* (1872), 8 Ch. App. 192; 44 Digest 535, *3516*.
(6) *Smith* v. *Butcher* (1878), 10 Ch. D. 113; 44 Digest 578, *3969*.
B (7) *Macnamara* v. *Macnamara* (1929), 30 S.R.N.S.W. 245.
(8) *Re Roberts' (C. J.) Will* (1929), 29 S.R.N.S.W. 562; Digest Supp.
(9) *Re Crane, Crane* v. *Crane* (1908), 8 S.R.N.S.W. 132; 44 Digest 862, case *g*.
(10) *In the Will of Wright (deceased), Equity Trustees, etc., Co.* v. *Firth*, [1922] V.L.R. 41.
(11) *In the Will of Connell (Senior), In the Will of Connell (The Younger), National* C *Trustees, Executors & Agency Co. of Australasia, Ltd.* v. *Connell*, [1910] V.L.R. 471; 44 Digest 861, case *o*.
(12) *Re Gundry* (1892), 11 N.Z.L.R. 444.
(13) *Matheson* v. *Atkinson* (1907), 26 N.Z.L.R. 145; 44 Digest 927, *7835 vii*.
(14) *Shaw* v. *Medley* (1909), 28 N.Z.L.R. 397; 44 Digest 867, *7211 v*.
(15) *Re Williams, Campbell* v. *Hill*, [1926] N.Z.L.R. 762.
D (16) *Greaves* v. *Simpson* (1864), 33 L.J. Ch. 641; 44 Digest 926, *7827*.
(17) *Re Hussey & Green's Contract, Re Hussey, Hussey* v. *Simper*, [1921] 1 Ch. 566; 44 Digest 926, *7826*.
(18) *Re George Chapman (deceased)*, [1913] S.A.L.R. 173.
(19) *Hillier* v. *Hiscock*, [1900] S.A.L.R. 1.
(20) *John* v. *John*, [1898] 2 Ch. 573; 23 Digest 66, *491*.
E (21) *Re MacDonald's Settlement, O'Callaghan* v. *O'Callaghan*, [1928] V.L.R. 421; Digest Supp.
(22) *Hazlett* v. *Lynch* (1889), 15 V.L.R. 713.

Appeal from a majority judgment of the Court of Appeal of New Zealand (Smith, Johnston and Fair, JJ., Sir Michael Myers, C.J., F and Reed, J., dissenting), dated July 5, 1935, upon an originating summons in the Supreme Court of New Zealand (Blair, J.), heard on Feb. 16, 1935, and by consent removed into the Court of Appeal for argument and determination. The facts, which were not in dispute, are set out in the judgment of their Lordships delivered by Lord Blanes- G burgh.

Fergus D. Morton, K.C., and *G. P. Slade* for the appellant.

Hon. S. O. Henn Collins, K.C., *George W. Currie* and *Joseph Stanton* for the respondents.

Morton, K.C.: There is nothing in the law of New Zealand which pre- H vents a testator from devising real estate to the common law heir. Although the descent on an intestacy in realty and personalty was assimilated in New Zealand in 1874, yet the term "heir-at-law" continued to be used. There is no case in which a gift of realty only to the heir-at-law has been held to give the property to the statutory next of kin. All the words in the will point to the common law heir to take at the death of the survivor. Even if there had been a gift simply to the heir-at-law and to no other party, it being a gift of realty, the decision of the court ought to be in favour of the appellant, and even if this were wrong, there is ample context to point to him. The expression "heir-at-law" retains its common law meaning in New Zealand notwithstanding the disinheritance of that person. [Counsel referred to: *Macnamara* v. *Macnamara* (7), *Morrice* v. *Morrice* (1), *Re Roberts'* (*C. J.*) *Will* (8), *Re Crane, Crane* v. *Crane* (9), *In the Will of Wright* (*deceased*) (10), *In the Will of Connell* (11), *Re Gundry* (12), *Matheson* v. *Atkinson* (13), *Shaw* v. *Medley* (14), *Re Williams, Campbell* v. *Hill* (15), *Greaves* v. *Simpson* (16), *Re Hussey & Green's Contract* (17), *Larkin* v. *Drysdale* (2), *Re George Chapman* (*deceased*) (18), *Hillier* v. *Hiscock* (19).]

G. P. Slade, following on the same side: The "heir-at-law" in New Zealand is not extinguished yet. He still has a legal existence, however restricted. [Counsel referred to *John* v. *John* (20) and *Re Griggs, Ex p. School Board for London* (3).]

Henn Collins, K.C.: There is a long line of authority in Australia which shows that such words as "heir," "heirs," "right heirs" retain in themselves a reference to a local code of law. See *Re MacDonald's Settlement, O'Callaghan* v. *O'Callaghan* (21). It is a misconception to regard the words "heir-at-law" and so on, when dealing with realty as an indication of a person; they are a convenient phrase referring to a system of law by which the identity of the person can be ascertained. If "heir-at-law" means "heir-at-law" as ascertained by English law, then this appeal succeeds, but the question is whether, in the mind and writing of the testator, that is what it meant. In a will made in New Zealand, dealing with New Zealand property, *prima facie* it means the "heir-at-law" as ascertained by the local law of New Zealand.

Morton, K.C., in reply: Up to 1874, the meaning of "heir-at-law" could designate one person only. In 1874, the law of descent on intestacy was altered, but, although the "heir-at-law" was disinherited, he still remained in being. The testator must be assumed to know that under the law of New Zealand, descent on intestacy in realty was assimilated to that of personalty: *Hazlett* v. *Lynch* (22). The heir-at-law in New Zealand, even in 1891, was not simply a mere historic personage.

Lord Blanesburgh: John Macleay, of Wanganui, in the province of Wellington, farmer, a Highland Scot by origin, and probably also by birth, at the time of his death, in 1895, was resident, and, as has been assumed, domiciled, in the Dominion of New Zealand. By a will, in 1891, he made provision for different collateral members of the Macleay family, still resident in the Highlands of Scotland—he appears to have had no children of his own—and the question now at issue relates to a devise of all his real estate " whatsoever and wheresoever " thereby made to trustees for the benefit of a brother and his eldest son during their joint lives and the life of the survivor, and then after 21 years to be conveyed and transferred absolutely to " the heir-at-law of such survivor his heirs and assigns." Who within the intendment of the will is that " heir-at-law ? " Is he a *persona designata*—in point of fact the appellant, as the eldest son of the survivor lately deceased ? Or, is the expression, in this will, a *nomen collectivum*, signifying a class to be referred to in what follows as the survivor's statutory next of kin—composed of persons who, as a result of modern New Zealand legislation with reference to the succession to real estate in the Dominion, would be entitled to succeed, in an administration in intestacy, to any New Zealand real estate of his own of which the " survivor " might have died possessed. The question, one, as will be found, of pure construction, can be approached effectively only after the provisions of the will as a whole have been reviewed, and after the words immediately in debate have been seen in the setting in which they are there found, due regard being had to the effect, if any, of the legislation referred to upon the meaning otherwise attributable to them. To the will, therefore, their Lordships at once turn.

It is dated Sept. 11, 1891. It opens with the gift of a legacy of £50 to each of the children of the testator's sister, Kate, " now or lately residing near Wingwall in Ross-shire in Scotland " : then follow legacies of a like amount to a daughter of the testator's sister, Ann, " also now or lately residing near Wingwall aforesaid," and to a son of the testator's brother, Donald—in his case, by way of exception, with no reference to the place of residence of either son or father.

The will then proceeds :

> I give devise and bequeath all the rest of my personal estate whatsoever and wheresoever unto my brother Alexander Macleay and his son John both now or lately residing near Wingwall aforesaid for their absolute use and benefit in equal shares.

Thereupon follows the devise now in question :

> I give and devise all my real estate whatsoever and wheresoever unto Archibald McDonell of Kauangaroa in the said provincial district, farmer, and Donald Stewart of Wanganui aforesaid, farmer, who with their heirs executors administrators and assigns are hereinafter called my trustees upon trust to pay the rents profits and emoluments to my said brother Alexander and his said son John in equal shares for their absolute use and benefit and upon the death of either of them my said brother and nephew upon trust to pay the whole of the said rents profits and emoluments to the survivor for his absolute use and benefit And upon further trust [and now is reached the provision upon which the present question arises] at the expiration of 21 years after the death of such survivor to convey and transfer the whole of my real estate absolutely to the heir-at-law of such survivor his heirs and assigns the true intent of this my will being that the heir-at-law of such survivor shall ultimately take the whole of the corpus of my real estate And upon further trust until such conveyance and transfer to pay the said rents and profits and emoluments after the death of such survivor to such heir-at-law for his absolute use and benefit. And I empower my said trustees to lease my said real estate or any part thereof

> from time to time at their discretion at such rent as may be obtained therefor without fine premium or foregift for any term not exceeding 21 years to take effect in possession on such terms as they may think proper.

Then the testator appointed these named New Zealand trustees to be the executors of the will.

A summary statement of subsequent events may conveniently precede the consideration of these provisions.

The testator died on June 26, 1895. On July 5 following, his will was proved by the executors. In 1913, they retired from the trusteeship, and the respondents, William James Treadwell and George Stannard Gordon, were duly appointed trustees of the will in their place, and have since acted in the trusts thereof. The testator's brother, Alexander, and his nephew, John—the full name of the nephew was John Leed Macleay—both survived him. Of these, Alexander, the father, was the first to go. John Leed, the son and "survivor," died on July 6, 1931. He had been twice married, and he left surviving him his second wife, with sons and daughters of both marriages, seven in number. Three of these children in 1935 were still infants. The youngest of them is now deceased. The appellant is the eldest son. He asserts that he is "the heir-at-law" of the survivor referred to in the testator's will, and he claims an immediate conveyance of the whole real estate to himself. The rival contention of the statutory next of kin other than the appellant is that all of them collectively are, in the event, the "heir-at-law" to whom the testator in the will referred, and, as such, are now entitled to the testator's real estate in the proportion of one-third to the widow of John Leed Macleay and two-thirds to his children who survived him.

The appellant's claim was not accepted by his immediate relatives, and, in order to have determined the question which it raised, the trustees, on Jan. 24, 1935, issued from the Supreme Court of New Zealand the originating summons out of which this appeal emerges. The appellant was cited as defendant, and, following an order made in the proceedings, the summons was served upon the respondent Mr. G. W. Currie, as representing the statutory next of kin of John Leed Macleay other than the appellant, his eldest son.

The questions propounded by the summons were as follows:

> 1. Who is, or are, the person or persons now entitled to succeed to the real estate of the said John Macleay deceased—the testator?
> 2. Whether the person or persons so found to be entitled to succeed are entitled to a conveyance from the trustees immediately or at the expiration of 21 years from the death of the survivor of the brother and nephew of the testator?

These questions, by an order of the Supreme Court of Feb. 16, 1935, were removed into the Court of Appeal for determination, and that court, after full argument, by a majority of three learned judges to two—these latter accepting the contentions of the appellant—answered the first in favour of the statutory next of kin, and caused that answer to be embodied in an order of the court dated July 5, 1935. It is from that order, containing in effect a deliverance in the sense stated—the actual terms of the order will be considered later—that the eldest son now appeals.

A The second propounded question has ceased to be a matter of contest. For the moment, it may, along with its answer, be left alone.

Returning now to the will of the testator, in order to ascertain from its terms who is the "heir-at-law" selected by him as the ultimate devisee of his real estate, the first inquiry, it would seem, should be B directed to the question, what is the system of law under which that "heir-at-law" is to be constituted? Such an inquiry might well have been a difficult one.

The real estate, the subject of the devise, is all the testator's real estate, whatsoever and wheresoever—that is to say, beyond, quite as much as C within, New Zealand. A single heir-at-law is the devisee of the whole —but there is no indication given of the country by whose law, be he one person or many, that heir-at-law is to be constituted. It seems clear from the will that, at its date, the law of New Zealand was not the personal law either of Alexander or of John Leed Macleay. It may D perhaps be hazarded that the law of Scotland was then the personal law of both, and, had the testator died possessed of Scottish real estate only, or of Scottish, as well as of New Zealand, real estate, it might have been difficult indeed to determine whether it was the Scots heir-at-law or the New Zealand heir-at-law of the survivor who was named by the E testator as devisee. The difficulty would have been enhanced by two considerations never throughout this case to be lost sight of: the first, that it was open to the testator, by the law of New Zealand, to devise his real estate there to anyone it pleased him to select and identify by any title or description; and the second, that the heir-at-law of the F survivor named by the testator took nothing in his character of heir-at-law, that expression in this will being no more than the label by which might be identified the beneficiary selected to take by direct gift from himself his, the testator's, real estate all over the world, but no property of the "survivor's" anywhere.

G But these, and other difficulties easily suggested, are, it is found, met by the fact that, whatever may have been the position at the date of the will—and in this respect it may be assumed perhaps to have remained unaltered when he died—all the testator's real estate at his death was situate within New Zealand. Indeed, it consisted of no more than his H farm at Wanganui, of 500 acres in area, and of £6,000 in value.

It is therefore only to New Zealand real estate that the devise, notwithstanding its complete generality, actually attaches, and when to that are added the accepted assumption that the testator himself died domiciled in New Zealand, and the facts that his devisees in trust were both New Zealanders, and that the "survivor" would, at his death, be under the will, tenant for life of this New Zealand property, and possibly be himself in occupation, it becomes, on construction, sufficiently clear, whatever may have been the testator's own view, if he had any, that the New Zealand heir-at-law of the survivor, and no other, must be taken to have been the heir selected by him as ultimate devisee. The only consideration remaining to bar that conclusion, viz., that, at the date of the will, the law of New Zealand was not, in the view of the testator, the survivor's personal law, cannot, in any court of construction, successfully withstand these opposing considerations. Indeed, their Lordships have dealt with this question at length, not so much because, in the result, the answer to it is doubtful, as because, by the inquiry made, they have been enabled to disclose—and this, it will be seen, becomes important in the sequel—that these considerations on this point, separately or collectively, balanced by counter-considerations or the reverse, are merely pointers to the true meaning of the testator's words, the only problem for solution in this case, and a problem, be it said at once, to be solved with no permissible judicial preference for one solution over another.

Interpreting, now, the will of the testator, armed with the finding that the heir-at-law there named is the heir-at-law constituted by the law of New Zealand, the next step in construction is not contested in any quarter. It is agreed that, had the testator's will been executed in 1874, before the passing of the statute of that year, to which reference will immediately be made, the heir-at-law of the survivor therein referred to must have been the appellant, as his eldest son, and that that must still, in New Zealand, be the effect of the will, unless, on construction, that effect in the case of a will made after it was passed is displaced by the legislation of 1874, and an Act of 1879 which superseded it.

The basic law of succession to real estate in New Zealand is the old common law of England, as modified in 1833 by the Inheritance Act. That Act is part of the law of New Zealand, and, except as modified by any subsequent Dominion enactment, remains in force in New Zealand to-day. It has never been there repealed. But it is said that the New Zealand legislation just referred to, by which, as in the different States of Australia, a new rule of succession to real estate has been introduced, so that in cases of intestacy realty is to be administered and is to devolve precisely like personalty, has in that Dominion operated to deprive of its content the term "heir-at-law" as theretofore in use. In the absence of some controlling context to the contrary, the effect of the legislation has been, so it is said, to attach to that expression, when found in a will, say, of 1891, the signification which, before that legislation, would have attached to the expression "statutory next of kin." In a New South Wales case, which has been much discussed, *Morrice* v. *Morrice* (1), OWEN, C.J., referring to analogous legislation in that State, asked, " Can it really be said that there exists such a person as an heir-at-law in this colony ? " The answer to that question, applied to New Zealand, and given by the majority in the Court of Appeal, in the present case is in the negative. In New Zealand, these learned judges hold there is, in its old signification, no longer any heir-at-law at all. In the vocabulary of the law, and as a term of art too, the expression still survives, but in meaning and content it is now, apart from a sufficient context, the equivalent of the expression statutory next of kin.

This is the real basis of their judgment in favour of these next of kin here, and their Lordships accordingly proceed to examine the legislation referred to, in order to ascertain what foundation is there to be found for an assertion as far-reaching as it is novel—no authority, apart from the rhetorical question of OWEN, C.J., in New South Wales, being adduced in its support.

The relevant sections of the legislation in question are to be found in the Real Estates Descent Act, 1874, the Administration Act, 1879, and the Administration of Estates Act, 1908. It will be convenient, for facility of reference, to collect these. They are not lengthy.

The Real Estates Descent Act, 1874, s. 3, is as follows :

> All land in New Zealand of which any person to whom this Act applies shall die seized or possessed as owner without devising the same, or which he shall only partially devise, shall, with all powers, privileges and rights of action attaching or relating thereto, go and pass to and become vested in the personal representative of the person so dying, if undevised absolutely, or if partially devised then subject to such partial devise ; and such personal representative shall hold the said land and the unapplied proceeds thereof for division or distribution in like manner as is now the case with chattel real property, and such land shall be distributable and disposable in like manner as other personal assets, without distinction as to order or application in the payment of debts or otherwise :
>
> Provided that mortgages, trusts and equities upon or affecting such lands shall be as valid as if the said lands had descended to the heir-at-law.

Sect. 18 is as follows :

> In the reading and construction of all Acts of Parliament, and of all deeds and documents that shall from time to time, after the day on which this Act shall come into operation, subsist and be in force, the word " heir " or " heirs," so far as relates to the deceased owners of undevised or partially devised lands, shall be taken to mean and include the person to whom letters of administration of the personal estate or probate of the will of such deceased owner, where such will only partially devises his lands, or only affects personal estate, shall be granted, and any person who shall take any lands by virtue of this Act shall so take as if the same had come to him by will of the deceased owner.

The Administration Act, 1879, repealed the Real Estates Descent Act, 1874, and sect. 6 is as follows :

> Immediately upon the granting of probate of the will or administration of the estate, or an order to administer the estate, of any deceased person, all the real estate then unadministered of such person, whether held by him beneficially or in trust, shall vest in the executor or administrator to whom such probate, or administration, or order shall be granted, as the case may be, for all the estate therein of such person.

Sect. 10 is as follows:

> Subject to the provisions of this Act, the executor or administrator shall hold—
>
> (1) The real estate of any person who dies leaving a will, according to the trusts and dispositions of such will, so far as such will devises or affects such real estate:
>
> (2) The real estate of any person who dies intestate as to such real estate after this Act comes into operation, upon trust for the person or persons who, if such A real estate were personal estate, would be entitled to such personal estate; and such person or persons shall in all respects have the same shares, estates, powers, and interests in and over such real estate as he or they would have in case the same had been personal estate.
>
> (5) The real estate of any person who died on or before Oct. 1, 1875, intestate as to such real estate upon trust for the persons who would have been entitled, if the Real Estate Descent Act, 1874, and this Act had not been passed. B

By the Administration of Estates Act, 1908, a consolidation statute, the Administration Act, 1879, sects. 6 and 10 (1), (2), (5), are substantially re-enacted.

Little more than a superficial examination of these enactments is required, as their Lordships think, to show, in the words of a learned C judge in Victoria, with reference to a corresponding statute of that state, that "the heir-at-law is not extinguished yet": *Larkin* v. *Drysdale* (2), at p. 166. So far as the Act of 1874 is concerned, the survival of the "heir-at-law," to whom lands would, but for the Act, have descended, is, by the proviso to sect. 3, assumed: and whereas, D by sect. 18, a more extended meaning is, as a result of the Act, thereafter to be attached "to the word 'heir' or 'heirs'" in the reading and construction in future Acts of Parliament, deeds and documents, no such extended meaning is directed to be attributed to the words "heir-at-law" when there found, an omission the more significant when it is E recalled that the "heir-at-law" has been in terms treated as existing in the proviso to sect. 3.

But, as has been stated, the Act of 1874 was repealed by the Act of 1879, which thenceforth took its place, and still remains in force by re-enactment in the Act of 1908. It is important, therefore, to note F that, by the Act of 1879, and in an even more striking fashion than in the repealed Act of 1874, it is made clear that the old "heir-at-law" remains in New Zealand an existing personage, notwithstanding anything contained in the new Act. Under sect. 6, the vesting in the executor of the real estate of a deceased person is, as will have been G seen, to take effect immediately upon "the granting of probate of the will or administration of the estate or an order to administer the estate" of the deceased. But not before. And in Victoria, under the Administration Act, 1872, of that state, No. 427, sect. 6—a section admittedly indistinguishable from this sect. 6 of the New Zealand Act of 1879— H it was held, as long ago as 1875, in the case of *Larkin* v. *Drysdale* (2), that there was in that section nothing to destroy the status of the old heir-at-law between the death of the deceased and grant of administration to his estate, and an action of ejectment, brought, during that interval, by the heir-at-law in respect of the property of the deceased, was accordingly there sustained. The correctness of the principle enunciated in *Larkin* v. *Drysdale* (2) was not canvassed by the respondents here. Nor could it well have been: it is fundamental: it has been applied in England in analogous circumstances under the Land Transfer Act, 1897, when, in *Re Griggs, Ex p. School Board for London* (3), LORD COZENS-HARDY, M.R., observed, at p. 552:

> Until there is a personal representative the property vests in the heir.

And perhaps upon this subject the judgment of this Board in *Wentworth* v. *Humphrey* (4) may be referred to. In that case, their Lordships were called upon to deal with "Lang's Act," the New South Wales Real Estates of Intestates Distribution Act, 1862, s. 1. That section, which will later have to be referred to again, is as follows:

> From and after the passing of this Act all land which by the operation of the law relating to real property now in force, would, upon the death of the owner intestate in respect of such property pass to his heir-at-law, shall instead thereof pass to and become vested in his personal representatives in like manner as is now the case with chattel real property.

In *Wentworth* v. *Humphrey* (4), the deceased owner was illegitimate, and died leaving no heir, and the Board held that the section applied to all cases, and not merely to cases in which the dead owner had actually left an heir. So far from the view being taken, however, that, after the Act, there was no common law heir for him to leave, the Board were of opinion that inquiry as to whether the deceased owner had or had not left one was not always required, for the reason that such an inquiry was (p. 626): "often a long and difficult one": not in any way, be it observed, because it could have no result.

To sum up, this examination of the legislation in question appears clearly to show that, in New Zealand, it has not put an end to the common law heir-at-law: it merely results that he shall not ultimately take beneficially as heir. So far from denying his continued existence, it leaves vested in him, for an interval of indefinite duration, it may even be permanently, the New Zealand real estate of every owner who dies possessed of such property. During that term of vesting, too, the rights of ownership with reference to the property are not in suspense; so that the status of the heir-at-law is brought literally within the words of Blackstone's well known definition of an heir, as being one:

> upon whom the law casts the estate immediately upon the death of the ancestor.

(Comm. Vol. 1, p. 201). In view of all this, is it remarkable that, as was shown to their Lordships by cases cited on behalf of the appellant, the term "heir-at-law," meaning thereby the common law heir, is in constant judicial use in New Zealand? In short, their Lordships cannot but conclude that the New Zealand legislation above detailed at length is in no way operative to justify an interpretation of the term "heir-at-law," when found unqualified in a will made after it was enacted which would not have been appropriate had the legislation never been passed—to apply the phrasing of sect. 10 (5) of the Act of 1879. A

A passage from the judgment of LORD SELBORNE, L.C., in the well known case of *Jones* v. *Ogle* (5), is helpful at this point. LORD SELBORNE, L.C., there envisaging a will dated after the passing of a relevant statute, makes this comment at p. 195: B

> I can quite follow the argument which would say that in such a case a testator makes his will, having the Act of Parliament in view, and that the words he uses are not to be construed without regard to the Act of Parliament.

This process may very usefully be applied to this testator and his will. The words of the will "heir-at-law of such survivor" have here to be interpreted. These words admittedly—the legislation of 1874 and 1879 C apart—describe the survivor's common law heir: had that legislation not been passed, he would have been, under this will, the ultimate devisee of the testator's real estate. The legislation has been examined in this judgment, and it is now found that, while thereby the old heir-at-law may have been reduced to a shadow of his former self, at the date of the D will he survived in New Zealand, and he still survives there, with definite rights and privileges appertaining to his status, remaining an heir—a circumstance for the purposes of this case specially important—capable of being ascertained and identified as easily as before. The result appears to their Lordships to be that this will of the testator, unambiguous in E this respect apart from that legislation, remains, when construed with it in view, as unambiguous as ever. The words in debate—here, as has been shown, words of identification only—remain the sufficient, probably the most strictly correct, description of the survivor's common law heir —a description, moreover, which remains in New Zealand as exclusively F applicable to that heir, as it ever was.

But the majority of the Court of Appeal, moved by the magnitude of the change in the law of succession to New Zealand real estate effected by the legislation in question, have been able to find in this will, in the words "heir-at-law of such survivor," a reference to the survivor's G statutory next of kin—a reference, that is to say, not to a single individual, but to a class—here, as it has happened, to a numerous class of persons, one of them—the widow of the survivor—neither of his kin nor of the testator's. The grounds assigned for this view must presently be looked at. Meanwhile, however, it will not be inconvenient to ascer- H tain, from an examination of the will itself, how far the word as a *nomen collectivum* is consistent with its other provisions either as a whole or in detail. This subject has been very fully dealt with in the judgments under review, and in the arguments before the Board.

And, if the will be read—as presumably it still should—with the
legislation of 1874 and 1879 in view—the testator is seen thereby to be
exercising to the full the power of testamentary disposition over his real
estate which remained his under sect. 10 (1) of the Act of 1879. The
A destination of his real estate under that Act had evidently no attractions
for the testator. His will counters it at every turn. The Act brings
about in intestacy a complete fusion of the real and personal estate of
the deceased: the testator's will maintains, as a predominant purpose,
and throughout, the complete separation of the two. The personalty
B alone is made the subject of the residuary gift: that is to say—such is
the favour extended to the realty—it is upon the personalty that the
legacies are exclusively charged, and, in contra-distinction to the Act of
1879, it is thereout that the debts and testamentary expenses are primarily
to be paid. Again, while the interests taken by the testator's
C brother and nephew, whether in his residuary personalty or devised
realty, are in every respect equal, each takes in the personalty immediately,
and, by appropriate language, an absolute interest, while in the
realty neither of them, putting it shortly, takes more than an equitable
life estate. In other words, the residuary personalty is at once disposed
D of out of hand. But the real estate in direct contrast is, intact, retained
settled by directions calculated to ensure, first, that, so long as it remains
vested in its trustees, there shall never be any disposition of any part
of it for more than 21 years, and, next, that, as real estate and still
intact, it may, 21 years after the death of the survivor of the two tenants
E for life, father and son, be conveyed "to the heir-at-law of such survivor
his heirs and assigns"—words of limitation appropriate to real estate
only. And when it is remembered that John Leed Macleay was the
eldest son of his father, and that accordingly, and as has in fact happened,
the same person would in all probability be the common law heir of
F each, as survivor, that heir being a Macleay of a later generation, the
inference becomes compelling that it was not upon a heterogeneous
collection of individuals, but upon such a single clansman as has just
been described, that the testator had it in mind to direct, as in words
he did direct, that his real estate should devolve.

G But the indications of the will to this effect do not end here. There
are others no less arresting. The limitation to the "heir-at-law" in
the singular is the more striking when found, as it is, in immediate
association with the "heirs and assigns" in the plural of that same
"heir-at-law." Again, the inference that the "heir-at-law" was, in
H the testator's contemplation, a single person, is made, as it seems, well-nigh
irresistible by the statement of his "true intent," namely, that the
heir-at-law "shall ultimately take the whole of the corpus." Lastly,
the direction that, pending conveyance and transfer, the trustees are to
pay the rents, profits and emoluments of the property to him "for his

absolute use and benefit," is a final indication, clear as their Lordships think, that the "heir-at-law" in this will, whatever else he may be, is not a noun of multitude.

Indeed, if the will be read as a whole, the conclusion seems inevitable that the survivor's statutory next of kin are not within its provisions, so that, even if the conclusion of the majority of the Court of Appeal could be accepted, namely, that, in view of preceding legislation, the heir-at-law must, in a New Zealand will of 1891, *prima facie* at least be held to mean the statutory next of kin of the *propositus*, that conclusion is, in this will, displaced by other provisions inconsistent with it. Here, their Lordships find themselves in complete agreement with the minority of the Court of Appeal—SIR MICHAEL MYERS, C.J., and REED, J.—when these learned judges hold that, even if the conclusion of the majority of the court were well founded as to the *prima facie* signification of the words "heir-at-law," the claim of the appellant to be, by this will, the devisee of the testator's real estate was nevertheless established.

But is that conclusion of the majority well-founded? The view of the Board that, even if justified, it is displaced by other provisions of the will, now deprives the question of practical importance But it raises a matter of general interest, and, in any case, their Lordships, out of respect for the elaborate and most careful judgments in which it has been justified by the learned judges who reached it, would not refrain from dealing with it, albeit less elaborately than might otherwise have been fitting,

It is in the judgment of JOHNSTON, J., that these views of the learned judges are most elaborately expounded. The conclusion reached by him is really based upon the proposition that to describe as the heir-at-law, say, of A.B., a person who can, as such, inherit no real estate from A.B., is a contradiction in terms. With some hesitation, perhaps, but still definitely, the learned judge further holds that the statutory next of kin of A.B., to whom, by Act of Parliament, his real estate with his personalty passes on his death intestate, have now, in New Zealand phraseology, so far become his "heir-at-law" that they may be held to have been properly and sufficiently so described without more in a New Zealand will, made, as was the testator's, in 1891.

The first of these propositions is primarily based upon definitions of authority found in English judgments and text books which import that the heir of A.B. is in England one who, on A.B.'s death intestate, inherits the real estate of which he died possessed. The definition of SIR GEORGE JESSEL, M.R., of "lawful heirs," in *Smith* v. *Butcher* (6) is specially relied upon:

> Lawful heirs means the person or persons who either alone or together would succeed to the fee simple estate of which the intestate ancestor died seised in possession at the time of his death.

This definition is made more appropriate to this case by adding to it the statement in CHALLIS ON REAL PROPERTY, 3rd Edn., p. 230:

> The word *heir* has no meaning except in reference to *an estate to which the person so designated might possibly succeed by inheritance.*

A The learned judge, while relying on these definitions in support of his first proposition, has not paused to consider how far they may be subversive of his second. If there must be an estate to constitute an heir, so also, it would seem, must there be an "ancestor" from whom he may inherit. That is to say, an heir, strictly so called, must be of
B kin to the *propositus.* His widow, for example, cannot, in any proper sense, be described as "heiress" of her deceased husband.

But their Lordships do not pursue this discussion, on which there is much to be said. They content themselves with the observation that, in England, when these definitions were propounded, there was no
C legislation in force analogous to the New Zealand legislation of 1874 and 1879, the effect of which, in New Zealand, on this very subject, has been already noted. Their Lordships, however, do not pursue the discussion, because it is, they think, irrelevant to the one question before the Board. In this case, they are concerned only to discover, according to the termin-
D ology of the law of New Zealand, the meaning, in a New Zealand will, of the expression "heir-at-law," and that meaning is surely authoritatively to be ascertained from the legislation in force in New Zealand with reference to the succession to real property there on the death of its owner intestate. Each of the learned judges of the Court of Appeal
E has expressed his conclusion on this point without making any reference to the provisions of that legislation, to which, apparently, the attention of the court was not in this connection directed. Their Lordships have taken a different course, and now that, on examination, the legislation is shown to have on this will the effect already stated, that effect cannot
F be nullified by considerations which may ignore it, but cannot be operative to displace it. And the above and other like considerations, upon which the learned judges of the majority rely for their conclusion, may all, their Lordships venture to think, be so described.

But the learned judges have further felt themselves supported in
G their conclusion by what they take to be the result of a great number of authorities found in the law reports, not only of New Zealand, but of the different Australian States, in which legislation in substance, but not in terms, the same as the New Zealand legislation of 1874 and 1879 has been passed. Their Lordships, under the guidance of the learned
H judges, who have tabulated these cases with great care, have considered them all, but they have not found there any real assistance in the task of construing the testator's will here. REED, J., in the course of his judgment, referring to the New Zealand authorities, observes that it might with confidence be said that they raised no doubts as to what,

with MYERS, C.J., he held to be the true construction of the testator's will. This, in their Lordships' opinion, may be said of all the authorities cited.

It will suffice, as an illustration of what they mean by this statement, to refer to the most typical, the case of *Morrice* v. *Morrice* (1), a New A South Wales decision of 1893, specially relied upon by JOHNSTON, J., in his judgment, and constantly referred to by the other learned judges.

The enactment in force in New South Wales and governing that case was sect. 1 of the Act of 1862—Lang's Act already cited. By the will there, the testator devised lands to his son in fee, with power, in the B event of the son's dying without issue, to appoint to his wife for life, and upon the death of the wife for the testator's "heirs." There was no context. Who were designated under the word "heirs"? That was the question. The learned judge, OWEN, C.J., applying Lang's Act, decided that the personal representative of the testator was the person C designated by him as his "heir," and that he held the property in trust for the testator's statutory next of kin. The decision has been much canvassed. Hard as it is to understand, it is unnecessary for their Lordships to consider or express any opinion here on the question whether or not it was, in view of Lang's Act, well decided. Their present difficulty D is to see how the case can have any application to the testator's will, where the gift is not to the "heirs," in the plural, of the testator, but is to the "heir-at-law," in the singular, of a third person altogether. Upon this second point of difference in respect of description, JOHNSTON, J., seems, in his judgment, to suggest that OWEN, C.J., E would have decided *Morrice* v. *Morrice* (1) in the same way, if, in the will there, the words "heir-at-law" had been substituted for the word "heirs." This suggestion, if it be intended by the learned judge, their Lordships cannot accept. In sect. 1 of Lang's Act, the "heir-at-law" and the statutory next of kin are, as beneficiaries, brought into immediate F contrast. It is difficult to see how a devise to the testator's heir-at-law without context, construed with that Act in view, could be anything else than a devise to his common law heir. This statement is important, because, prior to the order now under review, there is no recorded instance, either in New Zealand or in Australia, of the words "heir-at-law" in a will G with no context being construed as the equivalent of statutory next of kin, while the view that the words are too inelastic to be so extended is more than once judicially expressed, and is supported by the implications of the Act of 1874, to which reference has already been made.

It may be noted that the order now under review reproduces almost H textually the order in *Morrice* v. *Morrice* (1). It declares that:

> the estate in fee simple in the testator's real estate is held by the testator's *executors* upon trust for the persons who would under the Administration Act, 1908, have taken any real estate of the survivor of Alexander Macleay and John Leed Macleay, if such survivor had died intestate.

It seems that the executors there referred to are the executors appointed by the will. If this be so, the order in *Morrice* v. *Morrice* (1) has first been followed, and has then been extended to a state of circumstances to which that order had no application. The executors here have long A since ceased to function in favour of the respondent trustees, Messrs. Treadwell and Gordon, who, since their appointment as trustees in 1913 have, as devisees, held the property upon the trusts declared by the testator's will. And they have never been executors of the will. There is no evidence that the appointed executors *or* either of them are now even B alive.

But it may be that it is the respondent trustees to whom, under the name of executors, reference is made in the order. If so, the order imports that the testator's will, which in terms directs that the property shall be conveyed by the trustees to the " heir-at-law of such survivor," C means, on its true construction, that the property is to be conveyed to that survivor's statutory next of kin—a finding for which, in their Lordships' judgment, for the reasons already given, there is no sufficient reason.

The learned judges of the majority are not unconscious of the difficulties D in the way of their construction created by the inconsistent provisions of the will, to which attention has been drawn. They deem these insufficient to affect the result, which, in their view, is reached apart from them. JOHNSTON, J., seems to agree that these provisions, had the only issue been whether the testator was referring to one New E Zealand heir or to another, might have satisfied him that it was an heir in the singular who was pointed at. He considered himself entitled, however, to disregard or to discount these provisions because to permit them to have effect would result, as he saw it, in the introduction of elements of foreign law into a disposition of New Zealand real estate. F That this would result seems also to have been the view of SMITH, J. Their Lordships find it difficult to follow the learned judges here. Their Lordships, on what has seemed to them to be the true construction of the testator's will, have held that it is to the appellant, as the New Zealand heir-at-law of his deceased father, that the testator's real estate G now passes. But if, on the true construction of the will, it had been held that it was John Reede Macleay's Scots heir-at-law who was so entitled, the acceptance of that conclusion would not have involved the introduction of the Scots system, or any part of it, into this administration. To give effect to a devise even to a foreigner who can be identified H is not to introduce any foreign law. Rather is there thus recognised the quite lawful exercise of a testator's valuable right of testamentary disposition enjoyed by him under the law of New Zealand. To refuse, for any such reason, to recognise such a devisee, is to prejudice that right, one which, in its lawful exercise, it is, as their Lordships feel will be, on all hands, recognised, a primary duty of every New Zealand tribunal, as it is of their Lordships on appeal to His Majesty in Council, to acknowledge and vindicate.

Their Lordships need go no further. In their judgment, the appellant has established that he is the heir-at-law referred to in the will of the A testator, and, if so, it is now agreed that he is entitled to an immediate conveyance from the respondent trustees of the entirety of the testator's real estate.

The order of the Court of Appeal, except as to costs, should be discharged, and a declaration made to the above effect. B

Their Lordships will humbly advise His Majesty accordingly.

The costs of all parties of this appeal taxed as between solicitor and client should, before conveyance, be defrayed by the trustees out of the property in their hands.

Appeal allowed. Costs of all parties to be defrayed by the trustees out C *of the property in their hands.*

Solicitors: *Coward, Chance & Co.* (for the appellant); *Wray, Smith & Halford* (for the respondents).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

D

MIDLAND BANK EXECUTOR & TRUSTEE CO., LTD. *v.* YARNERS COFFEE, LTD.

[Chancery Division (Farwell, J.), **February 10, 1937.**]

Will—Construction—"I forgive and release all sums owing to me"—Loan to company—Release. E

By his will a testator declared "I forgive and release to any person indebted to me all sums owing to me by them except such sums as shall be secured to me by mortgages or legal charges." In answer to a circular sent to the shareholders of a company in which the testator was a shareholder, he had lent to the company £300 which had not been F repaid at the time of his death:—

Held: the words "forgive and release" did not restrict the operation of the clause to debts of a personal nature and the company was released from payment of the £300 and all interest owing thereon. A sum of money on deposit at a bank and book-debts of the testator's business were not released.

G

[EDITORIAL NOTE. "Forgiveness" of debts is said to imply a personal note into the matter and only debts owing by personal friends are included. "Forgive and release" are wider words, and must denote a wider release of debts. These words, however, must not be so widened in their effect as to make the will ridiculous and a large sum on deposit at a bank and book-debts are not released.

As to Construction of Particular Terms in Wills, see HALSBURY, 1st H Edn., Vol. 28, Wills, pp. 710, 711, para. 1332; and for Case, see DIGEST, Vol. 44, p. 736, No. 5913.]

Case referred to:

(1) *Re Neville, Neville* v. *First Garden City, Ltd.*, [1925] Ch. 44; 44 Digest 736, *5913.*

Action by the Midland Bank Executor and Trustee Co., Ltd., as executor and trustee of Hans Ove Larsen for £333 17*s.* 8*d.* being as to £300 money lent by Mr. Larsen to the defendant company, and as to the remainder interest thereon.

The defendant company admitted the loan and that it bore interest at the rate of 7 per cent. per annum, but contended that it was released by Mr. Larsen's will from payment of the loan and all interest owing at the time of his death. The defendant company counterclaimed £16 5*s.* 6*d.* paid for interest since Mr. Larsen's death.

C. E. Harman, K.C., and *Wilfrid Hunt* for the plaintiff company.

J. M. Gover, K.C., and *A. Newman Hall* for the defendant company.

Farwell, J.: This action raises a question of construction of the will of Mr. Larsen, who died on July 3, 1934. The testator was of Danish birth, but he became domiciled in this country, and lived here for many years, carrying on a large business as a market-gardener on some property which he owned. He was also a shareholder to the extent of some £500 in the defendant company, Yarners Coffee, Ltd., a company promoted by a Mr. Yarner, who was also of Danish birth, although he has since been naturalised. In the course of promoting the company, Mr. Yarner approached the testator; they became on friendly terms, and the testator invested £500 in that company. In 1931 the company was in need of further capital, and a circular letter was sent out to each of the shareholders in the company, including the testator, in these terms:

> Although, as pointed out in the report for the year ended Jan. 31, 1931, the directors believe that the company is now nearing the point when it can pay its expenses, they consider it essential that the financial position should be strengthened and additional working capital provided. They therefore invite subscriptions towards a loan not exceeding £1,500 at 7 per cent. per annum, such loan to be repaid at the end of three years, and subscribers to have the option, at any time within that period, to convert into preferred ordinary shares at par, and at the same time subscribe for 4 deferred shares of 1*s.* for every preferred ordinary share taken up. The directors trust that you will give this matter your careful consideration, as the provision of this additional working capital will lead to the definite establishment of a sound business.

In answer to that letter, on Aug. 12, 1931, the testator wrote:

> In accordance with your letter of June 27, 1931, and after consultation with P. Lind, Esq., I have decided to subscribe a further £300 to Yarners Coffee, Ltd., and hope the business will now be on sound lines.

Mr. Lind was a gentleman who was interested in the company, himself a shareholder, and, I think, a director, of the company, and he was also a friend of the testator. In accordance with that letter, the testator did lend £300 to the defendant company, and the defendant company from time to time paid interest to him on that sum, but the testator, I think, never took any advantage offered to him in that letter of taking up shares or otherwise dealing with the matter, and, at the date of his death, the £300 was due and owing to him from the company.

The testator's will, which is dated Nov. 13, 1933, provides by cl. 2 :

> I forgive and release to any person indebted to me all sums owing to me by them except such sums as shall be secured to me by mortgages or legal charges. A

Now, the question that I have to determine is whether this sum of £300, together with any interest due thereon, is payable to the plaintiff company as executor of the testator, and as being a debt due to the testator, and therefore one which the plaintiff company is bound to get in, or whether, by cl. 2 of the will, that debt has been released, and the B company is under no further liability in respect of it. The testator's estate was sworn at over £150,000. He had certain real estate and other assets which were used in the market-gardening business which he carried on, and there was a small sum of cash in the house, but the estate consisted largely of a sum of money on deposit at the Midland Bank, which, C at the date of the death, amounted to £64,000. Then there were certain sums of mortgage and interest, exceeding £5,000, and there were book-debts due to the testator in respect of his business. The first of the book-debts in the list before me is a debt of £6,601, due from George Munro, Ltd., of Covent Garden, for tomatoes. There were other debts of various D sums owing by individuals, none of them extremely large, but one for £200. There are in addition considerable small sums for rent, policy moneys payable under a policy on the life of the deceased amounting to nearly £4,000, and certain personal assets at Copenhagen, consisting partly of bonds held by the bank for safe custody there, and partly of E certain other bonds and certificates, about which I have practically no information at all. It is admitted that, when the testator made his will, there was money on deposit at the bank, though not necessarily the same sum, or so large a sum.

In those circumstances, what is the true meaning to be put on cl. 2 of F the will ? If I am to construe it quite literally, giving every word its ordinary and common meaning, the result would be that the Midland Bank would find itself the richer by some £64,000, because the testator will have released the bank from its liability to repay that sum, which was the money on deposit. It is plain, and cannot be denied, that money on G deposit or on current account with a bank is money which is lent to the bank, and which the bank is bound to repay, and, in the ordinary way, it is money which is not secured by either a mortgage or a legal charge. Therefore, read literally, the effect of cl. 2 of the will would be that the testator has released the bank from that liability, and it would also seem H to follow that the book-debts are released, with the result that the testator's estate would be reduced to such an extent that there would probably be a deficiency, or, at any rate, not a very large estate.

As was pointed out by Tomlin, J., in *Re Neville, Neville* v. *First*

Garden City, Ltd. (1), I am not obliged, when I am construing a will, to begin by discarding all ordinary common sense; I am not entitled to guess at the meaning of the words which the testator uses, but I am entitled to use common sense in considering the meaning to be attached to the words which the testator has used, and ordinary common sense renders it absolutely impossible to construe these words in cl. 2 to mean that the testator ever contemplated making a present to his bank of any sum, large or small, which might happen to be on current account or on deposit at the date of his death. That is so completely absurd that I am not bound, and I am not prepared, to give such a meaning to the words. Further, literally construed, it is plain that they would release George Munro & Co. from that company's debt for tomatoes, and the other persons who owe money to the business. That, again, is plainly not the intention of the testator. The testator has given express directions with regard to the carrying on of the business and the employment of the capital of the company, and the contention that he contemplated that the business should be hampered, and possibly restricted, by the debts which were owing to it being released, seems to me to be almost equally absurd. It is plain, therefore, that some limitation must be put on the language. Evidence has been called before me to show that the testator in his lifetime advanced some £200 to a Miss Lowrey in connection with a nursing-home which she was starting in partnership with a friend. The lady was a sister or a nurse in a hospital with which the testator was connected as treasurer, or in some such way. He made her acquaintance, and when she and her friend proposed to start this nursing-home, he, to assist them, lent the lady first £100, and then two subsequent sums of £50 each. Small sums were paid to the testator in his lifetime by way of repayment of that loan, but the loan remained outstanding to the extent of some £150 at the date of his death. No interest has been paid on it, and there was no mortgage or legal charge. The loan was made by the testator as a friend, to help the lady to start this business.

The only other oral evidence called before me was the evidence of Mr. Yarner, and he told me the circumstances of the company; but there is no evidence except of this one loan to this one lady; but that in itself, to my mind, is not very material, because there might have been at the date of the death other loans to other persons of the same nature, and I do not attach much importance to that.

Before I proceed further to consider the construction of the will, I will turn to one decision as assisting me—a decision of TOMLIN J., in *Re Neville, Neville* v. *First Garden City, Ltd.* (1). There the testator made a will which contained in the codicil the words: "I forgive all debts owing to me." His estate consisted of various British and foreign company securities, redeemable debentures and debenture stock in various companies, and certain mortgages and charges and sums of loan stock ; it also included certain loans to friends and past employees of the testator, to start them in business, and these the executors had, with the consent of the residuary legatees, treated as released by the forgiveness of debts. The question which was raised was whether the forgiveness of debts operated to release certain companies and societies from the A mortgage debts owing by them. TOMLIN, J., considered the matter, and came to the conclusion that, having regard to the circumstances, the word " debt " must receive a narrower construction than the strict legal meaning, and that its use in connection with the expression " I forgive " introduced a personal note into the matter with which the B testator was intending to deal, and, therefore, that the mortgage debts and sums of loan stock were not released. He says at p. 54 :

> I think that although these questions of construction may not be approached with a guessing mind, they may be approached with a mind that is endeavouring to apply some measure of common sense with a view to arriving at a conclusion C which avoids the ridiculous if not always the inconvenient. I come to the conclusion that the debts which are to be forgiven by virtue of this clause are in fact more limited than is contended for by the defendant societies and companies.

Then he says, at p. 55 :

> I think when he uses the phrase " I forgive all debts owing to me," he is not moved by emotion at the thought of railway companies who owe him the money D lent on the security of debenture stock—

and here I do not think that the testator, when he forgives all debts, was moved by emotion at the thought of the Midland Bank.

> What he has in his mind is that he may have lent some of his friends or acquaintances sums of money which he would not desire to recover from them. E The word " forgive " seems to me to introduce a personal note into the matter with which the testator is dealing.

In the case with which I am dealing, I have not to consider merely the word " forgive," because the testator has used the words " and release," and the use of those two words makes it rather more difficult to come to the F conclusion, as TOMLIN, J., did, that the use of the word " forgive " introduces some personal note. Further, there is in this case an express exception from the debts which are forgiven of such debts " as shall be secured to me by mortgages or legal charges." The clause is wide enough, and obviously includes the loan to Miss Lowrey ; no one has disputed G and no one could dispute that ; but the question is whether it includes the debt due from the defendant company. When one considers the nature of the debt, it obviously is not what one might call a personal debt, as it was a loan made to the company by way of, and in answer to, a circular sent out to all the shareholders, who were invited to subscribe H towards a loan, and I think it is impossible to say that, in this case, it was a personal loan in any sense at all. It is true that Mr. Yarner was an acquaintance of the testator, that they were both of Danish origin, and other persons interested in the company were of Danish origin.

It may be, for all I know, that the testator wished the company well, apart from the fact that he was himself a shareholder in the company, but I cannot treat the loan to the company as on the same footing at all as the loan made to Miss Lowrey, or as a loan which the testator made purely out of friendship to assist someone with whom he was personally acquainted. But I do feel a difficulty about limiting this clause to debts of that nature. Whatever the word "forgive" may connote, I do not think that the two words used together, "forgive" and "release", are sufficient to make it plain that the testator was contemplating only such loans as were made in a friendly way. Moreover, in view of the express exception from that clause of moneys secured by mortgages or legal charges, the clause cannot be limited in the way in which TOMLIN, J., was able to limit the words in the case before him.

That leads me to consider whether, if otherwise this clause is wide enough to include the loan to the company, it is excluded by reason of the fact that the forgiveness and release is to "any person indebted to me." *Prima facie*, a person includes a corporation, and the Law of Property Act, 1925, expressly so provides. There is no doubt whatever that, unless some context is to be found to the contrary in the will, a person must include a company. There is context to be found in this will, but it is context which points both ways. There are passages in this will where the word "person" quite plainly is intended to include a corporation. There are also passages in the will where the word "person" is applicable to an individual only, and does not in fact include a corporation. On the whole, I have come to the conclusion that there is not enough in this will to entitle me to say that "person," as used in cl. 2, is limited to an individual, and does not include a corporation. I have come to the conclusion, although with very considerable doubt, that, although cl. 2 does not include, and cannot include, any of the various ways in which the testator's money was employed, whether at the bank or whether owing and due to him for book-debts and other matters of that sort, it is wide enough to include the loan to the defendant company, and the defendant company is therefore released from its liability of £300 and interest thereon.

Action dismissed. Judgment for defendant company on counterclaim for £16 5*s.* 6*d.*

Solicitors: *C. R. Sawyer & Withall* (for the plaintiff company); *Sutton, Ommanney & Oliver* (for the defendant company).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

HEAPS *v.* PERRITE, LTD.

[Court of Appeal (Greer, Slesser and Greene, L.JJ.), **February 19, 1937.**]

Negligence—Damages—Action for personal injuries—Loss of both hands—£10,000 awarded—Appeal on quantum of damages.

The successful plaintiff in an action for damages for personal injuries had been awarded £10,000 for the loss of both hands. The defendants appealed against the judgment on the ground that this amount was excessive :—

Held : the judge was entitled to consider other matters besides the mere loss of earning power. The amount awarded, though large, was not unreasonable in the unusual circumstances of this case.

[**EDITORIAL NOTE.** The courts have from time to time made large awards in actions for damages for personal injuries. The amount awarded in the present case is altogether exceptional and the reasons given by the Lords Justices for refusing to interfere with the award are of particular interest.

As to Measure of Damages, see HALSBURY, Hailsham Edn., Vol. 10, p. 111, para. 139 ; and for Cases, see DIGEST, Vol. 36, pp. 122-125, Nos. 814-830. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 702, 703.]

Case referred to :

(1) *Phillips* v. *South Western Ry. Co.* (1879), 4 Q.B.D. 406, *on app.* 5 Q.B.D. 78 : 17 Digest 176, *784*.

Appeal from a judgment of Swift, J., at the Liverpool Assizes, dated Mar. 27, 1936.

W. Gorman, K.C., and *B. Ormerod* for the appellants.

N. B. Goldie, K.C., and *Selwyn Lloyd* for the respondent.

Greer, L.J. : We are satisfied that we cannot interfere with the judge's finding as to damages, although the amount is somewhat unusual even in cases of personal injury of this sort. Of course, it is very rarely that a judge has to deal with a working man who, by reason of the liability which the defendants have incurred towards him, has lost his two hands, although it is not an uncommon happening that working people have lost the use of one hand, on which they have to depend for doing their work and earning their wages. Of course, we have not merely to consider how much the earning power of this unfortunate boy has been reduced by reason of the accident which he has suffered in the course of his employment. We have to take into consideration the fact that even if artificial limbs were fitted he will be for the rest of his life a handless man, unable to do the ordinary work that every boy or man requires to have done—dressing himself and undressing himself, and doing the various things which are necessary even in health. We have also to take into account not only the suffering which he had immediately after the accident but the suffering that he will have throughout his life in future : the constant necessity of having assistance in the various things that he has to do for his own purposes, apart from earning money. Also, the fact that the joy of life will have gone from him. He cannot ride a bicycle, cannot kick a football. At any rate, if he can kick a football he cannot catch one. He cannot have any of the usual forms of recreation which appeal to the ordinary healthy man ; although possibly, with assistance, he might go to a football ground and watch other people playing football.

Taking all these matters into consideration, I think it is quite impossible to say that we are entitled to interfere with the finding of the learned judge as to the amount of damages, large as they are in this case, and possibly so large as not to be really in the interest of people of this kind—people, who are entitled to get damages and people who have to pay those damages. There is also the fact that if these large damages become common in these cases the insurance premium will be so heavy that business will become almost impossible. However that may be, I am satisfied that we cannot interfere with the finding of the learned judge in this case and the appeal must be dismissed.

SLESSER, L.J. : I am of the same opinion. The argument that the sum awarded might exceed the amount that the man is likely to earn, might be material in a case under Lord Campbell's Act ; but considering this matter at large, as it was put by COCKBURN, C.J., in the well known case of *Phillips* v. *South Western Railway Co.* (1) at p. 407, what has to be taken into account is :

> all the heads of damage in respect of which a plaintiff complaining of a personal injury is entitled to compensation. These are the bodily injury sustained ; the pain undergone ; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent.

Here it is not so much the loss of health as the loss of the amenities which the normal man has suffered in the loss of both hands. In my opinion, the judge was entitled to take all the matters into account which GREER, L.J., has mentioned, in coming to the conclusion that £10,000 was a reasonable sum.

GREENE, L.J. : I agree.

Solicitors : *William Hurd & Son* (for the appellants) ; *Helder, Roberts, Giles & Co.* (for the respondent).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

R. *v.* RIORDAN

[Court of Criminal Appeal (Swift, Finlay and Goddard, JJ.), **February 23, 1937.**]

Magistrates—Quarter sessions—Borstal prosecutions—Procedure—Criminal Justice Administration Act, 1914 (*c.* 58), *s.* 10.

The appellant was committed to quarter sessions with a view to his being detained in a Borstal Institution. At quarter sessions no counsel was instructed to prosecute. After the clerk of the court had informed the court how the appellant came to be there and the police officer had given evidence, the court, without giving the appellant an opportunity of addressing it, passed sentence of three years' detention at a Borstal Institution :—

Held : the foundation of the jurisdiction of the court of quarter sessions was that they should have inquired into all the circumstances of the case, not only the circumstances in which the appellant was convicted, but also the information with regard to his previous convictions. The conviction was quashed.

[**EDITORIAL NOTE.** This case lays down the procedure of quarter sessions when considering the case of a prisoner committed with a view to his being sent to Borstal. In order to avoid expense, it seems in some cases to have been the practice for the clerk of the court to inform the court of the relevant facts. The prisoner generally was unable to hear what was said and was not given an opportunity of making any statement. This is contrary to the Act, and it is necessary that the case should be fully gone into. It is preferable that counsel should be briefed for the prosecution, and the prisoner should have an opportunity of replying to his statement of the case.

As to Committal with a view to Borstal, see HALSBURY, Hailsham Edn., Vol. 21, p. 627, para. 1085 ; and for the Criminal Justice Administration Act, 1914, s. 10, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 11, p. 375.]

Case referred to :

(1) *R.* v. *Holding* (1934), 25 Cr. App. Rep. 28 ; Digest Supp.

Appeal from a sentence of three years' detention in a Borstal Institution passed on the appellant, Jack Riordan, at the West Kent County Quarter Sessions. The appellant had been convicted at the Anerley Juvenile Court of larceny and had been committed to quarter sessions for sentence. At quarter sessions, following the ordinary practice at those quarter sessions in Borstal cases, counsel was not instructed to prosecute. The clerk of the court informed the court how the appellant came to be there, and the police officer gave evidence. Sentence was then passed without giving the appellant an opportunity of addressing the court.

Henry Elam for the appellant.

Maxwell Turner for the Crown.

Swift, J. [delivering the judgment of the court] : This appellant, Jack Riordan, was committed from the Anerley Juvenile Court on

Nov. 17 last to the West Kent County Quarter Sessions with a view to his being dealt with for sentence and if the court thought it right to his being detained in a Borstal Institution. The Act of Parliament under which such steps can be taken is the Criminal Justice Administration Act, 1914, s. 10, which provides:

> (1) Where a person is summarily convicted of any offence for which the court has power to impose a sentence of imprisonment for one month or upwards without the option of a fine, and (*a*) it appears to the court that the offender is not less than sixteen nor more than twenty-one years of age; and (*b*) it is proved that the offender has previously been convicted of any offence or, that having been previously discharged on probation, he failed to observe a condition of his recognizance; and (*c*) it appears to the court that by reason of the offender's criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime, it shall be lawful for the court, in lieu of passing sentence, to commit the offender to prison until the next assizes or quarter session . . . and the court of assize or court of quarter sessions as the case may be shall inquire into the circumstances of the case—

and if it appears to the court proper, shall send him to a Borstal Institution. But the whole foundation for the exercise of this jurisdiction is that the court before passing sentence shall inquire into the circumstances of the case. Similar language is to be found in the Vagrancy Act, 1824, which by s. 10 provides:

> When any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned . . .

That section was considered by this court quite recently in the case of *R.* v. *Holding* (1), and in the course of delivering the judgment of the court, Lord Hewart, L.C.J., said at p. 30:

> There are two very unfortunate incidents in this case. The first is that the court below appear entirely to have ignored their duty under sect. 10 of the Vagrancy Act, 1824, of examining into the circumstances of the case. There is nothing here which can be called an examination into the circumstances of the case. To judge from this case and so many others which have come before this court, there is an impression abroad that, when a prisoner is sent to quarter sessions to be dealt with as an incorrigible rogue, the only duty of that court is to pass the maximum sentence of 12 months' imprisonment with hard labour. Their first duty is to examine into the circumstances of the case and their second is to consider what is the appropriate sentence.

That judgment applies equally to this case. These magistrates before they passed sentence were under a duty to make proper inquiries into all the circumstances in the case they had before them, not only the circumstances in which the boy was convicted at petty sessions, but also the information with regard to the previous convictions, of which there were three, twice when he was bound over and once when he was sent to an approved school. I know nothing of any examination with regard to these matters. The whole thing has been dealt with as it seems to this court in a manner which is most unsatisfactory. For some reason or another these magistrates do not encourage briefing counsel in these cases, and, instead of instructing counsel, the clerk of the peace states such matters as are thought necessary and the police officer gives such evidence as he thinks proper to give. There can be nothing I should think which would make a prisoner accused of a crime feel more uncomfortable about the justice which was being administered than to see, without being able to hear, the clerk make some remarks to the justices who are going to decide his case. Justice should not only be done, but should also be seen to be done, and I can imagine nothing more unfortunate than that it should be administered in the way it was dealt out in this court of quarter sessions. In the view of this court the sentence ought not to stand, and in all the circumstances, as this boy has been in custody since Nov. 17, 1936, the order of the court is that the sentence be quashed and he be discharged.

A

B

Appeal allowed. Sentence quashed.

C

Solicitors : *Registrar of the Court of Criminal Appeal* (for the appellant) ; *Solicitor for Metropolitan Police* (for the Crown).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

D

Re ALL HALLOWS, LOMBARD STREET.

[Privy Council (Viscount Sankey, Lord Blanesburgh, Lord Alness), **January 18, 19, February 9, 1937.**]

E

Ecclesiastical Law—Union of benefices—Scheme made by the Ecclesiastical Commissioners—Opposition—" Person interested "—Preliminary point—Necessity for determination of the preliminary point before the hearing of the main appeal—Provision for such hearing in the Order in Council—Union of Benefices Act, 1860 (c. 142), *s.* 16.

F

Under a scheme, put forward by the Ecclesiastical Commissioners, two benefices in the city of London were to be united. It was further proposed that the parish church of the second benefice should be closed and taken down, and the site sold. The scheme was opposed by the corporation of the city of London, by certain learned societies, and by a gentleman who had at one time been a parishioner. It was contended, on behalf of the Ecclesiastical Commissioners, while admitting the right of the city of London to appear, that the various learned societies had no such right, on the ground that they had no *locus standi*, although the Order in Council provided that their petition and objection should be considered by the Judicial Committee of the Privy Council when the appeal was being heard :—

G

Held : the Judicial Committee were themselves bound by the terms of the Order in Council to hear the petition and objection as well as the appeal of the city of London. Their Lordships were further of the opinion that, in future, in cases of a like nature, the Order in Council "should make provision to enable a respondent to take a preliminary point, should he so desire, and an opportunity should be afforded to the parties to have that preliminary point disposed of before the hearing

H

of the main appeal," and so obviate a party being put to the expense of preparing his case for the main appeal, only to find, perhaps, that, on a preliminary objection, he was not entitled to be heard because he was not an interested party.

[EDITORIAL NOTE. This case is reported only on the question of the preliminary objection and the alteration suggested by the Judicial Committee to be made in future Orders in Council having reference to the union of benefices.

AS TO UNION OF BENEFICES, see HALSBURY, Hailsham Edn., Vol. 11, pp. 720-722, para. 1308; and FOR CASES, see DIGEST, Vol. 19, pp. 409, 410, Nos. 2433-2443.]

APPEAL by the corporation of the city of London against a scheme proposed by the Ecclesiastical Commissioners for the union of the benefice of St. Edmund the King with St. Nicholas Acons, and the benefice of All Hallows, Lombard Street, with St. Benet Gracechurch, St. Leonard Eastcheap, and St. Dionis Backchurch. The judgment of their Lordships was delivered by VISCOUNT SANKEY.

H. B. Vaisey, K.C., and *W. S. Wigglesworth* for the appellant, the corporation of London.

Humphrey King for the appellant learned societies.

Michael E. Rowe for the appellant, Percy Alport Molteno.

F. J. Wrottesley, K.C., and *F. H. L. Errington* for the Ecclesiastical Commissioners.

VISCOUNT SANKEY: This is an appeal brought by the mayor and commonalty and the citizens of the city of London of the first part, by the Royal Academy of Arts, the Society of Antiquaries of London, the Royal Institute of British Architects, the Society for the Protection of Ancient Buildings, the London Society, the London Survey Committee, the Metropolitan Public Gardens Association, the St. Paul's Ecclesiological Society, and the London and Middlesex Archæological Society of the second part, and by Mr. Percy Alport Molteno, at one time a parishioner of All Hallows, of the third part, against the scheme, which was made by the Ecclesiastical Commissioners for England on Nov. 7, 1935, and which has since been certified to His Majesty in Council. The scheme was made under the Union of Benefices Acts, 1860 and 1898, and the appeal is brought under the provisions of sect. 16 of the Act of 1860.

The scheme proposes that the benefice of St. Edmund and the benefice of All Hallows, Lombard Street, shall be united into one benefice, and that, upon such union taking effect, the following provisions shall apply; that is to say, (i) the church of St. Edmund the King shall become the parish church of the united benefice and the church of All Hallows, Lombard Street, shall be finally closed and taken down; (ii) the font, communion table, sacramental plate, and other furniture used in the church of All Hallows, if not required for use in the parish church of the united benefice, shall be appropriated by the Bishop of London, for use in a new church, proposed to be erected on some spot within the diocese of London, and that any articles not so appropriated may be transferred to any other church or churches within the said diocese which the Bishop may select; (iii) the proceeds of the sale, after providing for compensation to church servants and other matters, shall be applied (*a*) in providing a church and parsonage for a new ecclesiastical district in the diocese of London to be called All Hallows; (*b*) in appropriating £24,000 towards two churches in two new ecclesiastical districts; (*c*) in providing a sum of £8,000 towards the rebuilding of the hall of St. Dionis in the united benefice; (*d*) in providing other sums for similar purposes; (*e*) in appropriating such a sum as the Ecclesiastical Commissioners and the Bishop of London may approve towards the cost of providing new churches within the portions of the dioceses of Canterbury, Chelmsford, London, Rochester and Southwark which are situate within the metropolitan area.

The main question to be determined in the appeal is whether, on the one hand, the church of All Hallows ought to be demolished, its site sold, and its contents either appropriated to another church or other churches, or sold, or disposed of, or whether, on the other hand, the church, together with its contents, ought to be retained in its present position, and used as a church as heretofore. The reasons given by the appellants against the scheme are as follows: they say (i) the carrying into effect of the scheme would seriously and unnecessarily diminish the religious privileges and the historical, architectural, artistic and other amenities of the city of London; (ii) the church of All Hallows and its furniture and fittings together constitute a priceless artistic and historical heritage, and the value and interest of its component parts would be almost destroyed by their separation from each other and from the surroundings and neighbourhood which have formed their setting for nearly 250 years; (iii) the church of All Hallows is still serving its original and proper function as a place of divine worship and, though the character of its work may have changed, it is still an active force in the spiritual life of the nation, which can be further extended.

At the beginning of the hearing, the learned counsel for the Ecclesiastical Commissioners took a preliminary point. While admitting that the city of London had a right to appear, he denied that the learned societies had such a right, or that Mr. Molteno, who was no longer a parishioner, had such a right, on the ground that they had no *locus standi*. It was urged that, by the Union of Benefices Act, 1860, s. 16, any person interested may show cause against the scheme, and that neither the learned societies nor Mr. Molteno were persons interested. The course, however, which this case has taken precludes the Ecclesiastical Commissioners from relying upon this point. By an Order in Council of May 28, 1936, it was provided as follows:

> His Majesty is pleased, in exercise of the powers conferred upon Him by the Union of Benefices Acts, 1860 and 1898, by and with the advice of His Privy Council, to order and direct that the said appeal, petition and objection be considered by the A Judical Committee of the Privy Council, who shall make report to His Majesty in Council thereupon as provided by the said Acts.

The petition referred to in that order is the petition of the Royal Academy and others against the scheme, and the objection therein referred to is the objection of Mr. Molteno against the scheme. Their Lordships are B of opinion, therefore, that they are bound to hear the petition and objection, as well as the appeal of the city of London. At the same time, it is unfortunate that, owing to the course the case has taken, the Ecclesiastical Commissioners have been prevented from relying upon their preliminary point. In future, in cases of this character, the Order C in Council, in their Lordships' opinion, should make provision to enable a respondent to take a preliminary point, should he so desire, and an opportunity should be afforded to the parties to have that preliminary point disposed of before the hearing of the main appeal. Otherwise, a party, as in this case, would be put to the expense of preparing his case D for the main appeal, only to find, perhaps, that, on a preliminary objection, he was not entitled to be heard, because he was not an interested party.

[The merits of the appeal were then dealt with, and their Lordships decided that the scheme ought to be affirmed.]

E *Scheme, subject to an undertaking given by the Ecclesiastical Commissioners, affirmed.*

Solicitors: *City Solicitor* (for the appellant the corporation of London); *Horne & Birkett* (for the appellant learned societies); *Markby, Stewart & Wadesons* (for the appellant Percy Alport Molteno); *Milles, Jennings* F *White & Foster* (for the respondents, the Ecclesiastical Commissioners).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

MURRAY *v.* SCHWACHMAN, LTD.

[Court of Appeal (Greer, Slesser and Greene, L.JJ.), **February 19, 22, 23, 1937.**]

Factories and Shops—Dangerous machine—Obligation of workman to use guard—Instruction by employer—Election by infant plaintiff to take workmen's compensation—Factory and Workshop Act, 1901 (*c.* 22), *s.* 10—*Woodworking Machinery Regulations,* 1922 (*S.R. & O.* 1922, *No.* 1196), *regs.* 17, 23.

An infant employee in a woodworking factory was injured while operating a spindle machine. The machine had been supplied with a guard, but in view of the waste of time caused by the use of the guard, the employee was instructed by his employers to operate the machine without the guard, and was doing so at the time of the accident. Having accepted compensation under the Workmen's Compensation Act, the infant employee brought an action alleging a breach by his employers of the Factory and Workshop Act, 1901, s. 10, and argued that the compensation he had accepted had been paid under a contract that was not for his benefit and one that, being an infant, he was entitled to repudiate. The employers contended that the obligation to use a guard imposed upon a workman by the Woodworking Machinery Regulations, 1922, reg. 23, is absolute, and cannot be waived or abrogated by an order of his employers, and that the accident was due to the breach of the employee's statutory duty:—

Held: (i) the employers, by ordering their employee not to use the guard had failed to provide a guard within the meaning of the regulations. There was therefore no guard provided within reg. 23, and there had been no breach by the employee of that regulation.

(ii) [*per* Greer, L.J.] the employers were not entitled to take advantage of their own wrong in ordering the guard not to be used.

(iii) the infant employee's election to accept compensation under the Workmen's Compensation Acts was not for his benefit and was therefore not binding upon him.

Decision of Hilbery, J. ([1936] 2 All E. R. 478), *reversed.*

[**EDITORIAL NOTE.** The court of first instance decided that the duty of the employee to use the guard was paramount and he could not be heard to say that the employer had instructed him not to use it. The Court of Appeal have reversed this decision, holding that if a master instructs the employee not to use the guard, he has not in fact provided a guard within the meaning of the regulations.

As to Dangerous Machinery, see HALSBURY, Hailsham Edn., Vol. 14, pp. 594-596, paras. 130-133; and for Cases, see DIGEST, Vol. 24, pp. 908-912, Nos. 62-84.]

Cases referred to:

(1) *Groves* v. *Wimborne* (*Lord*), [1898] 2 Q.B. 402; 24 Digest 911, *80*.

(2) *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K.B. 225; 34 Digest 492, *4070*.

(3) *Wheeler* v. *New Merton Board Mills, Ltd.*, [1933] 2 K.B. 669; Digest Supp.

(4) *Flower* v. *Ebbw Vale Steel, Iron & Coal Co.*, [1936] A.C. 206; Digest Supp.

(5) *Lochgelly Iron & Coal Co., Ltd.* v. *M'Mullan*, [1934] A.C. 1; Digest Supp.

(6) *Craze* v. *Meyer-Dumore Bottlers' Equipment Co., Ltd.*, [1936] 2 All E.R. 1150; Digest Supp.

(7) *Dew* v. *United British S.S. Co., Ltd.* (1928), 98 L.J.K.B. 88: Digest Supp.

(8) *Neale* v. *Electric & Ordnance Accessories Co., Ltd.*, [1906] 2 K.B. 558; 34 Digest 493, *4074*.

(9) *Rudd* v. *Elder Dempster & Co., Ltd.*, [1933] 1 K.B. 566 ; Digest Supp.
(10) *Hillen* v. *I.C.I.* (*Alkali*), *Ltd.*, [1936] A.C. 65 ; Digest Supp.
(11) *Moore* (*A. G.*), *& Co.* v. *Donnelly*, [1921] 1 A.C. 329 ; 34 Digest 302, *2501*.

APPEAL from a judgment of HILBERY, J., dated May 28, 1936, and A reported in [1936] 2 All E.R. 478. The facts of the case are set out in the judgments.

D. N. Pritt, K.C., and *David Weitzman* for the appellant.

Maxwell Fyfe, K.C., and *R. M. H. Everett* for the respondents.

Pritt, K.C. : There is no doctrine that an employer who has broken B a statutory duty can escape because the workman has done the same thing. The effective cause of this accident was the employer's fault. A workman is guilty of negligence if he removes a guard against the order of his master, but if he does it in obedience to an order, there is no contributory negligence. Even when both parties are negligent in C a breach of a statutory duty, the plaintiff is entitled to recover. [Counsel referred to *Wheeler* v. *New Merton Board Mills, Ltd.* (3) ; *Flower* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.* (4) ; *Groves* v. *Lord Wimborne* (1) ; *Lochgelly Iron & Coal Co.* v. *M'Mullan* (5) ; *Craze* v. *Meyer-Dumore Bottlers' Equipment Co., Ltd.* (6) ; and *Dew* v. *United British S.S.* D *Co., Ltd.* (7).]

The plaintiff has not lost his right to bring an action at common law because he has accepted some weeks' compensation under the Workmen's Compensation Act. There is nothing in the Act to deprive the plaintiff of his common law rights. Having exercised his option, if he were of E full age, he would be out of court ; but in the case of an infant, the exercise of his option must be treated as a contract ; by this action he is seeking to avoid it on the ground that it was not for his benefit. In trying to decide now what he should have done some months ago, one need not exclude all knowledge of what has happened since ; and since F then his damages have been assessed at £750. [Counsel referred to *Stephens* v. *Dudbridge Ironworks Co.* (2) and *Neale* v. *Electric & Ordnance Accessories Co., Ltd.* (8).]

Fyfe, K.C. : It is an essential part of the framework of the Factory and Workshop Act, 1901, that there is a duty placed on the workman G to look after his own safety. Once a guard has been provided, both master and man must use it, and they commit an offence if they do not. An action for breach of a statutory duty cannot now exist apart from negligence. A breach of a statutory duty causing damage is *ipso facto* negligence : *Rudd* v. *Elder Dempster & Co., Ltd* (9) ; *Lochgelly Iron &* H *Coal Co., Ltd.* v. *M'Mullan* (5). Contributory negligence does not depend upon any breach of duty as between a plaintiff and a negligent defendant ; it depends upon the question as to whether the plaintiff could have avoided the consequences of the defendant's negligence. If the plaintiff has broken the regulations, one cause of the accident has been his so falling below the statutory standard of care. His breach was continuing up to the time of the accident. The plaintiff has done a criminal act; he must be taken to know the law. He did not know of the regulation, but he knew he was doing a wrongful act. He and his employer are co-participators in criminality, and therefore he A cannot recover; *Hillen* v. *I.C.I.* (*Alkali*), *Ltd.* (10). The ordinary rule that acts ordered or authorised by the defendant do not constitute contributory negligence does not help the plaintiff in the case of a breach of a statutory duty on his part. A statutory prohibition cannot be waived: *Moore* (*A. G.*) *& Co.* v. *Donnelly* (11). The onus B is on the plaintiff, and he is relying on his own wrong.

Greer, L.J.: This action was one in which there was a claim by an infant plaintiff through his next friend, who was represented by a solicitor, for damages occasioned to him by the defendant company's C breach of obligation or duty imposed for the benefit of workmen of the class of which the plaintiff was one, and which had been broken by the employer. The judge came to the conclusion that the plaintiff could not recover, because the plaintiff himself had broken another regulation which applied to him to the same effect as the obli- D gation or duty that the defendant employer had failed to carry out. Now, two points arise for decision in the present case because, assuming that we find the view that the learned judge took was wrong, the respondent company are entitled to say that there is another question which would dispose of this appeal, and being respondent company they are E able to take advantage of that, though the learned judge did not decide it.

The facts of the case so far as material are very clearly stated by the judge in his judgment. The plaintiff worked on a spindle machine, and there was on that machine a circular saw, for which, when what F may be described as straight work was being performed by the men working at the spindle, the proper guards had been provided, but those guards were insufficient for the protection of the employees where the nature of the work was changed and a circular groove had to be made in the wood for the purpose, I suppose, ultimately of the manufacture G of some kind of furniture. In these circumstances, the judge came to the conclusion that, though there was an undoubted breach of a statutory duty by the defendant company, there was also a breach of a statutory duty on the part of the plaintiff, and that in considering whether the plaintiff could recover he was bound to give effect to the H view that, though the defendant company was failing to perform its statutory duty, the plaintiff was himself contributing to the accident by his failure to perform a statutory duty.

I think this appeal should succeed on two grounds. It seems to me quite unnecessary to refer to the number of cases in which the question has arisen as to what is the real ground of liability where a statutory duty has not been performed by the person on whom that statutory duty is imposed. Whether it is a case of negligence which admits of any reply A of contributory negligence, or whether it is a case of breach of a duty imposed for the purpose of protecting workmen and not a case of negligence at all, need not be determined in this case. What happened was this: the plaintiff was working at his spindle, and when he was working on what I have called the straight work, adequate protection was provided B by two guards, one on each side of the position which he had to take up; but those guards had to be taken away when a circular groove had to be made in the wood, and then it was necessary, either on the one hand, that the circular saw, which is dangerous machinery, should be unfenced, or that there should be some guard provided which would be C a protection to the workman when this circular groove was being made by the workman. At a certain date the factory inspector advised or ordered that there should be a guard which would be adequate protection when the second kind of work was being done, and when the guards appropriate to the first kind of work were taken away the respondent D company, recognising that it was right that there should be a guard, had a guard made and brought it on to the premises. For a little time it was in fact used by the plaintiff, who was quite familiar with the use of this guard, because he had used it in previous employments. It consists of something that the judge conveniently calls a vizor, that E is to say, a guard which had to be let down so that the edge of the saw was in such a position that the man working at it could just get at the saw, but his fingers could not get to it. Having used the machine for some time, the plaintiff was expressly told by the defendant company's managing director, a Mr. Schwachman, that he was not to use the guard. F I fail myself to see any good business reason why the guard should not have been used. It only meant the adequate organisation and arrangement of the work which had to be carried on at this factory. Now, the question arises whether, in those circumstances, it can be said that the plaintiff was committing a breach of Part II of the Woodworking G Machinery Regulations, 1922, reg. 23, which is in these terms:

> Every person employed on a woodworking machine shall (i) use and maintain in proper adjustment the guards provided in accordance with these regulations.

In order to see what are the duties of the employer, the occupier of the premises, one has to look at Part I, and to several regulations in Part I. H Reg. 2 of Part I says:

> Every shaft, wheel, pulley, strap, band or other device within reach by which any part of a woodworking machine receives its motion shall be securely fenced.

Then in para. 17 these words are used as binding upon the employer as to what he is to do:

> The cutter of every vertical spindle moulding machine shall when practicable

> be provided with the most efficient guard having regard to the nature of the work which is being performed.

Para. 21 reads in this way with regard to the duty of the employer :

> The guards and other appliances required by these regulations shall be maintained in an efficient state and shall be constantly kept in position while the machinery is in motion, except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable. A

It has not been contended that the use of the guard was impracticable in the circumstances of this case—

> The guards shall be so adjusted as to enable the work to be carried out without unnecessary risk. B

So that what the employer has to do is to provide a properly adjusted guard so as to enable the work to be carried out without unnecessary risk, and then in order that there should be co-operation on the part of the workman once he has been provided with a properly adjusted guard, reg. 23 comes into operation as stating the duty of the persons employed : C

> Every person employed on a woodworking machine shall (i) use and maintain in proper adjustment the guard provided in accordance with these regulations . . . except when, owing to the nature of the work being done, the use of the guards or appliances is rendered impracticable. D

Undoubtedly there was a guard within the meaning of reg. 23 provided by the employer at the time when this man received his injuries. It was near the place where the unfortunate young man was working, and the contention that the guard was in his custody or possession seems E to me to be a quite impossible contention. It was the employers' guard upon the employers' premises, and after he had received an order not to touch it or not to put it in position when he was doing the work in which there was a danger from which the guard was intended to protect him, it seems to me quite wrong to say that he was failing to maintain F in proper adjustment a guard provided in accordance with the regulations which I have mentioned already. It is not sufficient for the employer to say : " There was a guard somewhere upon the premises in the neighbourhood where the work was being carried on, and as I had ordered a guard to be there I had provided it within the meaning of the regulation." G I think he had just as much failed to provide when he said it was not to be used as if he had taken it away altogether and taken it out of the reach of the employee. If that is so, then the learned judge was wrong in finding that there was a breach by the plaintiff of reg. 23. On that ground, in my judgment, the learned judge's conclusion was wrong and H ought to be reversed. But I think there is another ground upon which this case ought to be decided in favour of the appellant. There is the well known principle that no man can take advantage of his own wrong, and the wrong that was done in this case of which the defendant desires to take advantage, was the order that the guard was not to be used. He gave a wrongful order which he knew would be obeyed by his own employee, and he wants to take advantage of that in order to enable him to say that reg. 23 gives him a defence to this action. I think he A cannot do it, because he is the author of his own liability, because he is disentitled to take advantage of his own wrong in preventing the employee, the plaintiff, from performing the duties which conceivably, if I am wrong on the other point, he might be called upon to perform under reg. 23.

I have dealt with this case without considering the numerous cases B that have been cited to us with reference to what the nature of the liability is that is imposed on an employer, an occupier of a factory, by the Factory and Workshop Act, 1901, s. 10, or by the regulations imposing the duty upon him. Whether the nature of that is that he can be sued in an action for negligence in which contributory negligence is C a sufficient answer, I think it is unnecessary to consider in this case. There has been, perhaps, some clearing up of the position by the Supreme Court and the House of Lords, but I have much sympathy with the view expressed by A. L. SMITH, L.J., in *Groves* v. *Lord Wimborne* (1) that the duty is an absolute duty imposed by the statute, and that the D reason why the plaintiff could take advantage and say: "I am entitled to damages because this absolute duty has not been performed," is that the duty is imposed upon the employer for the particular benefit of the employee who has been damaged by the failure to perform a duty, but as I say, I think it quite unnecessary to deal with that case, or with a E number of other cases that have been cited before us.

For the reasons that I have indicated, I think the judge's conclusion cannot be supported, but I should like to say this about it: the question presented to him for his decision was a very difficult one, and the court is greatly indebted to the very careful way in which F he stated the facts, and his reasons for believing that the plaintiff was an honest witness when he said what he did about the orders that he had got, and also for having saved the need for a new trial by finding what damages should be awarded in case the judgment should be reversed.

G Upon the other point, it is quite clear from the case of *Stephens* v. *Dudbridge Ironworks Co.* (2) that if an infant plaintiff is put to an election as to whether he should choose to make a claim under the Workmen's Compensation Act, or whether he should make a claim in damages at common law, he is only bound by the election if it is for his benefit. H The judge did not find it necessary to decide that question, but I think Mr. Maxwell Fyfe is right in saying that he rather indicated a view favourable to the respondent company with regard to that question. I take a different view. It seems to me that there is just as much risk in compensation cases as there is in the case of a common law action of having to go through three courts before you finally get a decision. In the present case I agree with Mr. Maxwell Fyfe when he says that the time we have to consider as to whether the election was for the benefit of the plaintiff is the time when in fact the election was made, namely, when he first claimed and received compensation under the Workmen's Compensation Act. In my judgment it was to the disadvantage of the workman that he should elect to proceed under the Workmen's Compensation Act, and to prefer that to an action at common law in which, if properly advised, he would have been told that his chances of success were very considerable, and his risks of failure were very small, and that on the whole it was to his interest to bring an action at common law to get the whole matter decided once and for all rather than have to deal with a statute under which it might be necessary to make applications from time to time, to suffer diminution of his weekly payments, and to have to apply if he found afterwards that the very grievous injuries that he received justified him in saying : " I now no longer earn the wages that I used to earn ; I cannot earn anything like so much, and I ask for a declaration of liability," or it may be : " I can earn, say, 10*s.* a week, and I ask for an order for 5*s.* a week." That is an unfortunate position in which a plaintiff may be placed. I think that the election was not for his benefit, and that it was not binding on him. The respondent therefore fails to satisfy me that he was entitled to succeed. For these reasons, I think the appeal should be allowed, and judgment entered for the plaintiff for £750 with costs here and below.

SLESSER, L.J. : I am of the same opinion. There is in this case no question but that the plaintiff has suffered a serious injury through the loss of parts of his hand due to the absence of a guard on a spindle moulding machine used in a woodworking factory, of which the defendant company was at all material times the occupier. There is, I think, no question on the evidence and on the finding of the judge that, but for the matters which I have mentioned, the occupiers committed a breach of the Woodworking Machinery Regulations, 1922, and particularly reg. 17. The judge says that the plaintiff establishes a breach of statutory duty by the employer, and the reason he says it is this : the evidence is that, following upon a visit by a factory inspector, a guard of the right kind was made and prepared for use with this machine, and that Mr. Schwachman, the managing director of Schwachman, Ltd., the defendant company, when the plaintiff tried to use the guard, said to him : " Do not use it ; it is only a waste of time," to which he added the somewhat sinister addendum : " It is there if anyone comes in." That really is not in dispute, and were the matter to rest there, there can be no doubt that this injury on that view being due to a breach of statutory duty by the employer, the case would fall within the well known principles established in *Groves* v. *Lord Wimborne* (1), and damages could be recovered by the workman on the basis of a breach of statutory duty. Then it is said by way of defence, and this defence has found favour with the judge, that the true cause of the damage in this case was not the breach of statutory duty by the employer, but was the breach by the workman himself of a statutory duty imposed by reg. 23 The judge puts it thus in his judgment :

> That, in my view, must disable him in a court of law from succeeding. If breach of the statutory duty, that is the failure to use and maintain the guard, is statutory negligence on the part of the employer, where the very same regulations imposed that same statutory duty on the employee his failure must necessarily be statutory negligence on his part and the cause of the accident.

When reg. 23 is properly considered and applied to the facts of this case, it is wrong to say that this workman was in breach of statutory duty. His sole obligation was to use and maintain in proper adjustment the guards provided in accordance with regulations. It is necessary, therefore, to see whether guards have been provided in accordance with the regulations, the failure to use and maintain which in proper adjustment has caused it to be said that the workman has broken the regulations. Now, the fact of the matter is this, that, having stated in reg. 17 that the cutter of the machine shall be provided with an efficient guard, the regulations require that the guard :

> shall be constantly kept in position while the machinery is in motion, except when, owing to the nature of the work being done, the use of the guards is rendered impracticable.

The evidence is that, so far from these guards being kept in position while the machinery is in motion, the very person on whom the obligation lay under Part I, namely, the employer, to keep the guards in position while the machinery is in motion, through his servant, the plaintiff, ordered him to take away the guards from the machinery while it was in motion, or prevented him from erecting them. The regulation goes on :

> The guards shall be so adjusted as to enable the work to be carried out without unnecessary risk.

Now, that is an obligation upon the employer, and in this case, so far from carrying out that obligation, he did not permit but forbade the adjusting of the guards at all, so that in my view there were no guards provided by the employer in accordance with these regulations. There were guards provided in the sense that a guard had been made, which the plaintiff had been forbidden to use, but it most certainly was not provided in accordance with the regulations, it was not kept in position, it was not adjusted, and therefore the plaintiff could not fail to use and maintain in proper adjustment guards provided, when no such guards had been provided which he could use and maintain in proper adjustment, and it is the failure to realise that, I think, which has led the judge into the

error of thinking that this plaintiff could properly here be said to have
broken any statutory regulation.

That being so, I find it unnecessary in this case—because the whole of
the alleged breach of duty by the workman said to have caused the
injury is based upon reg. 23—to consider what to my mind is a difficult A
question, namely, whether the independent obligation imposed by
sect. 10 of this statute can or cannot have read into it the provisions
of reg. 23. It is significant to observe that sect. 10, which the judge
also held here to have been broken by the employer, is not dealing with
any specific dangerous machinery for which regulations have been made B
under sect. 79, but speaks generally "with respect to the fencing of
machinery in a factory the following provisions shall have effect," and
then "(*c*) all dangerous parts of the machinery must be securely fenced."
On the facts of this case, and I think on the admissions in the pleadings,
it would follow that this case fell as much within sect. 10 as within the C
Woodworking Machinery Regulations, reg. 17. On that it has been
pointed out to us by Mr. Pritt that there are special provisions in
sects. 140 and 141 dealing with fines on the persons actually committing
the offence for which the occupier is liable, and under sect. 141, though
the employer's liability still continues, yet there is power to the occupier D
to exempt himself from fine on the conviction of the actual offender,
subject to this, that it has been made to appear to the inspector that the
wrongful act has been committed without the consent, knowledge or
connivance of the occupier. It is not necessary here to consider whether,
if this case had been brought only under sect. 10, those provisions do not E
at least indicate that where there has been connivance of the employer
he could not exempt himself from criminal responsibility, and nevertheless,
although the workman was not in default under the statute,
but had actually under sect. 140 committed the offence—assuming that
the workman himself is covered by sect. 140 as well as the other employees F
of the employer—it might be that another argument might have been
addressed to us by Mr. Pritt which we should have had to consider;
but as this case is founded solely on the consideration of reg. 23, I do
not think it necessary to pass upon that point.

That therefore leaves open only the question whether this workman G
by receiving, as he apparently did receive, payments under the Workmen's
Compensation Act, following upon a claim dated Nov. 19, 1935,
has put it out of his power now to claim under the common law right.
As has been pointed out, the authorities go to show that this option in
the case of a workman may be considered from the point of view of H
whether it is for his benefit or not, and if it is for his benefit that he
should proceed at common law, then he is not bound by the option.
One has to consider upon this aspect the position as it would have
presented itself at the time when the alleged election was made, and

when one has regard to the great limitations which are placed upon workmen under the Workmen's Compensation Act, namely, that in no case can they recover in damages, but only compensation, which is limited to the extent and the period of their incapacity, and that the amount of the compensation in any case is severely limited by the Workmen's Compensation Act, and when the fact is also taken into consideration that under sect. 29, if he proceeds first at common law, he may ask the tribunal to assess the compensation under the Workmen's Compensation Act, even if he fails at common law, and when the amount of injuries which have been suffered is considered I think that a competent counsel advising this client would, or ought to be, taken to have told him that he should take his risk and proceed at common law. If that be the right view, then it is clearly not for his benefit to elect to proceed under the Workmen's Compensation Act, and consequently I am of opinion that he is not bound by sect. 29, and might properly proceed in the present case. For these reasons I agree that this appeal succeeds.

Greene, L.J.: I agree that this appeal succeeds, and on the second point I do not wish to add anything to what has already been said by the other members of the court, but as we are differing from the learned judge, I wish to state in a few words my reasons for thinking that the appeal must succeed in spite of the argument addressed to us which found favour with the learned judge on the first point. That point lies in a very small compass. It is of this nature: it is conceded that the employers in this case were guilty of a breach of their statutory duty. It is said that the foundation of the action for damages arising from such a breach is negligence, and that the defence of contributory negligence can validly be set up. That latter proposition is one which, at any rate in this court, we must take to be correct. Now, it is said in the present case that the law has laid down a standard of duty towards himself for his own protection to which the employee is bound to conform, and if he fails to conform to that standard he himself is guilty of statutory negligence, just in the same way as in a matter arising at common law the plaintiff may have been guilty of negligence which affords a good defence, in that he has himself failed in the performance of that duty towards himself under which an ordinary reasonable man would be. The argument depends entirely on a certain construction of the Woodworking Machinery Regulations, reg. 23. Under that the employee

> employed on a woodworking machine shall (i) use and maintain in proper adjustment the guards provided in accordance with these regulations.

The matter of providing the guards under the regulations is one which concerns the employer. There is no obligation on the employee to provide the guards. It is for the employer to provide them, and if and when they are so provided it is for the workman to use and maintain them in proper adjustment. It is conceded on the part of the respondent company that if it had not been for the existence of that regulation no duty would have lain on the present appellant to use the guard in disobedience to the order prohibiting its use which the employer had given. It is said, however, that on the true construction of reg. 23 the A guard was provided by the employer notwithstanding the circumstance that the employer had forbidden the workman to use it. That is a construction which I am quite unable to accept. It seems to me that the language of reg. 23 is simple and intelligible. It creates a criminal offence in a workman who disobeys its provisions, and I should expect B to find, and indeed on the true construction of this regulation I do find, that the criminal offence which is created is one as to which there can be no doubt whether a workman has or has not committed it, because the matter is left in such a way that it is within his own volition whether he makes use of the thing provided or not. It is contemplating the case C where the master having performed his duty to provide and adjust the guard, and then going away about his affairs leaves the workman to perform his work, and the workman finding the guard there provided for him without anything to prevent or prohibit his using it fails to do so. That is a simple type of offence, and it is an offence which one would D quite reasonably expect to find created by regulations of this sort. But it is said that the word "provided" has a totally different meaning; that it does not mean provided effectively at the relevant moment, but that once the master has produced the required article he has provided it, and that even if he takes it away afterwards the workman who uses E the machine thereafter is guilty of a criminal offence because he is not using the guard provided. But if the guard was provided a week before and had subsequently been removed by the master I cannot see how the workman would be committing an offence under that regulation, because the simple answer is that at the relevant moment when it falls F to the workman to use the machine there is no effective provision of a guard by the master. I have taken the case where the guard having been provided by the master is afterwards removed because that illustrates the point with the greatest simplicity, but it appears to me that any act of the master which effectively places the use of the guard G beyond the competence of the workman is a failure by the master to provide the necessary guard, and it matters not whether that failure is due to the fact that having put the guard there he takes it away or locks it up so that it cannot be used, or himself stands with his hand upon it so that the workman cannot touch it, or orders the workman H not to use it. In each case he has removed the guard from the effective power and disposition of the workman to make use of it. It matters not, in the case where the use of the guard is prohibited, whether the workman, if he disobeyed that prohibition and used the guard, would be committing a trespass against a chattel belonging to his employer or would be merely committing a breach of his contract of service. The result, in my opinion, in either case is the same, because the guard has been put out of his power to use, unless he chooses to commit—whichever may be the right answer, and I am disposed to think that each answer is right—either a tort or a breach of his contract of employment. Indeed, if the effect of the regulation was as contended for, I think the draughtsman might be congratulated on having produced the very remarkable result of putting the workman in the position that he must either stop work altogether or he must commit a breach of his contract or a trespass to his master's goods or commit a criminal offence. I myself am happy to be able to read the regulation in a much more simple, and, in my opinion, a much more common sense way.

Having regard to the view which I take the particular matter which the judge decided does not fall for decision, but it must not be taken from the fact that I do not enter into a discussion of his reasons that I agree that even if there had been a breach of reg. 23 the plaintiff would have been disentitled to succeed on the facts of this case.

Appeal allowed.

Solicitors: *T. V. Edwards* (for the appellant); *C. St. A. Butcher* (for the respondent company).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

RHOKANA CORPORATION, LTD. *v.* INLAND REVENUE COMMISSIONERS.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Greene, L.JJ.), **February 4, 5, 8, March 4, 1937.**]

Income Tax—Interest on debentures—Payable in foreign currency at fixed rate of exchange—Deduction of income tax—Income Tax Act, 1918 (c. 40), *All Schedules Rules, r.* 21.

A company issued certain debentures secured by a trust deed, which provided, *inter alia,* that interest declared at sterling rates should be paid in sterling at the company's bankers in London, or at certain offices in New York in U.S.A. dollars at the fixed rate of exchange of 4.86 dollars to the £, or at certain offices in Amsterdam, in Dutch florins at the fixed rate of exchange of 12.11 Dutch florins to the £. The deed further provided that interest on registered debentures would be paid by cheque or warrant on the company's bankers sent through the post. The company duly paid the debenture interest on Dec. 31, 1931, deducting income tax at the rate of 5*s*. in the £ upon such interest in sterling. A certain warrant was cashed for dollars. The revenue authorities contended that in respect of that warrant a larger sum for income tax than that deducted by the company should have been deducted, such sum being arrived at by converting the total amount of the interest into dollars at 4.86 to the £, deducting tax in dollars at the rate of 5*s*. to the £, and reconverting this sum into sterling at the rate of 3.39 dollars to the £, the rate of exchange ruling on Dec. 31, 1931:—

HELD: the interest was not paid when the warrant was posted, but, in the case where the holder so elected, when payment was made in New York in dollars or in Amsterdam in Dutch florins. All Schedules Rules, r. 21, had to be applied to the dollar and Dutch florin payments. A deduction from interest paid in a foreign currency must be made in foreign currency, though it must necessarily be converted into English currency for tax purposes. A

Decision of LAWRENCE, J. ([1936] 2 All E.R. 678), *reversed.*

[**EDITORIAL NOTE.** This case is confined to the payment of tax upon interest by deduction and deals only with the case where, after the issue of the interest warrant, the holder has the right to cash it in foreign currency at a fixed rate of exchange. LAWRENCE, J., held that the right to cash the warrant abroad was a mere additional right of the payee. The Court of Appeal have held that there B is no payment of such a warrant until the holder receives the foreign currency abroad and that the deduction of tax must be calculated on the then value in English currency of that payment in foreign currency.

AS TO DEDUCTION OF TAX ON PAYMENT OF INTEREST, see HALSBURY, Hailsham Edn., Vol. 17, pp. 229-231, paras. 464-468; and FOR CASES see DIGEST, Vol. 28, p. 82, Nos. 463-468.] C

Cases referred to:

(1) *Thairlwall* v. *Great Northern Ry. Co.*, [1910] 2 K.B. 509; 10 Digest 1160, *8207.*

(2) *Payne* v. *Deputy Federal Commissioner of Taxation*, [1936] A.C. 497; [1936] 2 All E.R. 793; Digest Supp.

(3) *International Trustee for the Protection of Bondholders Akt.* v. *R.*, [1936] 3 All E.R. 407; Digest Supp. D

(4) *Auckland City Council* v. *Alliance Assurance Co., Ltd.*, [1937] 1 All E.R. 645; Digest Supp.

(5) *Ehrensperger* v. *Anderson* (1848), 3 Exch. 148; 1 Digest 451, *1406.*

(6) *Peyrae* v. *Wilkinson*, [1924] 2 K.B. 166; 35 Digest 174, *48.*

(7) *Reed* v. *Kilburn Co-operative Society* (1875), L.R. 10 Q.B. 264; 12 Digest 305, *2518.* E

(8) *Re British American Continental Bank, Ltd., Goldzieher & Penso's Claim*, [1922] 2 Ch. 575; 17 Digest 160, *608.*

(9) *Re British American Continental Bank, Ltd., Credit General Liegeois' Claim*, [1922] 2 Ch. 589; 17 Digest 160, *609.*

(10) *S.S. Celia* v. *S.S. Volturno*, [1921] 2 A.C. 544; 17 Digest 159, *602.* F

APPEAL from a judgment of LAWRENCE, J., delivered on May 28, 1936, and reported in [1936] 2 All E.R. 678, allowing an appeal by the company against the Commissioners of Inland Revenue.

The company, which was registered in London, issued in April, 1931, G a number of 7 per cent. 20-year convertible debentures. These were secured by a trust deed constituting a first floating charge over all the assets of the company. It was also a term of the offer that payment of interest (less United Kingdom income tax), principal and premium would be made at the option of the holder: H

(*a*) At the offices of Barclays Bank, Ltd., 54, Lombard St., London, of the net sum payable in sterling; or

(*b*) At the offices of Messrs. J. P. Morgan & Co., 23, Wall Street, New York, of an equivalent sum in dollars (United States of America) calculated at the fixed rate of exchange of 4.86 dollars to the £; or (*c*) At the offices of Nederlandsche Handel Maatschappij N.V. Amsterdam, of an equivalent sum in Dutch florins, calculated at the fixed rate of exchange of florins 12.11 to the £.

During the material period the company issued only registered debentures, A the material clauses of which are set out in the judgment. The company posted, to the registered holders of the debenture, warrants to the net amount in sterling of £87,749 15*s*. 5*d*., computed on a gross sum of £116,998 18*s*. 2*d*., and a tax of £29,249 2*s*. 9*d*. The company was assessed to income tax under r. 21 in respect of interest amounting to B the gross total, and the tax was duly paid. Of the warrants dated June 30, 1931, practically all were cashed in Amsterdam. Owing to the depreciation of the pound sterling which took place in Oct., 1931, when England went off the gold standard, many holders in the exercise of their option cashed their December interest warrants in New York C or Amsterdam. The total face value of these was £73,363 16*s*. 8*d*. The Commissioners of Inland Revenue made an additional assessment on the company in the sum of £41,732 10*s*. This was based on a total payment of interest in Dec., 1931, converted where necessary into sterling, computed at £104,662 15*s*. 5*d*. Although the December warrants had D been cashed in New York in dollars, at 4.86 dollars to the £, the revenue sought to convert the dollar total back into sterling at 3.39 to the £, the rate which the revenue estimated to be the middle rate of exchange on Dec. 31, 1931.

The company contended that :

E

(*a*) The company was assessable under r. 21 of the general rules upon payment of interest.

(*b*) The interest had been paid by the company by the posting of the interest warrants to the debenture holders.

(*c*) In respect of this payment of interest the company had already been assessed to and paid income tax.

F (*d*) Under the terms of the trust deed, the company had the option to pay in sterling or foreign currency.

Alternatively:

(*f*) The machinery of r. 21 was inapplicable to payments of interest in a foreign currency.

The Crown contended that :

G (*a*) Where a warrant was paid by the company's agents in New York in dollars, or in Amsterdam in florins, the payment was a payment of interest in dollars or florins respectively and not in sterling.

(*b*) For the purposes of r. 21, such a payment in dollars or florins must be converted into sterling at the rate of exchange current at the due date of payment.

The special commissioners decided that the corporation could not be H said to have paid interest until the holder of the warrant had exercised his option. They therefore held that, in computing the amount of interest paid by the corporation for the purposes of All Schedules Rules, r. 21, the amount of dollars or florins paid—i.e., the amount corresponding, at the respective fixed rates of exchange, to the gross amount of sterling interest indicated on the relative certificates—must be included at their sterling value at the date when the interest fell due, e.g., on Dec. 31, 1931, when the warrants in question became payable. They therefore confirmed the additional assessment in principle.

The company appealed to the High Court, and the appeal was A
heard on May 28, 1936, by LAWRENCE, J., who allowed the appeal with costs and discharged the additional assessment. The commissioners appealed.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the Crown. B

A. M. Latter, K.C., and *A. Andrewes Uthwatt* for the Rhokana Corporation, Ltd.

The Attorney-General: On the construction of the document, the judge was wrong in treating this right to receive interest in dollars or in guilders as an added right. Whatever the form of the document, C
the debenture holder has three alternative, and mutually exclusive rights, none of which is superior or subordinate to the others: to draw interest in sterling, in dollars, or in guilders. It is immaterial that, in drafting the document, the sterling sum is put first, and that in the deed the figures are given in sterling: see *International Trustee for the Pro-* D
tection of Bondholders Akt. v. *R.* (3). The legal effect of this court's decision of that part of the case, which was not reversed by the House of Lords, was that the holder had a right to demand dollars in the U.S.A. or pounds in London, and that the contract showed how the number of pounds was to be calculated. In *Auckland City Council* v. *Alliance* E
Assurance Co., Ltd. (4), there was an option for payment in New Zealand and in England, and it was held that a holder was entitled to be paid in English currency, which, at that time, was more valuable than New Zealand currency. The present document imposes an obligation to discharge a debt in three alternative ways and in three different and F
alternative currencies.

PARKE, B., said, in *Ehrensperger* v. *Anderson* (5), that an action for money had and received would lie for debt in a foreign currency, though the debt must of course be converted into English currency. There are many examples in law of a contract under foreign currency being treated G
as a debt, e.g., a bill of exchange. Even if the action had always to be an action for damages, that would not affect the question whether, for the purposes of income tax, interest payable in foreign currency is interest within the meaning of the revenue statutes. The payment is in money, whatever the currency in which it is made. A contract for H
sale of goods, the price being in a foreign currency, is treated as a contract for sale of goods and not a contract of barter: *Peyrae* v. *Wilkinson* (6). The Privy Council held, in *Payne* v. *Deputy Federal Comr. of Taxation* (2), that Australian income tax must be calculated and expressed

in Australian currency. The recipient in the present case should therefore, for income tax purposes, receive his interest in the sterling equivalent of the dollars paid. Admittedly, where a sterling debt is payable in America, the ordinary construction of the contract would be that payment there is to be made in dollars. Rule 21 expressly refers to interest payable out of the United Kingdom ; it obviously contemplates payments in a foreign currency. Interest of this kind is, therefore, within the charging words, and therefore within the necessary intendment of r. 21. The obligations to interest which the taxpayer has undertaken here do not prevent the machinery of r. 21 from applying, for the general force of the rule will override any difficulties of machinery. The respondent corporation says, on the authority of such cases as *Thairlwall* v. *Great Northern Ry. Co.* (1), that where the holders have assented to their interest being paid by a warrant sent by post, the company has discharged its obligation to pay interest when it puts that warrant in the post. On the true view of the law, payment is deemed to be made when the warrant is cashed. A holder whose warrant was lost in the post would be entitled to bring an action against the company under the Bills of Exchange Act, 1883, s. 74, on giving an indemnity to the company against the event of a finder cashing the lost warrant.

Latter, K.C., for the respondent corporation : On the construction of these documents, the payment of interest by the company was the payment in sterling of the amount of £55,616. Secondly, even if there had been any other or further payment of interest, it would not have been a payment to which r. 21 was applicable. By the provisions of the trust deed the company covenanted to pay the interest in sterling and provided that the posting of the warrant should be payment of the interest. Having received the warrant, and having been paid their interest, the holders have an added right. The document paid the interest and was taken in satisfaction of the amount that was due on the interest ; the company deducted 5*s.* in the £ from it. Three alternatives are given, and, by the general rule of law, the person who has to do the first act has the option : *Reed* v. *Kilburn Co-operative Society* (7). The company exercised this option by sending a cheque for sterling in payment of its interest. The holder can either take that amount in sterling or sell it in New York for more than its face value. In English law, the judge was correct in holding that the warrant merely gave a right to call for a commodity, and that failure to supply that commodity would give rise merely to an action for damages. The right is not different from the right to have certain goods delivered : *Re British American Continental Bank, Ltd., Goldzieher & Penso's Claim* (8), and *Re British American Continental Bank, Ltd., Credit General Liegeois' Claim* (9). Both these cases followed *The Volturno* (10).

The Attorney-General, in reply.

LORD WRIGHT, M.R. [reading the judgment of the court]: This appeal raises questions of some difficulty and complexity, relating to the application of All Schedules Rules, r. 21, to the payment of interest on debentures of an English company, where payment is made abroad in foreign currency in virtue of an option contained in the debenture. A The interest was subject to United Kingdom income tax, and was payable in sterling in London, or in dollars in New York, or in guilders in Amsterdam. Warrants were posted to registered holders, setting out the amounts payable in sterling, but also stating the options as to currency and place of payment, and defining specific rates for conversion into dollars or guilders. B Of the warrants for the quarter ending Dec., 1931, by far the greatest proportion was presented and paid in dollars in New York, converted from sterling at the contract rate of $4.86 to the pound. But, as the actual rate of exchange was in the neighbourhood of $3.40 to the pound, the payments made, converted C back at the actual rates into sterling, represented a much larger sum in sterling than appeared in the sterling sum set out on the face of the warrant. A first assessment was made, based on the sterling sum expressed on the face of the warrant. Subsequently an additional assessment was made, to correspond with what the corporation had actually D paid by way of interest in dollars, when the payment was converted back at the actual rate of exchange as compared with the conventional rate. The special commissioners upheld that assessment. Their decision was set aside by LAWRENCE, J. The Crown appeals from his decision. No actual figures have been discussed before the court, save such as are E necessary to elucidate the principles involved. The additional assessment, as found by the special commissioners, was in the sum of £41,578 6*s.* 11*d.*, as representing the difference between the total sum, at the sterling amounts shown on the warrants, and the actual value in sterling of the currency payments, the difference being due to F the divergence of the actual exchange rates from the conventional rates.

The respondent corporation had issued, in Apr., 1931, £4,500,000 7 per cent. 20-year debentures, secured on the assets of the company by means of a trust deed. At the material times, the debentures so G issued were all in the form of registered debentures. The registered debenture provided, so far as it is material, for payment to the registered holder of the principal sum, consisting of the relevant number of pounds sterling, or the equivalent thereof in the United States of American dollars, at the rate of $4.86 to the pound, or in Dutch florins at the rate H of 12.11 Dutch florins to the pound. It also provided for interest on the principal sum at various rates up to June 30, 1932, and thereafter at the rate of 7 per cent. per annum by equal half-yearly payments. " Such interest to be subject to United Kingdom income tax." One of the endorsed conditions to which the debenture was subject was condition 11, which was in the following terms :

> The principal moneys premium (if any) and interest hereby secured shall be paid in sterling at Barclays Bank, Ltd., 54, Lombard St., London, or other the bankers of the company in London for the time being or at the registered office of the company or in U.S.A. dollars at the fixed rate of exchange of 4.86 dollars to the £ at the offices of Messrs. J. P. Morgan & Co., 23, Wall St., New York, or in Dutch florins calculated at the fixed rate of exchange of 12.11 Dutch florins to the £ at the offices of Nederlandsche Handel-Maatschappij N.V. Amsterdam. The interest on registered debentures will be paid by cheque or warrant on the company's bankers sent through the post to the registered address of the holder or in the case of joint holders to the registered address of the one who is first named on the register ; and every such cheque or warrant shall be payable to the order of the person to whom it is sent, and payment of the cheque or warrant if purporting to be duly endorsed shall be a satisfaction of the interest.

We shall later state how we construe that condition. The debenture interest in question in these proceedings was the interest falling due on June 30, 1931, and Dec. 31, 1931, respectively. In due course warrants were posted to the registered holders for the net amount due shown in sterling, but with a clause setting out the dollar and guilder option. A specimen warrant was used for purposes of illustration. It was dated Dec. 31, 1931, addressed to Barclays Bank, Ltd., 54, Lombard St., E.C.3, payable to the particular named holder " or order," and was for £41,450 4*s*. 3*d*. At the foot was this clause :

> Payable at the option of the holder in sterling at Barclays Bank, Ltd., 54, Lombard St., London, E.C.3, or in dollars (calculated at the fixed rate of exchange of $4.86 to the £) at the offices of Messrs. J. P. Morgan & Co., 23, Wall St., New York, or in Dutch florins (calculated at the fixed rate of exchange of 12.11 florins to the £) at the Nederlandsche Handel-Maatschappij N.V. Amsterdam. C. Note : This warrant, if presented in New York or in Amsterdam, must lie 4 days for examination.

The warrant was crossed " not negotiable ; " in any case, it was not a bill of exchange, though assignable. Attached to the warrant was a certificate, showing the gross amount in sterling, £55,616 1*s*. 11*d*., less British income tax, £14,165 17*s*. 8*d*., net amount payable, £41,450 4*s*. 3*d*. The corporation also certified that the income tax deducted as shown has been or will be duly paid by the corporation to the proper tax officer. There was a note at the foot that the certificate would be accepted by the inland revenue authorities as proof of deduction of tax. The corporation presumably purported by this certificate to comply with the Finance Act, 1924, s. 33. The certificate was obviously imperfect so far as it disregarded the dollar and guilder options which were expressly stated in the warrant ; the certificate, however, could not determine the rights of the debenture holder or the rights of the inland revenue.

In Dec., 1931, owing to the financial crisis, by reason of which England went off the gold standard, the £ sterling had depreciated. In consequence, it was profitable for holders of the debentures to exercise their dollar option. The total net face value, expressed in sterling, of the debenture interest due in December was £73,363 16*s*. 8*d*. In respect of

that interest, warrants were cashed in New York to the total amount, on the basis of the net face value shown in the warrants in sterling, of £72,171 13*s.* 11*d.*; the actual sums paid, corresponding to this total of sterling converted into dollars at $4.86 to the pound, came to $350,754.12, which, when converted back into sterling, corresponded to A
a payment of £103,467 5*s.* 8*d.*, that is, if the rate of exchange of $3.39 to the £ prevailing on Dec. 31, 1931, is taken. That figure may be adopted here, for purposes of illustration, but it is subject to readjustment if the actual dates of payment in New York are to be regarded. That figure is the net figure paid after deduction of British income tax B
in accordance with the debenture conditions. Notionally, what was paid was the gross amount in dollars. Hence the revenue authorities have based their assessment under r. 21 on the gross figure, which, for convenience, they have arrived at by taking the net figure of £104,662 15*s.* 3*d.* (a figure which includes not only the dollar payments, but also some C
smaller amounts paid in sterling and guilders respectively), and adding on the appropriate tax (or "grossing up") so as to arrive at the true gross figure in sterling. In the first place, the corporation had been assessed simply on the sterling figures shown on the face of the certificate, disregarding the currency options and the actual payments. D
The revenue made a further assessment on the basis of the dollar payments actually made, and also the less important guilder payments. This assessment, which also included the June interest, was computed as follows: Total payment of interest converted where necessary into sterling: June, 1931, £14,385 18*s.* 9*d.*, Dec., 1931, £104,662 15*s.* 5*d.*, E
making £119,048 14*s.* 2*d.* Add for tax at 5*s.* £39,682 18*s.* 1*d.*, making £158,731 12*s.* 3*d.* Less first assessment, £116,998 18*s.* 2*d.*; leaving £41,732 10*s.* Owing to certain adjustments, the special commissioners reduced this figure to £41,578 6*s.* 11*d.* It may in any event require some further minor adjustments. In effect the view of the commissioners F
was that there was in each case no payment of interest under condition 11 quoted above until the holder had exercised his option by presenting the warrant for payment; if he exercised his option to be paid in dollars or guilders, there was no payment of anything but dollars or florins in satisfaction of his interest; accordingly, in computing, under r. 21, the G
amount of interest paid by the corporation:

> the amount corresponding at the respective fixed rates of exchange to the gross amount of sterling interest indicated on the relative certificates must be included at their sterling value—

at the relevant date or dates. H

Lawrence, J., in setting aside this assessment, was of opinion that r. 21 does not refer to payments outside the United Kingdom, and that a contract to pay in foreign currency is a contract to provide a commodity, which is not interest of money within r. 21. He concluded that the right to get dollars or guilders was an added right, which did not affect the interest on these debentures, because that was payable in sterling, and that r. 21 had no application to the added right. With great deference to the judge, we find ourselves in disagreement with his judgment.

A Before dealing with the application of r. 21 to such a case as this, it will be convenient to state what, in our opinion, is the meaning of the debenture and of the certificate and warrant. We think that the option given is the holder's option, given to him for his benefit, and is exerciseable by him. He cannot exercise it till he receives the documents, and B he cannot claim payment until he has endorsed the warrant. But condition 11, which includes both these terms or conditions, also contains a term that the interest will be paid by cheque sent through the post to the registered address of the holder. This, we think, refers to the initial machinery for effecting payment; at most, it can merely mean C that the corporation is not bound to give a duplicate warrant except on an indemnity: see per BRAY, J., in *Thairlwall* v. *Great Northern Ry. Co.* (1). Payment in the full sense is dealt with in the final words of the condition:

> Payment of the cheque or warrant if purporting to be duly endorsed shall be a D satisfaction of the warrant.

That, in our opinion, means payment at the place and in the currency selected by the holder in the exercise of his option. Such payment is obviously subsequent to the posting of the warrant. Further, there is only one payment, as, for instance, in New York, in dollars, if the holder E or his indorsee (for the holder may sell his warrant, which is to his order) so elects. It is not the case that there is a payment limited to a payment in sterling when the warrant is posted, and a separate and subsequent payment in dollars if the dollar option is exericsed; and, furthermore, the deduction of tax under r. 21 is made only when the payment F is made. The deduction is actually effected by paying the net amount. The warrant accordingly is for the net amount, and nothing else, and does not show the deduction. Some confusion has been caused because the sums shown on the certificate as the gross sum, the tax deduction, and the net sum, are shown merely in sterling, and the net sum in the G warrant is merely in sterling. Strictly speaking, they should have been in all three currencies; indeed, in the warrant, as the fixed rates are set out, the dollar or guilder amounts are impliedly stated; nothing is required but an arithmetical calculation, easily done by the paying bank, or by the holder, if he desires. But the same is really true of the H certificate, because the holder knows that the sterling sums are capable of transliteration into the corresponding dollar or guilder sums. Much of the confusion in the case, as we think, is due to the failure to set out in figures, in the certificate and in the warrant, the three optional sums. The warrant is as much a dollar or guilder warrant as a sterling warrant,

and, if the certificate had shown the gross sum, the deduction, and the net sum, in dollars and guilders, as well as in sterling, i.e., in all three currencies, the difficulty about making the deduction on the warrant, which impressed the judge, could not have been felt. In our opinion, the conception that the obligation expressed in the certificate and the A
warrant is primarily a sterling obligation is partly due to a failure to appreciate that the three optional currencies, sterling, dollar and guilder, are on the same level, i.e., that it depends on the holder what currency will apply, and partly to an idea that sterling is the primary currency, and that payment in one of the other currencies is something superadded. B
In fact, there is only one payment, single and indivisible, which takes place, once for all, at the place and in the currency selected by or on behalf of the holder. As we have already indicated, the confusion is partly due to the circumstance that the certificate shows the deduction only in sterling. But the deduction under r. 21 must be made upon C
payment. Writing out and posting the certificate and warrant do not constitute payment. It might be questioned whether what was done in this respect constituted a fulfilment of the Finance Act, 1934, s. 33, though to the holder the sterling amounts were translatable, under condition 11, into dollars or guilders; but, however that may be, it D
would not affect the position under r. 21.

In our opinion, r. 21 applies to the dollar or guilder payments in this case. We think the payment, for example, of the $201,448 in New York was a payment of interest of money within the meaning of the rule, after deducting therefrom a sum representing the amount of tax E
at the appropriate rate. We think that payment of the sum of dollars constituted a payment of money, though it is necessary, in order to bring the dollars into computation for United Kingdom income tax, to turn them into sterling, and we think that the payment would not be any the less within r. 21 because made out of the United Kingdom, and that the F
payment was duly made after deduction of tax. The warrant, read as a whole, taking into account the optional clause at the foot, was a warrant for, *inter alia*, $201,448, which was the proper net amount; all that the clerk at J. P. Morgan & Co.'s office in New York had to do was to convert, at the specified rate of exchange, the sterling amount expressed. The G
tax was deducted in the usual way, because the amount was not paid, but remained in the corporation's pocket. We can find in r. 21 no justification for the view that the rule is limited to payments made in the United Kingdom. Rule 21 relates to interest of money charged with tax under Sched. D. If reference is made to Sched. D, Case IV, r. 1, that H
rule expressly deals with foreign income, whether received in the United Kingdom or not, subject, *inter alia*, to a deduction on account of any annual interest payable out of the income to a person not resident in the United Kingdom. That rule clearly deals with financial transactions

abroad, and cannot reasonably be construed as applying only to transactions in sterling. Foreign money is clearly included, or, at least, is clearly not excluded. If it were said that a taxpayer is taxed under that rule on his profits, and that it does not matter whether the profits reach him in money or in goods, that is true enough, but irrelevant; in any case, the provision for the deduction on account of annual interest in a foreign country shows that a deduction within the meaning of the Act may be a deduction of foreign currency from foreign currency. Similarly, Case V must, we think, cover foreign income in foreign currency. Apart from the language of these rules, any other view would be difficult to accept, in a country like this, whose inhabitants are constantly engaged in international trade, own large foreign properties, landed and otherwise, hold immense amounts of foreign stocks and shares and are subject to heavy liabilities, on which interest is payable. All these may involve not only receipts but also payments or deductions in foreign currency. Indeed, the system of taxation of the United Kingdom could not function unless it recognised foreign currency; this is not less true because obviously that currency must be reduced to sterling in order to be brought into computation for United Kingdom tax purposes. This principle was clearly recognised in the decision of the Judicial Committee in *Payne* v. *Deputy Federal Commissioner of Taxation* (2), which related to Australian tax. We may further note that r. 19, which is comparable to r. 21, expressly specifies as coming within its scope any yearly interest of money, etc. :

> whether payable within or out of the United Kingdom, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation.

This language expressly brings within its scope payments of interest made out of the United Kingdom, and does not limit its scope to sterling transactions. It is true that these words are not repeated in r. 21; but that rule was much later in the date of its first introduction, and the draftsman may well have thought that the shorter language he used was, by reason of the context, sufficient. In any case, we cannot find, either in the language or the policy of r. 21, any possibility of limiting it so as to exclude from its application interest paid outside the United Kingdom, or interest paid in foreign currency. The truth is that the words "payment of any interest of money, annuity, or other annual payment charged with tax under Sched. D," read in connection with the machinery for "deduction" provided for in r. 21, are, in the context of the Income Tax Act, wide enough to cover not merely transactions effected in what is legal tender in the United Kingdom but also everything which is in a commercial sense a "payment," upon the making of which the statutory "deduction" can be made. Thus it includes payment by cheque or bill of exchange, by transfer of, for example, War

Loan, or any other marketable security, or by the making of credit entries in books of account. We can see no reason for excluding what is no less a payment, namely, the discharge of an obligation expressed in foreign currency. As in the case of a transfer of War Loan, so in the case of a delivery of foreign currency, the value of what is transferred or delivered can without difficulty be translated into terms of English money, and the deduction of tax which the rule requires to be made presents no difficulty whatever. In all these cases, there is, in our judgment, both a "payment" and a "deduction" within the meaning of the rule. There is no substance in the argument that the "sum representing the amount of tax" is necessarily a sum expressed in British currency, and that it is not possible to "deduct" British from foreign currency. In the case of a dollar payment, for example, the sum of dollars by which the contractual payment is diminished in order to comply with the provisions of the rule as to deduction is, in our judgment, a "sum representing the amount of tax," notwithstanding the fact that, before deduction can take place, a calculation, based on the sterling value of the dollar, must be made. To sum up this matter, we think that "interest of money" in r. 21 includes interest paid in foreign currency.

For all these reasons, we agree in principle with the conclusions of the special commissioners, and we think that the appeal should be allowed, the judgment of Lawrence, J., set aside, and the order of the special commissioners restored, with, however, some variations, because we do not agree with their view that the relevant date for conversion from dollars into sterling is the date when the debenture interest fell due, Dec. 31, 1931, but think that the dates of the actual payments, which were somewhat later, are the right dates to take. This is more advantageous to the taxpayer; but the Crown does not object to these later dates being taken.

Appeal allowed with costs. Reference back to the commissioners to adjust figures. Leave to appeal to the House of Lords.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *Holmes, Son & Pott* (for the respondent company).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Re WATERHOUSE'S POLICY.

[CHANCERY DIVISION (Farwell, J.), **March 1, 2, 1937.**]

Insurance—Life insurance—Assignment of policy—Sufficiency of stamp—Amount recoverable by assignee—Interest.

Revenue—Stamp duties—Assignment of insurance policy—Stamp Act, 1891 (*c.* 39), *ss.* 88 (2), 118 (1).

W. assigned to a bank, to secure an overdraft, an insurance policy for £500, payable either on his death or on his attaining the age of 60. The assignment was stamped to cover £500, but the overdraft, both at the time of the assignment and when the policy matured, exceeded £500. The moneys payable on maturity, including bonus, amounted to £963. The insurance company contended that the assignment was insufficiently stamped and that it could not, therefore, get a good discharge in respect of the policy moneys by paying them or any part of them to the bank. The bank contended that it could give a good receipt for £500, and sought to have that sum paid to it and the balance of the policy moneys paid to W. The insurance company then paid the £963 into court under R.S.C., Ord. 54c. The bank applied to have the money in court paid out to it and to W. The bank made the insurance company a respondent to the summons and asked *inter alia* that the insurance company should be made liable to pay interest on the amount paid into court:—

HELD: (i) upon the construction of the Stamp Act, 1891, ss. 88 (2), 118 (1), the assignment was a good security for £500, and the bank was entitled to £500 out of the policy moneys.

(ii) the insurance company was liable to pay interest on the amount due at the rate of 4 per cent. per annum from the date of the maturity of the policy to the date of payment into court.

[**EDITORIAL NOTE.** It is well settled law that a mortgage is only good for the amount for which it is stamped. In the present case an insurance company based an argument upon the Stamp Act, 1891, s. 118. that it could not pay over any part of the policy moneys to a mortgagee of the policy where the mortgage was insufficiently stamped. This argument was rejected and the assignee can give a good discharge for the amount for which the mortgage or the assignment of the policy is stamped.

AS TO PERSONS ENTITLED TO PAYMENT OF INSURANCE MONEYS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 530, 531, paras. 841, 842; and FOR CASES, see DIGEST, Vol. 29, p. 389-391, Nos. 3104-3122.

AS TO INTEREST, see HALSBURY, Hailsham Edn., Vol. 18, p. 466, para. 694; and FOR CASES, see DIGEST, Vol. 29, p. 391, Nos. 3123-3126.]

APPLICATION by the Bank of Ireland for the payment out of court of a sum of £963, paid in by the Phœnix Assurance Co., Ltd., of which sum it was asked that £500 should be paid to the applicant bank and the balance of £463 to Samuel Herbert Waterhouse, to whom the said sum of £963 had become payable under a policy of assurance on his own life dated Feb. 27, 1908, and issued by the Law Life Assurance Society, whose business was in 1910 acquired by the Phœnix Assurance Co., Ltd. Further, on the footing that the insurance company was wrong in its interpretation of the relevant sections of the Stamp Act, 1891, the bank asked for an order that the insurance company should pay interest on the sum of £963 from the date of payment in until the date of the order herein, and that it should also pay the costs of the present proceedings. The facts are fully set out in the judgment.

Harold Murphy, K.C., and *G. N. Cross* for the applicant bank.

R. W. Goff for the first respondent the Phœnix Assurance Co., Ltd.

G. N. Cross for the respondent Samuel Herbert Waterhouse.

Murphy, K.C.: The clear meaning of sect. 88 (2) is that the security is to be treated as a security for the amount covered by the stamp, but that, if any further advances are made for which it is desired that the security should be a security, it must be stamped with a new stamp. The subsection does not say that it must be stamped to cover such further advance, but must be deemed to be a new instrument. But, if the Act in any way leaves the matter in reasonable doubt, the construction most favourable to the subject is the one which should prevail. Here there are two subjects, the bank, which has the duty of stamping, and the insurance company, which has, under sect. 118, the duty, under penalties, of seeing that the proper stamp, within the meaning of sect. 88 (2), has been affixed.

Farwell, J.: I suppose, on your construction, the position would be this, that where the stamp which is actually affixed is one which would cover advances up to, but not exceeding, £500, there would be a security for a limited sum of £500, so that the insurance company would be bound, when it comes to distribute the money, to pay the bank £500, and the balance to the assured.

Murphy, K.C.: That is the practical point of view, and one which throws no burden on the insurance company under sect. 118.

Goff: The insurance company ought not to be ordered to pay interest or costs, because there is nothing in sect. 88 (2) which supports the applicant's contention. When the section says that if a subsequent advance is made the instrument is to be deemed to be a new instrument, it is inherent in that that it requires a new stamp. Whether or not a further advance is secured by the instrument is a question of the construction of the instrument. On the construction of this instrument, as it was intended to cover an amount which exceeded the amount for which it was stamped, it immediately became an instrument having two operations, in respect of both of which it required a stamp. The bank cannot change those two operations by electing to rely on the instrument in respect only of the amount which the stamp was sufficient to cover. Even if the insurance company was wrong in the view it took, its board acted reasonably in deciding to pay the money into court, having regard to the conflict of opinion among the textbook writers as to the meaning of sect. 88 (2), and in the absence of any decided case. Alpe on the Law of Stamp Duties, 22nd Edn., p. 223, supports the company's contention, which, if it is right, precludes the company from paying this money under sect. 118. Having paid the money into court, the company, even if its view of sect. 88 (2) is wrong, need not have been made a party to this summons, except in so far as the court desired to hear argument in support of its contentions. It should not, therefore, at any rate, be made to pay the costs of the summons.

A *Murphy, K.C.*, in reply: R.S.C., Ord. 54c, r. 1 (*d*), contemplates that an insurance company paying money into court under the Life Assurance Companies (Payment into Court) Act, 1896, shall submit to pay any interest and costs which the court may direct. See also r. 7 of the same order. There was a long controversial correspondence between B the parties, and the bank was advised that it was proper, in the circumstances, to serve the insurance company, and to ask for costs against it, having regard to the fact that the bank, as early as Aug. 10, 1936, gave up any claim to the policy moneys beyond £500.

C FARWELL, J.: This is a summons taken out by the governor and company of the Bank of Ireland, in which the Phœnix Assurance Co., Ltd., and Mr. Samuel Herbert Waterhouse are respondents, asking for an order that the insurance company lodge in court a sum equivalent to interest at 4 per cent. per annum, less tax on the sum of £963 lodged D by the bank in court on Nov. 16, 1936, from Aug. 13, 1936, down to the date of the order to be made herein, after deduction from such interest of any deposit interest earned by such sum since the payment thereof into court; that, upon such payment into court being made, the funds in court be dealt with in accordance with the schedule to the E summons; and that the costs of the applicant bank and of the respondent Samuel Herbert Waterhouse may be taxed and paid by the insurance company. The application is made under the Life Assurance Companies (Payment into Court) Act, 1896, and R.S.C., Ord. 54c.

The facts are very short, and may be stated in a few words. On F Feb. 27, 1908, Mr. Waterhouse insured his life with the Law Life Assurance Society, which was taken over by the Phœnix Assurance Co., and the policy was one under which the sum of £500 became payable either on the death of Mr. Waterhouse, or on his attaining the age of 60 years, whichever first happened. Mr. Waterhouse was a customer of the Bank G of Ireland, with which he had an account, and, on Feb. 25, 1928, he assigned to the bank, among other securities, this policy to secure his overdraft. The amount of the overdraft was over £500 both at the date of the mortgage and at the date when the insurance money became payable. The mortgage was stamped with a stamp sufficient to cover H the sum of £500, and no more. On Aug. 13, 1936, Mr. Waterhouse attained the age of 60, and thereupon the insurance moneys became payable, and the amount payable was £963, £500 being the original amount of the insurance, and the balance being bonus amounting to £463. Shortly before Aug. 13, 1936, certain correspondence took place between the insurance company and the bank and Mr. Waterhouse, and, by a letter dated July 29, 1936, the insurance company, by its manager, wrote to Mr. Waterhouse as follows :

> We have pleasure to inform you that this policy will mature for payment on the 13th proximo, the date upon which you attain age 60, and, subject to title, the amount which will be payable thereunder on or after that date will be as follows :

Sum assured	£500
Bonus to Dec. 31, 1934	432
Intermediate bonus	31
	£963

> We have received notice that by deeds of May 19, 1926, and Feb. 25, 1928, the policy was assigned to the Bank of Ireland, and if you will kindly communicate with the bank and arrange for these deeds to be produced to us, the matter shall have further attention.

In answer to that letter, the Bank of Ireland wrote, on Aug. 4, 1936, to the insurance company :

> Enclosed I send you the original of the above-noted policy for £500, together with mortgage dated Feb. 25, 1928, by the assured to this bank. The other act of which you have notice, of May 19, 1926, was a deposit of the policy with this bank without writing.
>
> Would you kindly let me have the receipt for the claim value of the policy, to be exchanged with you, when sealed by the bank, for its amount.

The insurance company had no notice of any charges on this policy other than the ones of May 19, 1926, and Feb. 25, 1928, and the only one which remained at this date was the one of Feb. 25, 1928. In answer to the bank's letter, the insurance company wrote to the bank on Aug. 5, 1936 :

> We have received your letter of yesterday's date, together with the above policy and the deed of Feb. 25, 1928, and note what you say as to the transaction of May 19, 1926. Subject to our receiving a certificate that the total amount advanced under the deed of Feb. 25, 1928, has not exceeded £500, the amount for which it is stamped to cover, we are prepared to pay the sum falling due on the 13th instant upon the receipt, under seal, of the Bank of Ireland as mortgagee. We accordingly enclose the necessary form of discharge for sealing, and if you will present this to us in due course on or after the 13th instant, the matter shall have further attention. On settlement of the matter, we shall require to retain the deed of Feb. 25, 1928.

In answer to that letter, the bank wrote :

> I have received your letter of the 5th instant with its enclosure, and I note what you say. The bank is not in a position to give you the certificate asked for, as regards the stamp duty. I have had the receipt sent me sealed by the bank and also signed by the assured, and return it herewith. I also send you a letter from Mr. Waterhouse authorising payment to this bank. I presume this will be satisfactory. If not, the bank is content that you should pay the balance over the amount of £500 to the assured.

In answer to that, on Aug. 7, 1936, the insurance company wrote :

> We have received your letter of yesterday's date, with its enclosures, and note what you say. We regret, however, that we are unable to deal with the matter in the manner you suggest, as in view of what you say it is obvious that the deed of Feb. 25, 1928, is insufficiently stamped to cover the amount outstanding. In these circumstances we send you the deed herewith, and if you will return this in due course the matter shall have further attention.

The last letter to which I need refer is a letter of Aug. 10, 1936, from the bank, as follows:

> I am in receipt of yours of the 7th inst. returning mortgage by the above to this bank, of the above-noted policy, dated Feb. 25, 1928, which deed is stamped to
A cover £500, and I note what you say. As no specified sum is mentioned in the deed, the bank is entitled to give you a good receipt for the policy moneys to the extent of the amount of the stamp duty, i.e., £500. Kindly, therefore, pay that sum to this bank on a receipt for the amount, under the bank's seal. The balance of the policy moneys over and above the £500 will then be payable by you direct to the assured and the bank is satisfied that this should be done.
>
> Kindly let me have the necessary form of receipt for completion by the bank,
B and exchange with you for the £500.

After that there followed a long correspondence, to which I need not refer, in which both sides discussed and put forward their various contentions in the matter, which was finally concluded on Nov. 16, 1936, so far as the insurance company was concerned by its paying into court,
C under R.S.C., Ord. 54c, the £963 payable under the policy. Under the Act itself, the insurance company is entitled to pay the money into court where the board considers that no sufficient discharge can otherwise be obtained, and this application is an application for payment out to the bank and to the assured of the amount so paid into court. But the
D bank has made the insurance company respondent to the summons because it is asking that the insurance company may be made liable to pay interest on the amount paid in, and that it should pay the costs of this summons.

Now, the whole controversy depends upon two sections of the Stamp
E Act, 1891. Sect. 88 (1) provides:

> A security for the payment or repayment of money to be lent, advanced, or paid, or which may become due upon an account current, either with or without money previously due, is to be charged, where the total amount secured or to be ultimately recoverable is in any way limited, with the same duty as a security for the amount so limited.

F

So far, there does not appear to be any difficulty. Where the loan is for a definite fixed sum, and any security is given for that sum, then there has to be a stamp duty which is sufficient to cover the total amount to which the borrower is entitled. Then sect. 88 (2) provides:

G
> Where such total amount is unlimited, the security is to be available for such an amount only as the *ad valorem* duty impressed thereon extends to cover, but where any advance or loan is made in excess of the amount covered by that duty the security shall for the purpose of stamp duty be deemed to be a new and separate instrument, bearing date on the day on which the advance or loan is made.

But before I deal with that subsection it is necessary to look at sect. 118.
H That section provides:

> (1) No assignment of a policy of life insurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the moneys assured or secured thereby, or to give a valid discharge for the same, or any part thereof, unless the assignment is duly stamped, and no payment shall be made to any person claiming under any such assignment unless the same is duly stamped.

Then provision is made for a penalty if any payment is made in contravention of that section. It follows that, in order that the insurance company may get a discharge for money due from it, it must be satisfied that the assignment is sufficiently stamped, and it runs a risk of a penalty if it pays over the money to an assignee on a security which is not suffi- A
ciently stamped. The insurance company contends, in this case, that the security was a security stamped for a loan of £500, and no more, that in fact the bank had advanced, or had permitted the assured to overdraw his account at the bank to, a sum exceeding £500, and that, therefore, the policy technically became a security for a sum larger B
than £500, and that it should have been stamped with an additional stamp whenever the loan exceeded £500, or at any rate at the date when payment was required by the bank from the insurance company for the amount which was then due on the overdraft. In my judgment, that is not the true content of sect. 88 (2), the effect of which is this. C
Where, as in this case, the bank permits one of its customers to overdraw his account, and there is no limit placed upon the amount of the overdraft, or, if there is a security, the security is to be a security for a limited amount only, and any overdraft allowed beyond that is not covered by that security, then there is no necessity to stamp the security for any D
amount greater than the amount for which the bank looks to the security as a security for the loan. Thus, if the bank chooses to take a security for an overdraft, and stamps that security with a stamp which is only sufficient to cover a limited sum, say £500, then, as a result of subsect. (2), it is precluded from claiming, either in any court of law or elsewhere, E
that the security which it has is a security for any greater sum than that for which the stamp on it covers. That is to say, supposing, in this case, there was a claim by the bank against the assured to recover the amount of the overdraft, the bank would not be able to claim against him any sum greater than that principal sum which the stamp covered, and the F
balance, so far as the insurance policy was concerned, would be unsecured. If a bank or any other person lends money, with no limit on the amount which is lent, and stamps the security which it takes with a limited stamp, and desires that security to be increased so as to cover a larger sum, then, on every occasion when it is desired to G
increase the security, it is necessary to stamp the security with a further duty, and for that purpose the security shall be deemed to be a new and separate instrument, bearing date on the day on which the loan is made. If no such step is taken, then the lender is precluded from claiming the security, whatever the particular form of the security may be, as security H
for any amount over that which the stamp on it will cover. Therefore, it follows, in my judgment, that the bank in this case was entitled to claim against the insurers the sum of £500 only, because that alone was the sum which was covered by the stamp on this security. But,

having satisfied the insurance company that there was a security for £500, the insurance company was bound to pay to the bank that sum of £500, and the balance, there being no notice of any other security, would then be payable to the assured. That, in my judgment, is the A true construction of this section of the Act, but the insurance company, which acted in perfect good faith, and which was no doubt fortified its view by the fact that some of the textbooks take a view of this section different from that which I have taken here, was not prepared to take the risk of paying the money over, and accordingly paid it into court, B thereby obtaining a good discharge for the amount due from it. It follows that the bank is entitled, out of the money in court, to receive a sum of £500, and that the assured is entitled to receive £493, and any interest which may have run in the meantime.

There remain the question whether, in the circumstances, the insurance C company is liable to pay interest on the sum of £963, and the question as to the costs of this summons. With regard to interest, the position seems to be this. The insurance company has taken up a wrong attitude with regard to this matter : it ought, on Aug. 13, 1936, when the money became due, to have paid over £500 to the bank, and the balance to D the assured, because, prior to that date, by the letter of Aug. 10, 1936, the bank had made it quite clear that it would be fully content that the money should be so dealt with, and, therefore, as from that date, the insurance company was holding money which it was not justified in so holding. But when it paid the money into court on Nov. 16, 1936, E there being a *bona fide* doubt in the minds of the directors whether it was safe to pay the money over or not, it obtained a discharge for the amount due from it. Accordingly, as from Aug. 13, 1936, to the date of the payment into court, the insurance company is liable to pay interest on the amount due, at the rate of 4 per cent. per annum. After F it had paid in the money, it obtained a discharge, and as from that date it cannot be called upon to pay any interest. But in the intervening period it had in its hands money which belonged either to the bank or to the assured, and it was in law wrongfully holding it against those persons, and against those persons it is to that extent liable to pay interest.

G That leaves only the question of costs. In my judgment, the application for payment out could have been made without making the insurance company a party. The insurance company had got a discharge, and the bank was not bound to make it a party to the summons. On the other hand, it was bound to make it a party to the summons H if it desired to claim against it either interest or costs. Now, it did desire, in this case, to claim interest and costs against the insurance company, and I cannot say that it was not justified in making the insurance company a party to these proceedings, having regard to the fact, as I have held, that the insurance company is liable to pay interest for a limited period.

On the other hand, the claim for interest which it has made by the summons was a much wider claim than that to which I have found it is entitled, namely, a claim for interest from Aug. 13, 1936, down to the date of the order to be made hereon, after deduction from such interest of any deposit interest earned by such sum since the payment thereof into court. That it is not entitled to. It is entitled, in my judgment, only to interest for the period down to Nov. 16, 1936. It has not wholly succeeded in the claim which it has put forward, and, in these circumstances, I shall make no order as to costs. Order for payment out. Liberty to apply.

Solicitors: *Freshfields, Leese & Munns* (for the applicant bank and the second defendant); *Walters & Co.* (for the Phœnix Assurance Co., Ltd.).

[*Reported by* C. M. Young, *Barrister-at-Law.*]

R. *v.* SALFORD ASSESSMENT COMMITTEE.

[Court of Appeal (Slesser and Greene, L.JJ., and Luxmoore, J.), **February 12, March 1, 1937.**]

Rates—Assessment committee—Clerk—Appointment of officer of county borough council—Rating and Valuation Act, 1925 (c. 90), *s.* 55.

The respondent committee resolved to appoint as clerk one B., who was an officer in the town clerk's department of the city of Salford, the corporation being the rating authority. B. was chief committee clerk to the city council, and as such he attended meetings of the rating committee of the city council for the purpose of taking minutes of its proceedings. Apart from recording such proceedings, he was not in any way concerned with its decisions, and took no part, advisory or otherwise, in them. As clerk to the assessment committee, B. acted in an administrative capacity, and advised the committee upon the proper procedure, making the proper entries in the valuation lists of the amendments authorised by the decisions of the committee, but taking no part in such decisions, although he was present while the committee considered them. The appellant, whose application to the assessment committee was being opposed on behalf of the rating committee, sought to prohibit B. from acting as clerk to the assessment committee:—

Held [Greene, L.J., dissenting]: although the mere duplication of offices in the rating and assessment committee was no ground in itself for prohibiting B. from acting as clerk to the assessment committee, the fact that the assessment committee performed *quasi*-judicial functions and that there was a possibility of bias or of apparent bias made it undesirable, in the circumstances, that B. should act as clerk to the assessment committee.

[**EDITORIAL NOTE.** In the court below, the Divisional Court held that there was no disqualification either by statute or at common law of an officer of the rating authority from acting as clerk to the assessment committee. The Court of Appeal by a majority have held that there is a possibility of bias in such a case and therefore a disqualification.

As to Appointment of Clerk of Assessment Committee, see HALSBURY, Supp. Rates and Rating, paras. 83-85; and Rating and Valuation Act, 1925, s. 55, HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 14, p. 678.]

Cases referred to:

(1) *R.* v. *North Worcestershire Assessment Committee, Ex p. Hadley,* [1929] 2 K.B. 397; Digest Supp.
(2) *R.* v. *Milledge* (1879), 4 Q.B.D. 332; 33 Digest 297, *118.*
(3) *R.* v. *Brakenridge* (1884), 48 J.P. 293; 33 Digest 372, 807.
(4) *R.* v. *Sussex JJ., Ex p. McCarthy,* [1924] 1 K.B. 256; 33 Digest 294, *97.*
(5) *R.* v. *Essex JJ., Ex p. Perkins,* [1927] 2 K.B. 475; Digest Supp.
(6) *Middlesex County Valuation Committee* v. *West Middlesex Assessment Area Assessment Committee,* [1937] 1 All E.R. 403; Digest Supp.
(7) *R.* v. *Surrey Assessment Committee, North-Eastern Assessment Area, Ex p. Woolworth (F. W.) & Co., Ltd.,* [1933] 1 K.B. 776; Digest Supp.

Appeal from a decision of the Divisional Court, dated May 6, 1936, and reported at [1936] 2 All E.R. 156. The facts of the case are fully set out in the judgment of Slesser, L.J.

Michael E. Rowe for the appellant: Officers of any authority ought not to be put in any position in which it might be said that they might be biassed. [Counsel referred to *R.* v. *Sussex Justices, Ex p. McCarthy* (4), *R.* v. *Surrey Assessment Committee, North-Eastern Assessment Area, Ex p. Woolworth (F. W.) & Co., Ltd.* (7), *R.* v. *North Worcestershire Assessment Committee, Ex p. Hadley* (1), *Middlesex County Valuation Committee* v. *West Middlesex Assessment Area Assessment Committee* (6), and *R.* v. *Essex Justices, Ex p. Perkins* (5).]

C. Erskine Simes for the respondent committee: It is submitted that the Act is a complete code in itself, and that it deals with all cases where a person is disqualified.

Slesser, L.J.: This is an appeal from an order of a divisional court discharging a rule *nisi* for a writ of prohibition to prohibit the Salford Assessment Committee from acting on a resolution dated June 26, 1935, in the manner shown by their resolution of Jan. 15, 1936.

The resolution of June 26, 1935, was to the effect that:

> Pending the appointment of a clerk to the committee, Mr. Brown of the town clerk's department be appointed as acting clerk to the committee.

The resolution of Jan. 15, 1936, was that Mr. Brown "remain in attendance upon the committee during the whole of the meeting." The actual position with regard to Mr. Brown is stated in his affidavit of Apr. 17, 1936, to this effect: that he has been employed by the council of the city of Salford for 34 years last past and has been engaged in the administration section of the town clerk's department. In addition to other work not here material, since Jan. 26, 1935, he has also acted as clerk to the assessment committee for the assessment area of the city of Salford, and, in that capacity, among other matters, he advises them of the proper procedure, makes the proper entries in the valuation lists of the amendments authorised by the decisions of the committee, but takes no part in the decisions of the committee. His other activity which has given rise to the present proceedings is that as part of the duties of a committee clerk he attends meetings of the rating committee to whom the council has delegated its duties with respect to the preparation of the valuation lists, for the purpose, as part of his duties, of taking the minutes of their proceedings, but apart from merely recording such proceedings, he is not in any way concerned with their decisions and takes no part in either advising or otherwise therein.

Mr. Charles Ogden, on whose motion the rule *nisi* was obtained, is the owner and co-occupier of cinemas and a billiard hall, and, by affidavit, alleges that on Oct. 14, 1933, a draft valuation list of the rating area of Salford was made by the rating committee and on Nov. 10, 1933, the appellant objected thereto ; and apart from his objections on Feb. 12, 1933, he proposed on behalf of himself and a co-occupier an amendment to the valuation list in respect of the billiard hall. On Feb. 14, 1935, the Salford Council as the rating authority, gave notice to him of objection to his proposal to amend his valuation and, after considerable correspondence and discussion, on the matter coming before the assessment committee on Jan. 15, 1936, to hear the objection of the rating committee, the solicitor on behalf of Mr. Ogden (who had previously given notice of his intention on Jan. 2, 1936), objected to the acting clerk, Mr. Walter Brown, being present, and on the deputy town clerk, on behalf of the rating authority, stating there was no legal objection to Mr. Brown carrying out the duties of clerk to the assessment committee, the solicitor stated he had received a letter from the town clerk relating to the rating of cinemas and asked for an adjournment, to which the assessment committee finally agreed, and the proceedings still stand adjourned. The rule *nisi* was granted on Mar. 2, 1936.

It appears from the judgments in the court below and the nature of the argument therein that the case for Mr. Ogden was put on a very much wider basis in the court below than was the case before us. In the language of LORD HEWART, L.C.J., the point of substance then was :

> that it is complained that Mr. Brown has been appointed by the Salford Assessment Committee to be acting clerk of that committee notwithstanding the fact that he is an officer employed in the town clerk's department of the city council. The argument is based upon two grounds. It is said, first, that holding the position he does, this gentleman comes within statutory prohibitions. Secondly, it is said, however that may be, he is likely to give rise to a suspicion of bias if he occupies this two-fold appointment.

LORD HEWART, L.C.J., points out in his judgment that as regards the allegation of bias, the Rating and Valuation Act, 1925, which contains the machinery for rating, contemplates that two-thirds of the members of the rating committee are themselves to be members of the rating authority, and that by sect. 55 (1) it is made lawful for rating authorities and assessment committees to appoint such rating officers and other officers as they think fit. GODDARD, J., relies on the same sect. 55 (1) as giving to the assessment committee the widest possible powers of discretion, and were the matter to remain there I should content myself with saying that I agreed that this rule should be discharged for the reasons stated in the divisional court which I have quoted. But, it does appear that Mr. Rowe, for Mr. Ogden, in argument took also a narrower point ; that is to say, apart from the general consideration of the incompatability of the two offices, he contended that as the clerk to the assessment committee admittedly was present to advise the committee on procedure it was highly important that he should be impartial : that is to argue not merely from his double office, but also from the fact, as appears in Mr. Brown's affidavit, that he did in fact make a practice of advising the assessment comimttee on matters of procedure. DU PARCQ., J., does mention the fact that Mr. Brown, as part of his duties as committee clerk to the rating authority, had to attend for the purpose of taking minutes of their proceedings and would appear, therefore, to have dealt not only with the duplication of office of Mr. Brown, but also to some extent with his actual functions. In these circumstances, I think it is right to deal with the matter in this more limited manner, and I confine my observations, therefore, to the question whether the assessment committee should be prohibited from proceeding while Mr. Brown remains in attendance during the hearing of Mr. Ogden's case.

The matter thus circumscribed appears to me to raise problems other than those which were considered in the divisional court. In the first place, it is clear that the assessment committee constituted under the Rating and Valuation Act, 1925, s. 17, to hear objections made to the draft list under sect. 27, and finally to approve the list under sect. 28 of the same Act, is a body performing judicial or *quasi*-judicial functions. If authority be needed for this proposition, it is to be found in the case of *R.* v. *North Worcestershire Assessment Committee, Ex p. Hadley* (1), where LORD HEWART, L.C.J., at p. 406, said :

> It is in my opinion a body of persons having legal authority to determine questions affecting the rights of subjects, and, secondly, to the extent to which it has and is performing that duty, it has, I think, the duty to act judicially.

It follows, therefore, that the general principles affecting the possibility of bias, as exemplified in the case of justices of the peace, should be applied to an assessment committee and this, I think, irrespective of their particular constitution. As has so often been stated, it is not only necessary that justice should be done, but that it should manifestly appear that justice is done, and the complaint here made is in essence that Mr. Brown is not a person who ought to advise the body which performs the judicial functions before whom his employers, the rating authority, are litigants in that, being present to advise the assessment committee on procedure, and possibly upon other legal problems—though, as he states, he takes no part in their decisions—he has already received, hearing with that attention necessitated by his duty as clerk taking the minutes to the rating committee, information (including perhaps the opinions of valuers and of counsel or solicitors) knowledge from which he can hardly divorce himself when he advises the judicial body.

In this matter of what has been called legal bias, the authorities are all one way. In *R.* v. *Milledge* (2), Mr. Milledge and another, being members of a council who had carried a resolution, thereafter sat upon a bench of justices when the summons came on for hearing. COCKBURN, C.J., at p. 333, said that these justices " practically made an order in a case where they were prosecutors," and the writ of *certiorari* was consequently made absolute. In *R.* v. *Brakenridge* (3), the Queen's Bench objected to the clerk to the justices acting as solicitor for one of the parties on a prosecution before his own bench, and in *R.* v. *Sussex Justices, Ex p. McCarthy* (4), the deputy clerk to the justices was a member of a firm of solicitors who were acting for the plaintiff in an action against a certain McCarthy who was being prosecuted by the police for driving a motor car in a manner dangerous to the public. LORD HEWART, L.C.J., at p. 259, speaks of the long line of cases which shows that:

> it is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly seem to be done.

As is pointed out by AVORY, J., in *R.* v. *Essex Justices, Ex p. Perkins* (5) at p. 488, the reported words " be seen to be done " must be a misprint.

> The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered ; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. . . . His two-fold position was a manifest contradiction.

Finally, in *R.* v. *Essex Justices, Ex p. Perkins* (5), at a branch office a clerk to a solicitor conducted the solicitor's business. A lady consulted this clerk about the preparation of a separation deed, no mention being made of the matter to the solicitor except in a short reference in a weekly report from the clerk. The solicitor acted for the justices as their clerk when they made an order in favour of the wife, but the court held, notwithstanding the remoteness of the possibility of bias that the rule for *certiorari* must go. AVORY, J., at p. 488, points out that although the clerk to the justices stated that he did not know any fact at the time when the summons was heard, though his firm had acted for the applicant's wife :

> If we had to consider whether or not he was in fact biassed, that statement would be most material. We have here to determine, however, whether or not A there might appear to be a reasonable likelihood of his being biassed.

SWIFT, J., applies the test, at p. 490 :

> might a reasonable man suppose that there had been such an interference with the course of justice. I agree that he might.

B I apply these principles to the present case and ask myself whether Mr. Ogden might not reasonably suppose that justice would not be done by the assessment committee when the adviser to the committee might of necessity be acquainted with the preparation for the proceedings of his opponents, the rating committee. As I have stated, whatever advice C might have been given to the rating authority by their lawyers or their advisers, such as valuers, Mr. Brown performing his attentive duties of making a précis of their proceedings for his minutes may well have known. He seems to me to be of necessity put very much in the same position as a clerk to a solicitor of a litigant who takes no part in the consultations before trial, but attentively hears all, subsequently being called D upon to advise the justices in those proceedings. On the authorities which I have cited, I have little doubt what would be the result of the subsequent impeachment of the trial.

A case recently decided in the Court of Appeal, that of the *Middlesex County Valuation Committee* v. *West Middlesex Assessment Area Assess-* E *ment Committee* (6), fortifies the conclusion at which I have arrived. By the Rating and Valuation Act, 1925, s. 18, there is established in every county a committee of the county council called the county valuation committee which is entitled to take steps to promote uniformity F in the principles and practice of valuation and to assist rating authorities and assessment committees in the performance of their functions. Under sect. 16 there are constituted county assessment committees. In *R.* v. *Surrey County Assessment Committee, North-Eastern Area, Ex p. Woolworth (F.W.) & Co.* (7), it had been held that the county valuation G officer, if present while the assessment committee were considering their decision, would invalidate the proceedings of the assessment committee. AVORY, J., at p. 786, says :

> I cannot doubt that, if in a particular case any difference of opinion arose in the assessment committee, they would refer to the county valuation officer, if present, for his advice and assistance. The mere fact that he did not in the present case H tender any advice or assistance is clearly shown by the authorities not to be sufficient of itself to get rid of the disqualification.

In the *Middlesex* case (6) it was further held that while the valuation committee had a right to send its valuation officer or other reasonable person to attend the meetings of the assessment committee he could not properly participate in the decisions of the committee. **Lord Wright**, M.R., at p. 410, says:

> The decision which the assessment committee is arriving at is the decision of the committee itself. The county valuation committee has nothing whatever to do with the formulation of the decision, which is purely the function of the assessment committee itself as a judicial body, and it would be most improper, on general A
> principles of law, that extraneous persons, who may or may not have independent interests of their own, should be present at the formulation of that judicial decision.

Romer, L.J., at p. 412, adds:

> The presence of the valuation officer with the committee on such an occasion B
> would infringe one of the fundamental principles of law relating to the administration of justice in this country.

To these common law objections to the presence of Mr. Brown it is alternatively urged that there is a statutory disqualification in Sched. 4, part 3, cl. 4 of the Act, which provides that no person being either a C
party to the objection or a witness in the case or a valuer employed by the assessment committee shall be present while the assessment committee are considering their decision on an objection, and applying the maxim, *expressio unius est exclusio alterius*, this disqualification does not extend to the clerk of the rating authority. This matter was not D
considered by the divisional court in the *North East Surrey* case (7) nor in this court in the *Middlesex* case (6) in dealing with the case of the county valuation officer, and appears to me quite untenable. On this view, a relation of a member of the assessment committee who in the case of justices might well be deemed to be biassed, would not be E
disqualified from being present as not being specifically mentioned in Sched. 4, though he was indirectly interested in the result. It is clear to my mind that this provision is declaratory of certian disqualifications, but does nothing to affect persons otherwise disqualified at common law.

By cl. 12 of Sched. 1 it is provided that: F

> no person who is a member of any committee to which the duties of the rating authority . . . are delegated shall be qualified for appointment as a member of the assessment committee.

This is but another example of specific disqualification; that is to say, one who from being a member of the rating committee may know of G
particular matters is specifically prohibited from being a member of the assessment committee—though a member of a rating authority which has not delegated its powers to a committee apparently is not, and it would seem may sit upon the assessment committee. It appears that legislation has sometimes qualified the presence of persons whose presence H
would otherwise invalidate the proceedings of the tribunal and sometimes has added express disqualifications. As an example of the former in London, by the Local Government Act, 1929, s. 18 (*h*), the town clerk or in the city of London such other officer as the council may designate

or appoint shall be the clerk to the assessment committee. But this special provision qualifying a person who, in my view, might otherwise be disqualified to act is but one more example of specific invasion of the common law objection to bias which might otherwise obtain. On the A other hand, by the Licensing (Consolidation) Act, 1910, s. 49, it is provided in terms that a person being clerk of any licensing justices shall not by himself, partner or clerk act as solicitor or agent for any person, conduct or act in any application for or in respect of a justices' licence.

In conclusion, I would again emphasise that in allowing this appeal B I am dealing solely with the facts of this particular case. I agree with the divisional court that the mere duplication of offices in the rating and the assessment committees is no ground in itself for granting the rule for the reasons by them stated, with which I also agree. It is the particular fact that Mr. Brown, who must be taken for the reasons I have stated C to have knowledge of all the transactions of the rating authority at which he takes the minutes, advises the assessment committee of the same area on procedure, which makes it impossible for me to hold that this is a case where justice appears manifestly and undoubtedly to be done. The rule craved appears to me, in its present reference to the manner in which D the assessment committee acted upon this particular occasion in allowing Mr. Brown to remain in attendance during their meeting, not to be quite apt to produce the result required; the rule which will go is to prohibit the assessment committee of the city of Salford from allowing Mr. Walter Brown to remain in attendance on the assessment committee E of the said city during the hearing of the appellant's objections and proposal and during the subsequent deliberations thereof.

By r. 206 of the Crown Office Rules, R.S.C., Ord. 58 dealing with appeals is applied. Under this rule of the Court of Appeal has power to make such amendments as necessary in the justice of the case. The appeal is F allowed with costs.

GREENE, L.J.: It was not suggested before us that the mere fact that Mr. Brown is engaged in the administrative section of the town clerk's department raises a possibility, or an appearance of the possibility, of G a bias on his part in favour of the council as rating authority in connection with any proceedings before the assessment committee in which the rating authority is concerned as a party. The real objection was based upon the circumstance that, as committee clerk, it is his duty to be present at meetings of the rating committee of the council, and that H at such meetings he must, of necessity, hear any discussions which may take place as to proceedings, actual or contemplated, before the assessment committee in which the rating authority is concerned; and it was said that a person who has in his mind information so obtained, if he afterwards acts as clerk to the assessment committee in connection with such proceedings, may be affected, or appear to be affected, by bias in favour of the rating authority.

In my opinion, this objection lacks substance. Whether or not a person is disqualified from acting in a certain capacity upon the ground of real or apparent bias is, in my opinion, a question to be determined upon the facts of the particular case. In the present case, the body under whom Mr. Brown proposes to act is the assessment committee. By the Rating and Valuation Act, 1925, s. 17 (3), as amended by the Local Government Act, 1929, s. 15 (1), the assessment committee for a county borough is appointed by the council of the borough, that is to say, by the rating authority of the borough, and two-thirds of its members may be members of the council. In the present case, the assessment committee consists of 20 persons, of whom 13 are members of the council. As is usual, at any rate in large boroughs, the duties of the council in connection with the preparation of valuation lists are delegated to a rating committee of the council. By the Rating and Valuation Act, 1925, Sched. 1, r. 12, no member of the rating committee can be a member of the assessment committee.

Now, by the constitution of the assessment committee—a constitution considered by the legislature, if not desirable, at any rate not objectionable—a majority of its members consists of members of the very body namely, the rating authority, which will be vitally interested in the decisions of the committee. It is not disputed that these members as members of the city council are entitled to see the minutes of the council and its committees, including those of the rating committee itself. I am unable to see that a person who is present at the meetings of the rating committee for the purpose, and the purpose only, of taking these minutes, can be supposed to bring the reality of the appearance of bias to the discharge of his very limited duties as clerk to the assessment committee, constituted, as it is constituted, with a majority of members who are appointed by the rating authority itself, and are able to inform themselves, by inspection of the minutes, as to what takes place at meetings of the rating committee. Assessment committees are bodies with a special constitution of their own, and peculiar functions, and it is, I think, misleading to approach the present question as though it were one relating to a tribunal such as magistrates and their clerk.

An attempt was made to reinforce the argument by saying that discussions may take place, and documents (such as opinions of counsel) may be produced, in the rating committee, which would not necessarily be recorded in the minutes. I am not prepared to assume that any matter of substance dealt with by the rating committee will fail to appear in the minutes; and as for documents produced, even if it be improper for a member of the assessment committee who is also a member of the city council to inspect any of the council's documents which he pleases in the absence of any internal regulation of the council prohibiting him from doing so (a matter as to which I express no opinion), it is to be observed that the delegation of duties in connection with rating to a rating committee is only permissive ; and this, to my mind, shows that the legislature did not intend to treat the possession of knowledge obtained by a member of the assessment committee in his capacity as a member of the rating authority as in any way incapacitating him from sitting at the hearing and determination of appeals to which the rating authority is itself a party.

I repeat that, upon the facts of this case, the objection, in my opinion, lacks substance, and I would dismiss the appeal.

LUXMOORE, J. : It appears from the judgments in the divisional court that the objection to the resolutions was put on three grounds. The first ground was that the resolutions were *ultra vires* because they offended against certain statutory provisions specified in the order of Mar. 2, 1936, and the second ground was that, if Mr. Brown acted as clerk to the assessment committee, a suspicion of bias would be likely to arise, by reason of the fact that he was an officer employed in the town clerk's department. The third ground was that suspicion of bias would arise because Mr. Brown acted as committee clerk to the rating committee, and in that capacity was present at their meetings, his duty being to make minutes of what transpired. The first two grounds were dealt with by the divisional court, and, though the fact that Mr. Brown acted as committee clerk and attended the meetings of the rating committee is mentioned by DU PARCQ, J., in his judgment, the court did not in fact deal with this aspect of the case. It will be observed that the first and second grounds challenge the validity of both resolutions, on the broad ground that Mr. Brown is disqualified entirely from acting as clerk to the assessment committee, while the third ground challenges the validity of the resolution of Jan. 15, 1936, directing him to be present during the whole of the meeting of the assessment committee, which it is admitted means during the hearing of the appellant's objections and proposals and the subsequent deliberations of the assessment committee thereon. During the hearing before us, the attack on the resolutions on the first two grounds was abandoned, and the appeal was thereafter confined to the attack on the resolution of Jan. 15, 1936, on the third ground.

It seems to me that the case was not considered from this point of view in the divisional court. In considering it, it is necessary to bear in mind that it is the duty of the assessment committee constituted under the Rating and Valuation Act, 1925, s. 17, to hear, under sect. 27 of that Act, objections to the draft valuation list made by the rating authority, and, under sect. 28, finally to approve the list. On the hearing, among others entitled to appear and be heard are the objector and the rating authority. There can be no doubt that the assessment committee, in discharging the duties referred to, is performing judicial or *quasi*-judicial functions: see *R.* v. *North Worcestershire Assessment Committee, Ex p. Hadley* (1), per Lord Hewart, L.C.J., at p. 406. It seems to me that the general principles relating to the conduct of judicial proceedings apply equally to the proceedings and deliberations of an assessment committee when performing judicial or *quasi*-judicial functions as to the proceedings of any other body acting in a judicial or *quasi*-judicial capacity, unless there is some statutory relaxation of those principles in the case of an assessment committee. Included in those general principles are those relating to bias, or the possibility of bias, having regard to the actual constitution of the body whose duty it is to adjudicate. These principles are well settled. In cases where the bias alleged is other than pecuniary, the real likelihood of bias must be shown by the party objecting. It must necessarily be a question of degree whether the position of the person attacked is such as to give rise to a reasonable suspicion of bias in the mind of a reasonable person. Many cases in which persons have been held to be disqualified on this ground are to be found in the books—for example, an order of a bench of magistrates in proceedings by a lady against her husband was quashed because a clerk to the solicitor, who acted as clerk to the magistrates when the order was made, had acted for the lady in the preparation of a separation deed. See *R.* v. *Essex Justices, Ex p. Perkins* (5). In his judgment in that case, Avory, J., at p. 488, referred to what was said by Lord Hewart, L.C.J., in *R.* v. *Sussex Justices, Ex p. McCarthy* (4), at p. 259. The passage he referred to material to this case is this:

> A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. [I think that in that sentence the words "be seen" must be a misprint for the word "seem."] The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.

In the present case it appears that Mr. Brown has been in the employment of the council of the city of Salford for some 34 years, and that he has during that time been engaged in the town clerk's department. It is part of his duty to attend, as committee clerk, meetings of the rating committee, for the purpose of taking minutes of the procedings of that committee. It is to this committee that the council has delegated its duties with respect to the preparation of the valuation lists which the appellant is seeking to have amended or altered by the assessment committee. It is Mr. Brown's duty, as acting clerk to the assessment committee, among other things to be present at the hearing of the applications before the assessment committee with regard to the valuation list, and to advise the committee of the proper procedure thereat, and to make notes of the proceedings. In addition, he has to perform A certain administrative acts which are not material to be stated. Mr. Brown has stated in his affidavit that he takes no part in the decisions of the assessment committee, but it is not suggested that he takes no part in the discussions preliminary thereto. The appellant's application to the assessment committee is being opposed on behalf of the rating B committee, and it certainly does not appear to me unreasonable to suppose that the appellant might properly think that justice might not be done if a person, having the knowledge that Mr. Brown must necessarily have with regard to the rating committee discussions upon his objections and proposal in respect of the valuation lists, should be present C at the hearing by the assessment committee of those objections and that proposal, for the purpose of advising the assessment committee of any question of procedure arising during that hearing, or at the subsequent deliberations of the assessment committee thereon.

It is said that Mr. Brown's duties at the meetings of the rating committee D are merely ministerial, and that the objection on this ground cannot be substantial because a majority of the members of the assessment committee are members of the council, and are able to call for and inspect all the minutes of the council, including those of the rating committee, and also any opinions of counsel obtained on behalf of the E rating committee. So far as the minutes are concerned, they are of necessity only a *précis* of what has happened at the meetings, and do not disclose the reasons why the resolutions are arrived at. With regard to the opinions of counsel taken on behalf of the rating committee, it would, I think, be improper for a member of the assessment committee, F who is also a member of the council, to exercise his rights as a member of the council to obtain information from the inspection of opinions which would not be admissible at the hearing before the assessment committee, and would not be available to all its members. It seems to me that the adoption of such a course by one or more of the members G of the assessment committee might well vitiate the proceedings before it. It is further said that the constitution of the assessment committee, which by statute is authorised to include—and, in the present case, does include—members of the city council, so long as their number does not exceed two-thirds of the total number of members of the assessment H committee, renders unreasonable the appellant's objection to Mr. Brown's presence at the hearing of his objections and proposal by the assessment committee and its deliberations thereon. I am unable to accept that argument. In this connection, it is material to bear in mind that there is a statutory prohibition against any member of the rating committee being a member of the assessment committee. But, apart from this, I am of opinion that a statutory relaxation of the general principles with regard to the conduct of judicial or *quasi*-judicial proceedings in respect of some particular person or class of persons, owing to the necessary implication to be inferred from the provisions of some particular statutory enactment, can apply only to the person or class of persons mentioned in the enactment, and cannot be extended so as to include a person or class of persons in a different position. Slesser, L.J., whose judgment I have had the opportunity of reading, and with which I respectfully agree, has referred to a number of cases in which there has been statutory invasion of the common law objection on the ground of bias which might otherwise obtain, and I therefore refrain from further reference to those cases.

I respectfully agree that the fact that Mr. Brown has twofold duties to perform with regard to the rating committee and the assessment committee does not in itself afford a sufficient ground for prohibiting him from acting as clerk to the assessment committee, for the reasons stated by the divisional court, but I think, for the reasons I have endeavoured to state, that, on the particular facts of this case, the assessment committee should be prohibited from allowing Mr. Brown to remain in attendance on the assessment committee during the hearing of the appellant's objections and proposal and also during the subsequent deliberations thereon.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *Peacock & Goddard*, agents for *Percy H. Barker & Co.*, Manchester (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Brett & Co.*, Manchester (for the respondent committee.)

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

Re HAYTER, HAYTER *v.* TRANTER.

[Chancery Division (Clauson, J.), **February 11, 1937.**]

Will—Construction—"Everything I die possessed of"—Testator's share in father's residuary estate—Death of testator before father—Testator's children surviving father—Wills Act, 1837 (*c.* 26), *s.* 33.

A testator by his will gave "everything I die possessed of" to E. T. The testator's father by his will bequeathed half his residuary estate to the testator. The testator died in 1933, and his father died in 1934, leaving him surviving the testator's two children, with the result that, by virtue of the Wills Act, 1837, s. 33, the testator was to be presumed to have survived his father, so as to prevent the operation of the doctrine of lapse in respect of the half share of residue bequeathed to him by his father's will. Upon a summons to determine whether the words in the testator's will were sufficient to entitle E. T. to the testator's share in expectancy in his father's residuary estate, or whether the testator died intestate as far as that share was concerned:—

Held: the words of the gift to E. T. were a general residuary devise and included the property which he would receive under his father's will.

A **[EDITORIAL NOTE.** Although the point arises in connection with the doctrine of lapse, which perhaps gives it an added interest, the real question here is the meaning in a will of the words "Everything I die possessed of." It is decided that these words may be construed as a general residuary gift and they are therefore wide enough to include an interest which is a mere expectancy at the date of the testator's death.

As to Residuary Gifts, see HALSBURY, 1st Edn., Vol. 28, Wills, pp. 712, 713, para. 1333; and for Cases, see DIGEST, Vol. 44, pp. 742-746, Nos. 5990-6036.]

B Cases referred to:

(1) *Johnson* v. *Johnson* (1843), 3 Hare, 157; 44 Digest 505, *3238*.
(2) *Re Hensler, Jones* v. *Hensler* (1881), 19 Ch. D. 612; 44 Digest 505, *3240*.
(3) *Pearce* v. *Graham* (1863), 1 New Rep. 507; 40 Digest 511, *566*.

C Adjourned summons for the determination of the effect of the will of James Keith Dowden Hayter, dated Oct. 29, 1933, on the half share of the residuary estate of his father Albert Henry Hayter, bequeathed to him by the will of the said Albert Henry Hayter, dated Jan. 28, 1933. The facts are fully set out in the judgment.

D *Hon. Denys Buckley*, for the plaintiff, the widow of the testator: On the question whether this half share of residue was property over which the testator had testamentary power, see *Johnson* v. *Johnson* (1). Although this case may be relied upon for the proposition that one may extend the fiction of the child dying after the father to the construction of the child's own will, that would be carrying the fiction E further than sect. 33 permits, or is necessary, for carrying out the object with which the section was framed. See *Re Hensler, Jones* v. *Hensler* (2), and *Pearce* v. *Graham* (3). The effect of sect. 33 is to extend the life of James Hayter for the purpose only of giving effect to the gift in the will of Albert Hayter, and it does not extend it for the purposes of the F will of James Hayter. In order to construe James Hayter's will, you must look at the position when he died, and, at the date of his death, he was not possessed of the half share in his father's residuary estate.

Clauson, J.: But the words "everything I die possessed of" would be sufficient to dispose of property over which the testator had a general G testamentary power. See the Wills Act, 1837, s. 27.

Buckley: In that event, the person who is entitled to exercise the power has got some present right or power over the property. There is something which he can be said to be possessed of at his death. But in this case it is not possible to say that James Hayter was possessed of any H interest in his father's residuary estate at the date of his death. His father might have made a new will, giving the whole of his estate to other legatees. It would be stretching the meaning of the words "possessed of" far beyond their ordinary meaning to say that James Hayter was entitled, at his death, to property which was a mere expectancy, though, if he had not used the words "everything I die possessed of," there would be no doubt but that he intended to dispose of everything which he might have.

G. Evelyn Miles, for the defendant, the sole beneficiary under the testator's will: The interest in the father's estate was disposable of A by the son's will, and it was disposed of by the words the testator has used, which are very general words. Owing to the legal fiction extending the son's life, his legal death took place at a time when he was possessed of this share of his father's estate.

B

CLAUSON, J.: Mr. Albert Henry Hayter, whom I will call the father, made his will on Jan. 20, 1933. By his will he gave his property to his wife, who predeceased him, for life, and after her decease it was to be divided equally between his two sons, Edward and James. The son James died on Nov. 21, 1933, and the father died on Oct. 10, 1934. C The operation of the father's will as regards the half share of his residue which, according to its tenour, was left to James, was given effect to by the Wills Act, 1837, s. 33, which reads in this way:

> Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not D determinable at or before the death of such person shall die in the lifetime of the testator leaving issue [that was effective, James leaving issue], and any such issue of such person shall be living at the time of the death of the testator [such issue was living], such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

The gift by the father of half of his residue to James took effect, therefore, E as if James had died immediately after the father. It is reasonably clear, and the authorities support this view, that the effect of that event was that the half share of the father's residuary estate passed, on the father's death, to the son's executrix, and that it is to be treated as part of the son's estate. The son, as I have said, died on Nov. 21, F 1933, having made his will on Oct. 22, 1933, and his will is in these terms:

> This is the last will and testament of me James Keith Dowden Hayter of 22 Wood Street, Surbiton, Swindon, Wilts. I appoint Elsie Tranter of Lays Restaurant, Swindon, manageress, sole executrix of this my will and I give to the said Elsie Tranter everything that I die possessed of.

G

Of course, James Hayter was not, at the date of his death, possessed of the half share of his father's residuary estate. But I am clearly of opinion that that gift to Elsie Tranter of "everything that I die possessed of" is a general residuary gift, which covers everything which the testator could, according to law, dispose of by his will, including property H over which he had any general power of disposition. This last observation is justified by sect. 27 of the Wills Act. The effect of sect. 33 is plainly this, to put the half share of the father's residuary estate into the hands of the son's executrix as part of the son's estate, and it must, in my view, have this result, that the son must be treated as having, at the time of his death, power to dispose of that interest by will. Otherwise the absurd result would follow that the son would necessarily die intestate of the interest so taken under the father's will. In my view, accordingly, this interest is one over which the son had a general testamentary power of disposition, and, the words used by the son being as wide as they are, it seems to me that that interest goes to Elsie Tranter by reason of the terms of the will. It was ingeniously suggested that this was not a residuary gift, that it was, I suppose, a specific gift of all that the testator was, at the moment of his death, possessed of. Exactly what " everything I die possessed of " would mean, in those circumstances, I must confess I do not quite appreciate. But it is not necessary for me to decide that. It is sufficient for me to say that, in my judgment, these words do cover the property which the son got by virtue of his father's will. I therefore hold that, on the true construction of the will of James Keith Dowden Hayter, the half share and interest in the residuary estate of his father, to which, in the events which happened, he became entitled on the death of his father, passed, under the residuary gift in the son's will contained, to Elsie Tranter. Costs of all parties as between solicitor and client to come out of the estate.

Solicitors: *Taylor, Willcocks & Co.*, agents for *Kinneir, Jupp & Southan*, Swindon (for the plaintiff); *Matthew J. Jarvis* (for the defendant).

[*Reported by* C. M. Young, *Barrister-at-Law.*]

O'GORMAN *v.* PARAMOUNT FILM SERVICE, LTD.

[Chancery Division (Clauson, J.), **February 11, 1937.**]

Copyright—Play—Title—Film unconnected with play—Same title—Rights of owner of copyright in play.

The plaintiff was part author and composer of a play entitled *Irish and Proud of It*, and the owner of the copyright in the words and music of it. The play was first produced in 1914 and continued to be produced until 1924. It had never been published in book form. In 1936 the defendants produced a film which was given the name of *Irish and Proud of It.* It was admitted that the film had nothing to do with the plaintiff's play, and it was found as a fact that no ordinary member of the public would think that the film was an adaptation of the play. The plaintiff contended that his copyright gave him the exclusive right to present a film representation of his play, that in doing so he would naturally use the title of the play, that the production of a film under the same title by the defendants was an interference with his rights, and that unless his rights were protected he might suffer damage by reason of the defendants using that title :—

Held: as there was no immediate prospect of any film version of the plaintiff's play being produced in public, he was not entitled to an injunction restraining the defendants from continuing to produce their film under the title *Irish and Proud of It.*

[**EDITORIAL NOTE.** The title of a work is not the subject matter of copyright unless it is of such length as to constitute a literary composition of the author. Under the Copyright Act, 1911, the owner of the copyright in a work has the sole right to perform the work in public by means of a cinematograph film. It was sought in the present case to deduce from the above two rights, a right in an owner of the copyright in a play who had no immediate intention of producing a film based upon the play, to prevent the producer of a film not based upon the play using the title of the play. The court could find no such right, though it might be otherwise where the owner of the copyright in the play was producing a film based upon it. A

As to Rights in Title of a Work, see HALSBURY, Hailsham Edn., Vol. 7, p. 525, para. 826 ; and for Cases, see DIGEST, Vol. 13, pp. 177-179, Nos. 131-142.]

B

Cases referred to :

(1) *Samuelson* v. *Producers Distributing Co., Ltd.*, [1932] 1 Ch. 201 ; Digest Supp.

(2) *Levy* v. *Rutley* (1871), L.R. 6 C.P. 523 ; 13 Digest 184, *198*.

(3) *Dicks* v. *Yates* (1881), 18 Ch. D. 76 ; 13 Digest 178, *133*.

(4) *Mathieson* v. *Pitman (Sir Isaac) & Sons, Ltd.* (1930), 47 R.P.C. 541 ; Digest Supp.

(5) *Houghton* v. *Film Booking Offices, Ltd.* (1931), 48 R.P.C. 329 ; Digest Supp. C

Motion for an interlocutory injunction by the plaintiff in the action (treated by consent of the parties as the trial of the action). By his writ, as amended, the plaintiff claimed, *inter alia*, against Paramount Film Service, Ltd., and Crusade Films, Ltd., an injunction : D

> To restrain each of the defendants and their respective servants and agents from advertising, distributing or showing and from causing or permitting to be advertised, distributed or shown any cinematographic film under the name of *Irish and Proud of It* or under any other name calculated to induce persons reading such title to believe that such film is a film of or is connected with the musical play heretofore produced by the plaintiff under the title of *Irish and Proud of It*.

The plaintiff was part author and composer of the above-mentioned E play, and the owner of the copyright in the words and music of it. The play was first produced in Mar., 1914, and continued to be produced in music-halls in and around London, and in many towns of Great Britain and in the United States, until 1924. There had been no presentation of it since 1924, nor had it ever been published in book F form, but, during the two years preceding the present action, the plaintiff had submitted the play to film producers with a view to its being produced as a film, and was in fact in process of re-writing it for film work when he became ill in Jan., 1935, since when he had been confined to his bed. He still had the intention, however, of disposing G of the film rights, and had also had under consideration the question of staging a revival of it.

During 1936, the second defendant company produced a film, of which the first defendant company was the distributor, written by a Mrs. Donne Byrne, to which the name of *Irish and Proud of It* was H given. The second defendant company subsequently assigned its rights in the film to the first defendant company. It was admitted that the film had nothing whatever to do with the plaintiff's play, the title of it having been taken by chance from a popular song called "We're

Irish and proud of it, too," but the plaintiff alleged that members of the public, seeing the advertisements of the film under its present title, would conclude that it was a film version of his play, with the result that, if a film version of the play was subsequently produced,
A the chances of its success would be seriously prejudiced.

Ian Campbell, for the plaintiff: It is not suggested that there is anything in the film which is pirated from the play, but the defendants' use of the same title for their film as the plaintiff used for his play in effect amounts to a passing-off: *Samuelson* v. *Producers Distributing*
B *Co., Ltd.* (1).

Clauson, J.: See *Levy* v. *Rutley* (2). Has the plaintiff copyright in the title of his play?

Campbell: See Copinger on the Law of Copyright, 7th Edn., p. 77. An author's right in a title is akin to that in a trade mark. The
C plaintiff must satisfy the court that there is likely to be some deception if this title is used by the defendants. It is a case of *res ipsa loquitur,* that ordinary members of the theatre-going public, who go by the name of a play, and not of its author, will assume that this film is a version of the plaintiff's play.

D *Gerald Upjohn,* for the defendants: *Samuelson's* case (1) was quite different from this case, as it was a passing-off case in the usual sense of the term, and the court there came to the conclusion that there was an intentional passing off. In the present case, unless the court are satisfied that this name is so identified with the plaintiff's play that
E members of the public will inevitably conclude that this film is a film version of that play, the plaintiff cannot succeed. See *Dicks* v. *Yates* (3).

Clauson, J.: But the law has been changed since that case by the Copyright Act, 1911, which gives the author of a literary work the right to reproduce it in various forms. That is the right which is interfered
F with in this case.

Upjohn: But the plaintiff has no copyright in the title of his play, and that being so, the fact that the defendants' use of it may cause him some difficulty in producing his own film version gives him no right against the defendants. Unless he can show that the public will be
G misled, the plaintiff can succeed only by showing that the defendants have committed a common law fraud. See James, L.J., in *Dicks* v. *Yates* (3), at p. 90. See also *Mathieson* v. *Pitman (Sir Isaac) & Sons, Ltd.* (4), at p. 549, and *Houghton* v. *Film Booking Offices, Ltd.* (5), at p. 338. These cases establish that the plaintiff must establish, where a
H common title has been used, that such title has become identified in the minds of the public with the plaintiff, and the evidence in this case is totally insufficient to establish that.

Campbell, in reply: The fact that this title is a common one is not material. If a well known name becomes associated with a particular product—for instance, Morris and motor cars—it cannot be similarly used by anyone else. The plaintiff in law is solely entitled to revive his play, or to make a film version of it. He has considered exercising this right, and has taken certain steps towards doing so, but, if the defendants do what they threaten to do, that right will be seriously A damaged, as he will not be able to show his film under the name by which the play is well known.

Clauson, J.: [His Lordship held on the facts that, as the plaintiff's play ceased to be produced 13 years ago, no ordinary member of the public would think that the film was an adaptation of the play.] There B is, however, a further point with which I ought to deal. It is said, and I think it is said perfectly truly, that the plaintiff's copyrights give him the exclusive right to put before the public a film representation of his sketch, and in doing so he will naturally describe it under the title by which his sketch was called. It is suggested that the production of a C film under the same title by the defendants is an interference with his rights, and that it may be, unless his rights are in some way protected, that he will suffer damage by reason of the defendants using this title. The point is glanced at in certain observations in *Samuelson* v. *Producers Distributing Co., Ltd.* (1). The position seems to me to be this. If the D plaintiff, in the exercising of his right, did in fact produce a film version of his play under the title *Irish and Proud of It*, and if, while that was running, the defendants were to put their film before the public, the mere use of the title might give rise to some confusion. I think it may well be that, in those circumstances, the court would, on being satisfied E that, by advertisements, the plaintiff's film version of his play was effectively before the public, and there was accordingly some danger to him, grant an injunction restraining the defendants from continuing to produce their film under that title, without making it clear that their film was not a film version of the plaintiff's play—which, of course, F could be quite easily done. It may be that, in some circumstances—I think they would have to be rather special ones—the danger that the plaintiff's rights might be prejudiced in that way might be protected by a *quia timet* injunction. The position at present is this. There is no immediate prospect, as far as I can see from the evidence, of any film G version of the plaintiff's play being produced in public. On my finding of fact that at the present moment the public, on seeing that title, would not be led to suppose that the film produced under the title was a film representation of any play of the plaintiff, it seems to me impossible for the plaintiff to make out any case of *quia timet*, even on some such H ground as I have indicated.

Solicitors: *Vickress & Clare* (for the plaintiff); *Kerly, Sons & Karuth* (for the defendants).

[*Reported by* C. M. Young, *Barrister-at-Law.*]

Re WAXED PAPERS, LTD.

[Chancery Division (Bennett, J.), **March 1, 2, 1937.**]

Companies—Meetings—Proxy—Proxy-holder—Extent of rights of voting—Proxy to act at the meeting and to vote for scheme of arrangement—Amendment to defer consideration of scheme—Voting.

At a meeting to consider a scheme of arrangement a number of shareholders had appointed proxies "to act for me at the meeting . . . for the purpose of considering and, if thought fit, approving, with or without modification, the proposed scheme of arrangement . . . and at such meeting or at any adjournment thereof to vote for me and in my name" either for or against the scheme. At the meeting a shareholder moved an amendment to the resolution approving the scheme that the consideration of the scheme should be deferred until after the publication of the accounts for the year. Upon a show of hands there was a majority in favour of the amendment, but the chairman demanded a poll, and using the proxies given to him, secured a majority to defeat the amendment :—

Held : the form of proxy did not restrict the holder of the proxy, so far as voting was concerned, to voting either for or against the scheme of arrangement, and the chairman was entitled to use the proxies which he held to vote upon the amendment.

[**EDITORIAL NOTE.** Proxies are purely the creatures of the articles of association of a company since there is no common law right to vote in this way. The decision in this case is therefore purely the construction of the proxy, but, as it is in a fairly common form and the point taken is a general one, the case is of wide interest.

As to Proxies, see HALSBURY, Hailsham Edn., Vol. 5, pp. 364, 365, para. 592 ; and pp. 792, 793, para. 1362 ; and for Cases, see DIGEST, Vol. 9, pp. 575-577, Nos. 3825-3849.]

Petition asking the court to sanction a scheme of arrangement between the company and its preference and ordinary shareholders, under the Companies Act, 1929, s. 153.

The case is reported only upon the question whether certain proxies given in favour of a scheme of arrangement could be used to vote against an amendment to defer consideration of the scheme. The form of the proxy is set out in the judgment.

Lionel L. Cohen, K.C., and *P. J. Sykes* in support of the petition.

H. A. H. Christie, K.C., and *Sir Hugh Lucas Tooth* for those opposing the scheme.

Bennett, J. : The statutory majority in favour of the scheme at the meeting of preference shareholders was what one may fairly describe as overwhelming. At the meeting of ordinary shareholders the voting was 343 shareholders holding 66,188 shares, in favour of the scheme and 21 shareholders, holding 3,624 shares, against it. At both meetings a large number of shareholders was not present in person, but acted by proxy. The proxy was given to the chairman of the meeting, and it was approved when the convention of the meeting was ordered. I am dealing with the form of proxy given by a holder of preference shares, because nothing which was done at the meeting of ordinary shareholders has been called in question. The form of proxy is one in which the shareholder must insert his name and address and state the number of preference shares he holds, and it goes on:

> . . . appoint Arthur Winton Thorpe . . . and failing him, Laurence Edmund Tubbs . . . as my proxy to act for me at the meeting of 7½ per cent. cumulative preference shareholders of the company to be held at the Institute of Chartered Accountants . . . on Wednesday, Dec. 30, 1936, at 12 o'clock noon, for the purpose of considering and, if thought fit, approving, with or without modification, the proposed scheme of arrangement referred to in the notice convening the meeting, and at such meeting or at any adjournment thereof to vote for me and in my name— A B

and then the shareholder is given two alternatives "for" or "against,"

> the said scheme, either with or without modification, as my proxy may approve.

As I have said, the resolution approving the scheme was carried at the meeting by a very large majority. Some of the preference shareholders who were there objected and were dissatisfied with the result of the voting at the meeting. Some of the dissatisfied preference shareholders circularised their fellow preference shareholders and as a result of that circular, a considerable number of preference shareholders have been persuaded or induced to come here, to oppose the scheme which the court is being asked to sanction. The number is sufficient to have defeated the resolution, if they had gone to the meeting of preference shareholders and had voted against the scheme. The number of shares represented or held by those who are now instructing solicitor and counsel to oppose the scheme is 46,331 and the number of the shareholders is 363. In these circumstances and in view of that opposition, the court has to decide whether it shall give its sanction to the scheme or not. First of all, there was a technical objection taken at the meeting of the preference shareholders. Before the voting took place, one of the preference shareholders moved an amendment to the resolution: C D E F

> That the consideration of the board's scheme be deferred until the results of the trading for the year ending Dec. 31, 1936, can be laid before the shareholders.

The view of the meeting upon that resolution was first taken upon a show of hands and there was a majority in favour of it. Thereupon, the chairman of the meeting demanded a poll, and when the poll was taken he used proxies with the result that the resolution to defer the consideration of the scheme was defeated by a substantial majority. The technical question arises whether, as Mr. Cohen and the company say, the holder of a proxy is entitled to use it for the purpose of voting upon such a resolution, or whether he is to be restricted, as Mr. Christie has argued, to using the proxy only for the purpose of voting upon the scheme and for no other purpose. I am told that there is no authority upon this point at all. The position is to be determined by the language of the proxy itself which is an instrument by which a shareholder appoints G H an agent—the agent being the proxy-holder—to do two things: to act for the shareholder at the meeting and to vote at the meeting either for or against the particular scheme. There is nothing in the language of the instrument itself to restrict the holder of the proxy, so far as voting A is concerned, to voting either for or against the matter it was the purpose of the meeting to decide. It seems to me that the language enabled him to vote upon any incidental matter which might arise.

In my judgment, the objection to the chairman's use of the proxies to vote upon the motion to defer the consideration of the question fails. B The language of the proxy enables it to be used for voting upon such a resolution.

[His Lordship considered the scheme and, having heard the opposition, held that the decision come to at the meeting ought to prevail and that the scheme ought to be sanctioned.]

C Solicitors: *Leonard Tubbs & Co.* (in support of the petition); *Nordon & Co.* (for those opposing the scheme).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

D

DOMINE *v.* GRIMSDALL.

[KING'S BENCH DIVISION (Atkinson, J.), **January 25, 27, February 2, 17, 18, 24, 1937.**]

County Courts—Execution—High bailiff—Irregularity in levy—Liability— E *Remoteness of damage.*

The plaintiff recovered judgment against C. for a certain sum, the order providing for payment by instalments and providing that, in the case of default in payment of any instalment, execution might issue for the whole debt and costs remaining unpaid. C. defaulted in the payment of one instalment and the plaintiff immediately caused an F execution to be levied upon C.'s business premises. The bailiff, by an assistant, went into possession and seized certain furniture. C. paid the amount of an instalment into court and the amount then owing together with certain fees was £41 19*s*. 8*d*. C. urged the assistant bailiff not to remove the furniture, some of which C. had agreed to sell. L., a friend of C., said there was an application being made to the court to stay the execution and that he was ready to pay the money into court as a G deposit pending the application. The assistant bailiff accepted this arrangement and gave a receipt for the £41 19*s*. 8*d*., stated to be "received of C. on account of the debt, etc.," with a note at the foot "paid by L. as deposit pending application." Upon the application being made it was ordered that, upon C. undertaking to discharge the balance of the debt and costs by regular instalments and paying the costs of H the execution, the warrant of execution should be set aside and the £41 19*s*. 8*d*. returned to L., but in default of the payment by C. of the costs of the execution the £41 19*s*. 8*d*. was to remain in court to attend the further order of the court. The plaintiff appealed to the Court of Appeal. The appeal was allowed and a new trial ordered to determine whether L. paid the money as agent for C. or otherwise. The county court judge's order was held to be irregular, for, if L. paid as such agent,

D

the debt was discharged and the execution was at an end, and no further order could be made with regard to it, and if he was not an agent no order could be made in respect of the sum paid as a deposit, as L. was not a party to the action. Further, the county court judge had jurisdiction only to stay the execution and not to set it aside. L. was then joined as a party and at the new trial the judge held that the payment A by L. gave the plaintiff no right to the money, and, being satisfied that C. was unable to discharge the instalments due under the judgment, he ordered the execution to be suspended upon the terms of a new order for payment by instalments. The plaintiff was ordered to pay L.'s costs of that application and C.'s costs of both applications, such costs to be set off against the costs payable by C. to the plaintiff under the order of the Court of Appeal. C. failed to make any payment under the new B order for instalments and the plaintiff thereupon claimed from the bailiff, as damages suffered by reason of the assistant bailiff's breach of his duty to remove the furniture seized under the execution, the amount of his judgment debt, L.'s costs, C.'s costs, his own costs and the costs of the appeal:—

Held: (i) in view of the prospective sale of some of the furniture by C., there was a chance that in order to prevent the removal of the C furniture C. might have made a payment on account of the debt. The plaintiff had lost this chance of payment by the bailiff's action, and this chance ought in the circumstances to be valued at £15.

(ii) the bailiff was liable for the amount of the costs of the second hearing. The costs of the ineffective first hearing and of the appeal, for which the bailiff was not responsible, were too remote. D

[EDITORIAL NOTE. The proceedings upon the execution in this case were the subject of consideration in the Court of Appeal in *Domine* v. *M. Cohen & Co.* (1). It is no doubt difficult to avoid some sympathy with the execution debtor during the course of an execution, but at the same time it is necessary for bailiffs and their officers to bear in mind that, if they depart from their strict duty, they may render themselves liable in damages to the execution creditor. Such damages may E include the costs of proceedings taken in consequence of the irregularity in the execution.

As to Irregularity in Levy of Execution, see HALSBURY, Hailsham Edn., Vol. 8, pp. 159, 160, para. 244; and for Case, see DIGEST, Vol. 13, p. 454, No. 49. See also NEW COUNTY COURT PRACTICE, 1937, pp. 190-192.]

F

Cases referred to:

(1) *Domine* v. *M. Cohen & Co.*, [1936] 1 All E.R. 55; Digest Supp.
(2) *Watson* v. *White*, [1896] 2 Q.B. 9; 13 Digest 454, *49*.
(3) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; 36 Digest 29, *151*.
(4) *Latham* v. *Johnson (R.) & Nephew, Ltd.*, [1913] 1 K.B. 398; 17 Digest 117, *268*. G
(5) *Chaplin* v. *Hicks*, [1911] 2 K.B. 786; 17 Digest 92, *98*.
(6) *Hammond & Co.* v. *Bussey* (1887), 20 Q.B.D. 79; 17 Digest 110, *214*.
(7) *Hadley* v. *Baxendale* (1854), 9 Exch. 341; 17 Digest 93, *101*.
(8) *Liesbosch, Dredger* v. *Edison S.S.*, [1933] A.C. 449; Digest Supp.

Action for damages for breach of duty by the defendant in carrying H out an execution as high bailiff of Shoreditch County Court. The facts are fully set out in the judgment.

H. V. Lloyd-Jones for the plaintiff.

Valentine Holmes for the defendant.

ATKINSON, J.: On Mar. 15, 1935, the plaintiff recovered judgment for £53 8*s.* against Kate Cohen carrying on business as M. Cohen & Co. The order provided for payment by instalments of £2 a month, the first instalment to be paid on Apr. 15, 1935, and provided that, in case of default in payment of any instalment, execution might issue for the whole of the debt and costs then remaining unpaid. Cohen paid 6 instalments, but made default by non-payment of the instalment due on Oct. 15, 1935. The plaintiff thereupon, on Oct. 17, caused an execution to be levied upon the business premises of Cohen for £42 9*s.*, made up as to £41 8*s.* the balance of the judgment debt, and £1 1*s.* the poundage for issuing the warrant to the defendant, the high bailiff. On Oct. 22 the defendant, by an assistant bailiff named Palmer, went into possession, and seized certain furniture which was valued at £51. Cohen made and dealt in furniture. On the same date, Cohen paid £2 into court, reducing the amount owing to £40 9*s.*, making a total, with the appraisement and other fees amounting to £1 10*s.* 8*d.*, of £41 19*s.* 8*d.* On Oct. 22, Palmer made ready to remove the goods for deposit. Cohen and her son Israel, who managed the business, were very upset. They had agreed to sell a considerable part of the furniture to Lewis, Davis & Co., who were coming for it that afternoon with a cheque. Israel Cohen urged Palmer to leave the furniture. Palmer said he could not, he must remove it. Cohen told him of the sale of the furniture, and begged him to delay. At that moment Lewis came in, a friend of the Cohens, and a creditor. He joined in urging Palmer not to take the goods. Lewis said there was a customer for some of the goods, and if they were taken away the sale would be spoiled. Palmer said he had to take them away. Lewis expressed a willingness to help the Cohens. The Cohens' solicitor who was present, prompted perhaps by Mr. Lewis, said there was an application being made to the court to stay the execution, and that he was ready to pay the money into court as a deposit pending the application. Palmer agreed to this. He says that his view was that, if the execution was stayed, he would have to return the furniture, and, if it were not, then the money would be available for the plaintiff. The money was paid by Lewis, and Palmer gave the following receipt:

Received the 22nd day of October, 1935, of the above-mentioned defendant the sum of £41 19*s.* 8*d.*

On account of debt and costs	£40	9	0
Appraisement fees	1	5	6
Stamp and papers		5	2
	£41	19	8

Paid by MR. L. LEWIS, as
deposit pending application.

H. PALMER,
Bailiff.

Of course, the inconsistencies and contradictions in the document are transparent. The money is first described as being received of the defendant, and then it goes on, "On account of debt and costs, appraisement fees, stamp and papers", and then, in the corner, these words: "Paid by Mr. L. Lewis as deposit pending application." Later on I shall have to examine more precisely the evidence as to what was said. The only certainty is the form of the receipt, and the fact that Palmer gave up the furniture and came away. Palmer's conduct was wholly irregular. It was a plain breach of the statutory duties imposed on him. I need only refer, I think, to the County Courts Act, 1888, s. 154, which says in plain terms:

> and until such sale the goods shall be deposited by the bailiff in some fit place.

There was a positive duty imposed on him to keep the goods in a fit place until sale, and his conduct seems to me to have been a plain breach of that statutory duty.

On Oct. 24, the application referred to was made to and heard by the judge. No evidence was tendered or heard. Lewis was not before the court, and the order made was as follows:

> Upon the defendant undertaking to discharge the balance of the debt and costs . . . by regular instalments of £2 a month. . . . And upon the payment by the defendant to the registrar . . . of the sum of £2 11*s*. 8*d*. being the costs occasioned by the issue of the execution in this action it is ordered that the warrant of execution be set aside and that the sum of £41 19*s*. 8*d*. paid to the bailiff of this court by Mr. L. Lewis by way of a deposit pending the hearing of this application be repaid to him; but in default of the payment by the defendant of the sum of £2 11*s*. 8*d*. . . . then the sum of £41 19*s*. 8*d*. shall remain in court to attend the further order of the court.

The plaintiff was not satisfied with this order, first, because it set aside an execution, although the court had been asked only to stay it, and had power only to stay it; and, secondly, because the county court judge construed the words added to the receipt, but did not deal with the important question as to whether the money had been paid on behalf of the debtor. If it had been so paid, as the receipt began by saying, the payment would have discharged the debt, or, at any rate, it had a very material bearing upon the question of a stay. He therefore appealed: see *Domine* v. *M. Cohen & Co.* (1). The Court of Appeal in effect said this. The order setting aside the execution was technically wrong because there was power only to stay it, and, which is more important, it was impossible to say what the effect of this payment was unless evidence was heard. Slesser, L.J., at p. 59, after reading the receipt, said this:

> Speaking for myself, I am not quite able to understand what legal effect this may have. But at any rate we do not know whether in law the debt has been paid or not. If it has, there is no further subject matter for execution and no question of the exercise of discretion by the judge in staying execution can arise. If on the other hand it is not so paid and is still the property of Mr. Lewis then it appears that Mr. Lewis by this order has been, if not deprived of his property, at any rate kept out of the enjoyment of it to this extent, that if the defendant defaults in the payment of £2 11*s*. 8*d*. the sum of £41 19*s*. 8*d*. is to remain in court "to attend the further order of this court." The matter therefore will have at some time to

> be considered ; whether this debt has in fact already been paid and discharged by the payment of Mr. Lewis and if either party feel that, if they are so advised, they ought to bring Mr. Lewis before the court we give liberty to add Mr. Lewis as a party to these proceedings.

Scott, L. J., said, at p. 60 :

> I know of no statutory provision under which the county court could receive a payment from a third party for the purpose of guaranteeing an ultimate payment of the debt, which appears to be the view taken by the registrar of the note upon the receipt given for the payment in question. If there was no statutory power in the court to receive a payment tendered not as an absolute payment but only as a conditional payment by a third party acting in effect as guarantor then the whole thing was a nullity and the payment would have to be returned simply to Mr. Lewis and the documents of the court including the judge's order which is under appeal before us will have to be corrected simply because there has been a complete misapprehension as to what it was to do. The judge, of course, in considering the matter when it comes back to him would, I think, properly take into account an offer by a friend of the defendant to make payment of the judgment debt on his behalf. But the judge could not decide that that was sufficient ground for holding that the defendant was unable to pay, unless he was satisfied that the money was really put at the disposal of the defendant. If he was satisfied that that was the case then I think it would be very difficult to avoid the conclusion that it has been paid into court on behalf of the defendant and that the judgment debt was thereby discharged. These matters he will have to consider when the issue is before him.

The plaintiff was given the costs of the appeal. On Feb. 27, the debtor gave notice of an intention to apply for an order to add Lewis as a party. On Mar. 3, the second hearing before the county court judge took place, and a good deal of evidence was called. The result was that Lewis was admitted as a party. The next order was that the high bailiff was forthwith to repay to Lewis £41 19*s.* 8*d.*—it will be observed that that was to be repaid quite regardless of the question whether the execution was to be further stayed or not :

> And the judge being satisfied that the defendants were on Oct. 24, 1935, and are still unable to pay and discharge the instalments due under the judgment in this action—

the judge ordered that the execution :

> be suspended upon the terms following, namely : That the defendants shall discharge the balance of the debt and costs by instalments of £4 forthwith and £2 a month—

and it was ordered that the plaintiff should pay the costs of Lewis of this application, that the plaintiff should pay the defendants' costs of that application and of the application of Oct. 24, and that the costs payable by the plaintiff to the defendants under that order should be set off against the costs payable by the defendants to the plaintiff under the order of the Court of Appeal.

Now, I am told by counsel who was present that the judge said that this money had been paid in simply as a deposit relating to the application, whatever that might mean, and that it was something which gave the plaintiff no rights in any respect in any event. After hearing the

evidence, he adopted the view which had been expressed by Scott, L.J. Apparently the only way in which the payment could have helped the plaintiff was if it had been paid on behalf of Cohen. Scott, L.J., had pointed this out, and Palmer had no difficulty whatever in swearing before the county court judge that nothing was said by Lewis to make him think A
that the money was paid on behalf of Cohen. I was asked by both counsel to read the judge's note of the evidence, and this particular piece of evidence of Palmer was directly contrary to the evidence which he gave before me. Before me, he swore again and again that Lewis said that the money was being paid on behalf of Cohen. But, be that as it may, B
that was the judge's order, and it meant that the plaintiff had to pay Lewis's costs, which were taxed at £5 13*s.* 1*d.*, the debtor's costs amounting to £11 9*s.* 5*d.*, his own costs of Mar. 3 taxed at £8 15*s.* 6*d.*, and the costs of the appeal, which came to £31 12*s.* 9*d.* Needless to say, he never received a penny from Cohen, and the subsequent history of the matter C
was that there were further defaults in the instalments, and I gather that the Cohens disappeared. The plaintiff claims that the damage he suffered by reason of the defendant's breach of duty is, first, a loss of £40 9*s.*, his judgment debt, then the £5 13*s.* 1*d.* paid to Lewis, the £11 9*s.* 5*d.*, the costs he had been ordered to pay the debtor, his own costs D
of £8 15*s.* 6*d.*, and the costs of the appeal, £31 12*s.* 9*d.*

In my judgment, the defendant through Palmer was guilty of an actionable breach of duty. He was under a statutory obligation to deposit the goods in some fit place, or place them in the custody of a fit person, until sale. The sale could not take place until after the end of five days E
following the day on which the goods were taken. The County Court Rules, Ord. 25, contains complete directions for the conduct of a bailiff. He parted with the goods to the debtor for a payment not made on behalf of the debtor, not made on account of or in reduction of the debt, but in such circumstances that the plaintiff could derive no benefit whatever F
from it. Further, he did this in such a way, and gave a receipt in such a form, that the transaction was wholly unintelligible without the aid of oral evidence. I think that the plaintiff was a party aggrieved by reason of the defendant's neglect, connivance, or omission, within the meaning of the County Courts Act, 1924, s. 49. But a party aggrieved G
within the meaning of sect. 49 is not deprived by the section of his common law remedy; that was decided in *Watson* v. *White* (2).

Now, to what damages is the plaintiff entitled? Mr. Valentine Holmes says that no recoverable damage has been proved, that the defendant's conduct did not cause the loss of the debt, and that the other claims H
are too remote. Various and varying tests have been laid down, from time to time, for determining the limits of responsibility for wrongs. It is clear that the law cannot be regarded as settled, but there are, I think, two rules, at any rate, which are binding upon me. The first

I take from the judgment of SCRUTTON, L.J., in *Re Polemis & Furness, Withy & Co.* (3), at p. 577 :

> To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage ; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results.

In other words, the principle there laid down, and put quite concisely, I think, is this : Damage is recoverable if, without intervening causes, having no connection with the negligent act, it is dircetly traceable to the negligent act. The second rule is that damage is recoverable if, despite intervening independent causes, the person guilty of the original negligence ought reasonably to have anticipated such interventions, and to have foreseen that, if they occurred, the result would be that his negligence would lead to mischief. That I take from the judgment of HAMILTON, L.J., in *Latham* v. *Johnson* (*R.*) *& Nephew, Ltd.* (4), where he says, at p. 413, dealing with interventions :

> No doubt each intervener is a *causa sine qua non*, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause, if he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief—

and HAMILTON, L.J., proceeded to cite a number of authorities for that proposition.

Now, as to the claim for the loss of the damage, the £40, in my view, it is impossible to say that it has been proved that the plaintiff lost the amount of the judgment debt by reason of Palmer's conduct. What he lost was the chance of payment, or at any rate of some payment in reduction of the debt. I do not understand that Mr. Valentine Holmes denies that the loss of a chance may be something sounding in damages. The question was fully discussed in *Chaplin* v. *Hicks* (5), a case arising out of contract, not out of a wrong. The plaintiff in that case, through the breach of the rules relating to a beauty competition, lost the chance of having her photograph considered by the judges. The court had no difficulty in holding that this loss was within the contemplation of the parties as the probable direct outcome of the breach. The point most strenuously argued was that the damages were of such a nature as to be impossible of assessment. That point, of course, is the same whether the claim arises out of contract or out of tort. Dealing with that aspect of the case, VAUGHAN WILLIAMS, L.J., on p. 791, said :

> Then came the point that was more strenuously argued, that the damages were of such a nature as to be impossible of assessment. It was said that the plaintiff's chance of winning a prize turned on such a number of contingencies that it was impossible for any one, even after arriving at the conclusion that the plaintiff had lost her opportunity by the breach, to say that there was any assessable value of that loss.

It is said that in a case which involves so many contingencies it is impossible to say what was the plaintiff's pecuniary loss. I am unable to agree with that contention. I agree that the presence of all the contingencies upon which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision. The proposition is that, whenever the contingencies on which the result depends are numerous and difficult to deal with, it is impossible to recover any damages for the loss of the chance or opportunity of winning the prize. A

Then VAUGHAN WILLIAMS, L.J., points out that, in that case, there were fifty selected competitors, of whom the plaintiff was one, and so on. He proceeds at pp. 791, 792:

Then it is said that the questions which might arise in the minds of the judges are so numerous that it is impossible to say that the case is one in which it is possible to apply the doctrine of averages at all. I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable. I agree, however, that damages might be so unassessable that the doctrine of averages would be inapplicable because the necessary figures for working upon would not be forthcoming; there are several decisions, which I need not deal with, to that effect. I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages. B C

Then, dealing with where there is no market for goods, he says:

Sometimes, however, there is no market for the particular class of goods; but no one has ever suggested that, because there is no market, there are no damages. In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract. I do not wish to lay down any such rule as that a judge can in every case leave it to the jury to assess damages for a breach of contract. D

There is one other passage I should like to refer to in the judgment of FARWELL, L.J., at p. 798: E

Then comes the question as to the ascertainment of the amount. In actions for unliquidated damages this is ordinarily for the jury, and to my mind it is not correct to say that the present is an exceptional case. It is contended that the amount of the plaintiff's loss is so entirely a matter of pure chance as to be incapable of assessment. I cannot for this purpose draw any distinction between a chance and a probability. In the OXFORD ENGLISH DICTIONARY, one of the definitions of "chance" is "a possibility or probability of anything happening, as distinct from a certainty," and a citation is given from REID'S INTELLECTUAL POWERS, "The doctrine of chances is a branch of mathematics little more than a hundred years old." The two words "chance" and "probability" may be treated as being practically interchangeable, though it may be that the one is somewhat less definite than the other. The necessary ingredients of such an action are all present; the defendant has committed a breach of his contract, the damages claimed are a reasonable and probable consequence of that breach, and loss has accrued to the plaintiff at the time of action. It is obvious, of course, that the chance or probability may in a given case be so slender that a jury could not properly give more than nominal damages, say one shilling. F G

On p. 799, he says:

In my opinion the existence of a contingency, which is dependent on the volition of a third person, is not enough to justify us in saying that the damages are incapable of assessment. H

I think everything which I have quoted is relevant to the matter that I have to consider. Everyone knows that the pressure exerted by a threatened execution, and *a fortiori* by an execution actually levied, is

enormous. There must be countless executions which are paid out before sale as a result of this pressure. There is nothing wrong in such pressure. It is contemplated by the legislature ; the delay of five days is provided for by the rules. The pressure being exerted on the debtor on Oct. 22
A was indeed great. Removal of the furniture meant ruin ; it meant the immediate loss of profitable sales, and all the furniture which was seized was in fact (and I am taking this from the judge's note) sold to Lewis, Davis & Co. for £70—that is 40 per cent. higher than the trade value. It went to that company on Oct. 24, and was paid for on Friday,
B Oct. 25. Obviously, it would have been good business to pay Palmer enough in reduction of the debt to force Palmer to leave behind the furniture already agreed to be sold. He could not refuse a payment on account, and he would not then have been entitled to remove more furniture than enough to produce the unpaid balance. Even if the
C debtor had not enough (and she was not called before the county court judge or before me), Lewis had ; he was there, ready and willing to help ; but, when the ingenious suggestion of a deposit was made, and accepted by Palmer, of course there was no need for anything more ; all pressure was suddenly removed. Mr. Valentine Holmes has said
D there was no evidence that Lewis would have paid anything. I think the facts show that he might well have done so, and that in all probability he would have done so ; he was ready to risk, and did risk, £40. After all, the execution might not be stayed, conditions might be imposed which the debtor could not perform, and some consideration might,
E for all he knew, be given to the rights of the creditor. On the other hand, there would have been very little, if any, risk about a payment on account, enough to clear the furniture already agreed to be sold.

The evidence before the county court judge and before me was very strong about the sale. It was a business certainty—at any rate, they
F were so representing it to Palmer, and I have Palmer's evidence as to what took place. He says that, when he was being urged to leave the goods :

> I said, " All that does not prevent my removing the goods ; unless I get the money I must remove them." Lewis said, " I will pay the money on his behalf."
> G We went into the office. I received the money, and, whilst making out the receipt, Lewis, or the solicitor's clerk, asked me to endorse the receipt as a deposit. I saw no objection to that, and did it.

Later, he said he could not have got the money without the endorsement, but he had got the money before he wrote the receipt, and, having
H the money, he proceeded to write it out. The evidence of Lewis was, of course, much more cut and dried. He said that he saw Palmer ; he asked him to delay seizure as Cohen was expecting customers.

> Palmer said he would not, and he asked if I could help. I said, " I am not prepared to let Cohen have any more money."

It is interesting to compare that with what he said to the judge. There he said:

> I said I did not want to risk any more.

Now it is strengthened into: A

> I am not prepared to let Cohen have any more money—but I was prepared to pay the money into court . . .

Of course, naturally enough, Lewis wanted, and he still wants, to make it clear that he only paid as a deposit. I am quite satisfied that in the end that was so, that that is what was done, but I cannot believe B that all Palmer's earlier evidence is unfounded—this passage in which he said that Lewis said, " I will pay the money on his behalf "; it was put to him, and he said that was correct. Again and again he said that that is what took place, that there was this willingness expressed to pay the money on his behalf. C

> I went into the office and it was only when the receipt was being made out that these words were added.

I cannot think that all that has no foundation at all, and it indicates to me that there was on Lewis's part a readiness to help which, in the end, took a certain form, when they found Palmer was complaisant, D but which might have taken another form if Palmer had done his duty, a form which would have been of some benefit to the plaintiff.

Test it in this way. A sum of £25 was mentioned in the evidence as the price of some, at any rate, of the furniture which had been sold. Assuming that that was 40 per cent. on the appraisement value—I take 40 E per cent. from the £70 for which Cohen says the seized goods were in fact sold—there was surely a very good chance of a payment of £18 or £19, sufficient to take that furniture out of the levy, if, as they say, they knew that that very afternoon they were going to get £25 for it. I have to do the best I can, and the mere fact that it may be difficult, F according to the case to which I referred, does not relieve me, and would not relieve a jury of the duty of doing one's best with it. I propose to allow £15 for the loss of the chance of a payment on account by the course taken by Palmer. I think the chance was at least worth that. I can well understand the plaintiff thinking that it was worth a good deal G more, but I have not the slightest doubt myself that it was worth at least that.

Then comes the question of costs. The question of recovering costs incurred by reason of a breach of contract, I think, has been deemed settled since the case of *Hammond & Co.* v. *Bussey* (6). But, of course, H the case with which I have to deal now is not one of contract. The principle there was that costs incurred in defending an action, being in the circumstances reasonable—the costs incurred by the plaintiffs as defendants in such action—were recoverable, under the rule in *Hadley* v.

Baxendale (7), as being damages which might reasonably be supposed to have been in the contemplation of the parties, at the time when the contract was made, as the probable result of a breach of it. Applying the two rules which I have defined, which seem to me to be applicable to this case, I think that the plaintiff is entitled to those costs which were reasonably incurred as a direct result of Palmer's act, or which, despite intervening causes, ought reasonably to have been foreseen by Palmer. Palmer let the goods go when he had no right so to do. The only record of the transaction was a contradictory, unintelligible document, with regard to which the Court of Appeal has said that its effect could not be determined without evidence. The plaintiff was the one person entirely in the dark. I think Palmer ought to have contemplated that there would almost certainly be costs incurred in determining the effect of what he was doing. I think that the plaintiff was entitled to an investigation of what had happened, and that it was reasonable, and indeed necessary, to oppose and take part in a hearing before the county court judge. I think that the first hearing ought to have been on the lines of the second hearing ; the Court of Appeal has said so. Such a hearing would have been the direct result of the defendant's conduct. The defendant was not responsible for the first hearing not being effective ; there were intervening causes, which I do not think he could have anticipated. The defendant is not, in my view, responsible for the costs of the Court of Appeal, and there is the further difficulty about the appeal that the loss was due to the impecuniosity of the debtor, and that point is dealt with in *Liesbosch, Dredger* v. *Edison, S.S.* (8). But, be that as it may, I think the costs of the first hearing and of the appeal do not fall within the two principles which I have enunciated ; but I think that Palmer was responsible for the costs of an effective hearing before the county court judge, or, to be more strictly accurate, for the costs of an effective hearing in so far as those costs were attributable to the trial of the issue which his conduct had raised. In the result, that means that, in my opinion, he is entitled first to the £5 13*s.* 1*d.* As to the £11 9*s.* 5*d.*, as I understand it, those were the debtor's taxed costs of both hearings. I do not suppose anyone knows exactly how much of that was attributable to the first hearing. We have this guide, that the plaintiff's costs of the first hearing taxed, I think, at £2 13*s.* 11*d.*, and some part, of course, of the costs of the second hearing would be attributable to the simple issue whether the plaintiff was entitled to a stay at all ; but what strictly the plaintiff is entitled to, in my view, is that part of the £11 9*s.* 5*d.* which is attributable to the debtor's costs of the trial of this issue. Then I think he is entitled to part of his £8 15*s.* 6*d.* ; some small part of that would be attributable, doubtless, to the resisting of the application to stay the execution, again something quite small—obviously the great bulk of those costs would be due to the contesting of this particular issue. But the costs which I have indicated were costs reasonably paid or incurred by the plaintiff in litigation which was directly due to the negligent act of the defendant, and which ought reasonably to have been anticipated by the defendant.

It seems to me that it is much better for me to apportion these trifling figures without putting the parties to the expense of taxation; and what I propose to do is to give the plaintiff £5 13*s.* 1*d.*, £8 on account of the £11 9*s.* 5*d.*, and £6 on account of the £8 15*s.* 6*d.*, which means that in costs he will recover £19 13*s.* 1*d.*, and the £15 for the loss of his chance, making £34 13*s.* 1*d.* in all.

Solicitors: *J. E. Baring, Gomm & Co.* (for the plaintiff); *Treasury Solicitor* (for the defendant).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

R. *v.* KURASCH.

[COURT OF CRIMINAL APPEAL (Swift, Finlay, and Goddard, JJ.), **February 23, 1937.**]

Criminal Law—Evidence—Articles in possession of accused—Article found in accused's home in possession of servant—Admissibility.

The appellant was charged with larceny and conspiracy. The facts of the crime were that with two others the appellant obtained £2,300 from a person by a trick in the course of a transaction in which that person intended to purchase a number of Kruger sovereigns for that sum. At the trial evidence, to which objection was taken, was given that Kruger sovereigns had been found in the appellant's flat. In fact these sovereigns belonged to an employee of the appellant's wife. The recorder upheld the objection and in his summing up said more than once that the jury ought to exclude that evidence from their consideration. The jury convicted and the appellant appealed on the ground that the evidence ought not to have been admitted:—

HELD: the evidence that Kruger sovereigns were found in the appellant's flat was material and admissible and no objection could be taken to the fact that it was admitted.

[EDITORIAL NOTE. Evidence of articles found in the possession of the accused is generally admissible upon proof of some connection between the articles and the crime. In the present case the articles were in the home of the accused but in the possession of a servant of his wife. The evidence was, however, held to be admissible.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 9, p. 188, para. 270; and FOR CASES, see DIGEST, Vol. 14, pp. 401-403, Nos. 4216-4233.]

APPEAL against conviction and sentence by Hyman Kurasch, who was convicted together with two other men at Plymouth Quarter Sessions of larceny of £2,300 and conspiracy to steal, and was sentenced to concurrent terms of 5 years' penal servitude and 2 years imprisonment with hard labour. The facts are set out in the judgment of the court delivered by FINLAY, J.

Norman Birkett, K.C., and *Henry Elam* for the appellant.

J. Scott Henderson for the Crown.

A

FINLAY, J.: This appellant, Hyman Kurasch, and Jack Carter were indicted at the Plymouth quarter sessions before the learned recorder, together with a man called Benny Wildman, for larceny and conspiracy. Carter pleaded guilty, and he was sentenced by the recorder B to 3 years' penal servitude and 2 years' hard labour, to run concurrently, to commence at the expiration of a sentence of 4 years' penal servitude which had been imposed upon him at the Leeds Assizes on Nov. 16 last. Carter now appeals against that sentence. Kurasch, who had pleaded not guilty, was tried by the recorder and a jury, and he was C found guilty, and sentenced to 5 years' penal servitude and 2 years' hard labour to run concurrently. The other man, Wildman, who has not appealed, was sentenced to 18 months' and 6 months' hard labour to run concurrently.

A very brief narrative of the facts is all that is necessary. A singu- D larly ingenious theft was perpetrated from a Dr. Bradlaw at Plymouth, though I should think it to be more exact to say at Devonport, and all three prisoners were convicted of that theft. The bait was laid by one of the conspirators going to the doctor to consult him, and then producing to him a Kruger sovereign. Some discussion arose about it, and E it was suggested to the doctor that he might desire to purchase a number of these sovereigns. The doctor said he did not himself deal with such matters, but that he had a friend who might be interested. Thereupon an arrangement was made for a meeting, which took place on Sept. 30. Carter and Wildman went, and they went in a car with Kurasch. The F three went together, and Kurasch remained in the car. Carter and Wildman went into the doctor's house to interview him and his friend. Then a most ingenious conjuring trick was played. The two conspirators by an ingenious device suggested that the doctor should put away some of the Kruger sovereigns, and £2,300 which the doctor and his friend G were prepared to produce in respect of the purchase, and that those things should be locked away in a drawer in the doctor's room, while the two conspirators, as they said, were to go off and fetch the other Kruger sovereigns, which they said they had not brought with them. By a most ingenious conjuring trick, Carter succeeded in substituting H for the notes for £2,300 a number of pieces of paper. When the conspirators did not return, the doctor not unnaturally became alarmed, and opened the drawer, and opened the bag in which these things were, and, instead of the money being there, there was nothing there but pieces of paper.

It is perfectly clear from the evidence and it is not denied by Mr. Norman Birkett in his argument for Kurasch that there was ample evidence on which the jury might properly find the appellant guilty, and, in the view of this court, there was ample evidence, and the jury believed that evidence, and found Kurasch guilty. But Mr. Norman A Birkett rested the whole of his case on one submission. The matter arose in this way. Detective-Sergeant Hare, of the Metropolitan Police, was called by the prosecution, and was examined by Mr. Scott Henderson, who conducted the prosecution, and Mr. Elam from the very beginning of the evidence objected, and it is due to Mr. Elam to say that at least B the shorthand note makes this clear, that he so objected, and continually objected, but that evidence, in the view of this court, was entirely admissible. That evidence was to the effect that Detective-Sergeant Hare had been to a flat which was occupied by the appellant and his wife, and he said, unfortunately after the objection had been taken by C Mr. Elam, that he had found there nine Kruger sovereigns. It appears, and this court is perfectly willing to believe, that these Kruger sovereigns, which were found in this house, belonged to a girl who was employed by the appellant's wife at some club which she was running.

Now, the recorder apparently heard some argument, and upheld D Mr. Elam's objection, and disallowed the evidence. The recorder said more than once that the evidence ought to be excluded, and there is a passage, at the beginning of his summing up, warning the jury that the evidence ought to be omitted from their consideration. If this court had been of opinion that the submission of Mr. Norman Birkett was well- E founded, it would have had to consider carefully whether, having regard to the reiterated warning of the recorder, the jury had allowed themselves improperly to be influenced by the evidence which they had been told to disregard, but in truth, in the view of this court, that matter does not arise. It seems to this court that it is impossible to say that that F evidence was not material evidence, and not admissible. The principle is perfectly familiar. It is perfectly clear that, where a man is charged with housebreaking, it is clearly relevant to give evidence of housebreaking implements having been found in his house, whether they were found merely lying in the house, or in the possession of his wife, or in G a bag belonging to a servant of his wife. The mere discovery of these things is evidence against the prisoner. So, here, it is clear that the vital matter for consideration was the possession of Kruger sovereigns by the appellant, and it is impossible to say that the fact that the police officer, on going to the appellant's house, had found such sovereigns in the posses- H sion of a servant of his wife, was not relevant evidence. It is enough to say that it was relevant evidence. The appellant did not deny that his wife had some Kruger sovereigns, and, in the view of this court, the whole matter was really a mistake. The court appreciates the anxious care with which the recorder had excluded evidence, to which, in his view, any possible objection might be taken.

Now, when it is sought to upset this conviction, on the ground that this evidence was improperly admitted, in the sense that the witness
A gave an answer which was in fact inadmissible, the court is bound to say that the whole thing is founded on a mistake, and that this evidence was for the jury, and that this evidence was quite plainly admissible evidence. That was the only point on which Mr. Norman Birkett relied, and it is sufficient to say that that point, in the opinion of this court,
B quite clearly fails.

There was ample evidence on which the jury could properly convict the appellant, and it is impossible to say that the sentence was in any way excessive. Accordingly, this appeal fails, and it is dismissed.

Appeal dismissed.

C Solicitors: *J. Albert Davis & Co.* (for the appellant); *Director of Public Prosecutions* (for the Crown).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

D

BROWN v. NEW EMPRESS SALOONS, LTD.

[COURT OF APPEAL (Slesser and Greene, L.JJ., and Luxmoore, J.), **February 10, 1937.**]

E *Practice—Costs—Running-down action—Payment into court—Admission of negligence—Denial of liability—Costs after date of payment into court—Discretion of court—R.S.C., Ord. 22, r. 6—R.S.C., Ord. 65, r. 1.*

The plaintiff was a passenger in a motor coach owned by the defendant company, when the coach was involved in a collision in which the plaintiff was injured. The defendant company admitted the collision, but denied negligence and liability. Subsequently the company paid
F money into court admitting negligence, but still denying liability. At the trial the plaintiff recovered a less amount than had been paid in. The judge refused to give judgment for the defendant company for its costs from the date of payment in. In the note of his judgment the judge stated that he had taken into account both the fact that money had been paid into court and the amount of such payment as directed by R.S.C., Ord. 22, r. 6:—

G HELD: payment into court by a defendant of a sum which is greater than the amount recovered by the plaintiff does not give the defendant a conclusive right to costs after the date of such payment in, but such payment is a factor to be taken into account by the court in exercising its discretion as to costs. In the present case it was impossible to say that there were no grounds on which the judge had exercised his discretion.

H

[**EDITORIAL NOTE.** The new rule in 1933 brought the vexed question of costs in actions in which payment in has been made into line with the general discretion as to costs given to the judge under R.S.C., Ord. 65, r. 1. In all cases, costs are now in the discretion of the judge, but in cases where payment in has been made, he must take into account (*a*) the fact of payment in and (*b*) the amount paid in.

As to Costs where Payment In made: See HALSBURY, 1st Edn., Vol. 23, Practice, pp. 149, 150, para 265; and for Cases, see DIGEST, Practice, Nos. 4157-4162. See more particularly YEARLY SUPREME COURT PRACTICE, 1937, pp. 370, 371.]

Cases referred to: A

(1) *The Young Sid*, [1929] P. 190; Digest Supp.

(2) *Campbell (Donald) & Co.* v. *Pollak*, [1927] A.C. 732; Digest, Practice, 788, *3503*.

(3) *Ritter* v. *Godfrey*, [1920] 2 K.B. 47; Digest, Practice, 854, *4002*.

(4) *Powell* v. *Vickers, Sons & Maxim, Ltd.*, [1907] 1 K.B. 71; Digest, Practice, 490, *1668*. B

(5) *Williams* v. *Dorothea Slate Quarry Co., Ltd.* (1936), 29 B.W.C.C. 174; Digest Supp.

(6) *Davies* v. *Edinburgh Life Assurance Co.*, [1916] 2 K.B. 852; Digest, Practice, 491, *1681*.

(7) *Munday (J. R.), Ltd.* v. *London County Council*, [1916] 2 K.B. 331; Digest, Practice, 482, *1614*. C

(8) *Critchell* v. *London & South Western Rail. Co.*, [1907] 1 K.B. 860; Digest, Pleading, 87, *736*.

Appeal from a decision of Swift, J., dated Apr. 28, 1936. The facts are fully set out in the judgment.

W. H. Cartwright Sharp, K.C., and *A. F. Engelbach*, for the appellant D company: The judge had no grounds to refuse the defendant company its costs; his discretion must be exercised on some grounds. It is not English procedure to deprive of his costs a successful litigant who has not been guilty of any misconduct. [Counsel referred to *Campbell (Donald) & Co.* v. *Pollak* (2), *Ritter* v. *Godfrey* (3), *The Young Sid* (1), E and *Williams* v. *Dorothea Slate Quarry Co.* (5).]

S. E. Pocock, for the respondent: The defendant company was not wholly successful below. Negligence was admitted, but the payment in was made with a denial of liability. That was a question for the trial, and the plaintiff had to prove his case. If money is paid in with a denial F of liability, costs are in the discretion of the judge. [Counsel referred to *Powell* v. *Vickers, Sons & Maxim, Ltd.* (4) and *Davies* v. *Edinburgh Life Assurance Co.* (6).]

Cartwright Sharp, K.C., in reply: The judge cannot have exercised his discretion upon the ground that liability was not admitted, because G he did not know that. The case was fought on the basis that liability was admitted. In *Munday (J. R.), Ltd.* v. *London County Council* (7), it was held that to admit negligence and deny liability is a proper plea, contrary to the decision in *Critchell* v. *London & South Western Railway Co.* (8). If the money had been paid in with an admission of H liability, the same issues would have been tried. Where a mere denial of liability has not led to any extra costs, there is no ground for denying costs to a successful defendant. Otherwise the defence of payment in becomes a mere farce.

Slesser, L.J.: In this case, which was an action for negligence, damages were claimed by Mr. Frank Charles Joseph Brown against the New Empress Saloons, Ltd., Mr. Brown alleging that the defendant company, through one of its servants, had negligently driven a coach in which he was a passenger, and that he was seriously injured, particulars of special damage amounting to a considerable sum, and damages were claimed. In its defence, the defendant company admitted the collision, it denied that either of its servants was guilty of negligence, and it denied the several acts and matters complained of in the statement of claim. The defence was delivered on Feb. 20, 1936. On Mar. 17, 1936, the solicitors for the defendant company wrote to the solicitors for the plaintiff:

> Will you kindly take notice that the defendants withdraw the denial of negligence; negligence is admitted, but the denial of injuries and special damage in the defence is adhered to.

Two days after that, on Mar. 19, the defendant company served notice upon the plaintiff that it had paid into court £1,500, and said that that sum was enough to satisfy the plaintiff's claim, but denied liability therefor. The case came on for trial before Swift, J., and we have the benefit of his judgment, both a shorthand note taken at the time, and an additional note added to his notes of the evidence; and the judge does say in the second paragraph:

> It is not disputed that the defendants are liable to compensate the plaintiff for the injuries which he sustained in that accident. . . . The only question which I have to decide is what amount will compensate, so far as money can compensate, the plaintiff for the injury.

On that, the judge reviewed the medical evidence as to the state of this man's injuries, and came to the conclusion that the proper compensation for the injuries was £1,000, and gave judgment for that amount. It was then mentioned to the judge, by Mr. Engelbach, who was appearing for the defendant company, that there was a sum of £1,500 paid into court, and he asked for judgment for the defendant company with costs. Mr. Pocock then asked that he might have an order for costs up to the date of payment in, and there was no question about that. The judge then asked when the payment in was made and Mr. Pocock answered that it was on Mar. 19, of this year. The judge then asked when was the admission of liability made, and Mr. Pocock, somewhat unfortunately, answered that that was made on Mar. 17. This was, of course, accurate in one sense, but not completely accurate, since the admission which had been made on Mar. 17 was in terms limited to the withdrawal of the denial of negligence. At any rate, however that may be, the judge said:

> Then you are to have no costs since Mar. 19; you have the costs up to Mar. 19. At present, the only order which I have made is that there is to be judgment for the plaintiff for £1,000, with costs up to the date of payment in.

Then Mr. Engelbach asked for judgment for the defendant company for costs from the date of payment in, and then the judge made the order giving judgment for the defendant company from the date of payment in without costs, which is now the subject of this appeal. In the note the judge says that he thinks it right to say that, in exercising his A discretion under R.S.C., Ord. 65, r. 1:

> I took into account both the fact that money had been paid into court and the amount of such payment as directed by R.S.C., Ord. 22, r. 6, and I did not consider any absolutely immaterial matters which had absolutely no connection with the case. The rules I have mentioned and *The Young Sid* (1) were well within my mind and I acted upon them. My recollection is that when I said what I B proposed to do neither counsel made any objection or contested the matter further.

Mr. Cartwright Sharp has argued before us that the judge could not have exercised the discretion which he purported to exercise in giving judgment for the defendant company from payment in without costs, because there was no ground at all upon which he could exercise such a C discretion. He draws our attention to the fact that, in the House of Lords, in *Donald Campbell & Co.* v. *Pollak* (2), the principles laid down by LORD STERNDALE, M.R., in *Ritter* v. *Godfrey* (3), are approved actually in terms by some of their Lordships, and approved in principle by substantially the whole House of Lords. The particular passage which is D appoved is that on pp. 52, 53 of the report in *Ritter* v. *Godfrey* (3), to this effect:

> This was a case tried without a jury before the judge alone, and therefore in the absence of an order by him neither party is entitled to any costs. It therefore differs from a case tried before a jury, where there is a statutory right to costs if there be no order to the contrary. But there is such a settled practice of the courts E that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial, and this court cannot interfere with his discretion.

F

On the facts of this case, I have come to the conclusion that it is impossible to say that there was no ground upon which the judge could exercise his discretion, because it appears from the notice of payment in that the payment in of £1,500 was accompanied with a denial of liability, which was qualified to this extent only, that the denial of negligence G was withdrawn. There remained, therefore, other matters which might conceivably be in issue beyond the mere question of quantum of damage. One of the necessary allegations in the statement of claim had been that this accident had caused the injuries which the defendant sustained, and, indeed, under the denial of liability, everything was at large except the H matters expressly admitted. In those circumstances, it seems to me that the present position is that, once the judge was entitled to say that, on the issues which the defendant company had left open at the trial, it had failed, it was entirely a matter for him in his discretion to decide what he would do with the costs. Such a dissection of the questions appears in *Powell* v. *Vickers, Sons & Maxim, Ltd.* (4), at p. 75. Where, under the old practice, two distinct issues might be raised on a denial of liability, first, whether the defendant is under any liability to the plaintiff, and, secondly, whether the sum paid in is sufficient to cover the liability, if any, under the now existing rule the question of costs following on the result of the decision of those issues is left to the discretion of the judge, as provided in R.S.C., Ord. 22, r. 6 :

> The judge shall, in exercising his discretion as to costs, take into account both the fact that money has been paid into court and the amount of such payment.

I agree with the comment in the Annual Practice, p. 406 :

> The question whether liability is or is not denied when the payment in is made would still seem to be important.

For these reasons, I think the judge, having before him the question of liability, may himself have had regard directly to these matters, but, in any view, it makes it impossible for us to say that there were no grounds upon which he could exercise his discretion such as would be necessary for Mr. Cartwright Sharp to succeed, in order to bring himself within the principles laid down in *Campbell (Donald) & Co.* v. *Pollak* (2), and in *Ritter* v. *Godfrey* (3). For these reasons, not being satisfied that there was no ground upon which the judge could exercise his discretion, I think this appeal fails.

Greene, L.J. : I agree. The judge's discretion as to costs which is referred to in R.S.C., Ord. 22, r. 6, is the general discretion given in the widest language in R.S.C., Ord. 65, r. 1, which says :

> Subject to the provisions of the Act and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge.

The language, therefore, of r. 6 starts off upon the footing that the judge, in a case where money has been paid into court, as in a case where money has not been paid into court, has a general discretion as to costs ; but it provides this, that, in a case where money has been paid into court, that factor is one which the court is to take into account in exercising its discretion, both the fact that money has been paid into court and the amount of such payment. In other words, on the true construction of that rule, it appears to me to be reasonably plain that those matters, the fact of payment into court and the amount, are left as in no way conclusive, but merely as elements which the judge is to take into account. Mr. Cartwright Sharp's argument would really amount to this, that, where you find, in an action of this kind, payment into court with a denial of liability in the circumstances of this case, in some way it is incumbent upon the judge to make some particular order as to costs. I am quite unable to read r. 6 as producing any such result. It appears to me that you start off with this, that the judge has got the discretion as to costs. You then find certain factors have to be taken into account. If a judge had not taken those factors into account, obviously it could not be said that his discretion had been properly exercised as the rule requires. But in this case we know that the learned judge did take those factors A into account, because, in the note appended to his note of evidence, he himself says:

> I took into account both the fact that money had been paid into court and the amount of such payment as provided by Ord. 22, r. 6.

The learned judge therefore did what the rule said he was to do; he B took those matters into account, but he did not consider them to be sufficient to cause him to exercise the general discretion which he has as to costs in the way desired by Mr. Cartwright Sharp. I agree that, on the facts of this case, it is not possible for us to say that, in exercising that discretion, he omitted to take into account matters which he ought C to have taken into account, or that he exercised it on some improper ground, or with a complete absence of ground.

Luxmoore, J.: I agree, and have nothing to add.

Solicitors: *Stanley & Co.* (for the appellant company); *North & D Son* (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

GREAT WESTERN RAILWAY CO. *v.* UNITED KINGDOM E CHAMBER OF SHIPPING.

[Court of Appeal (Lord Wright, M.R., Romer and Scott, L.JJ.), **March 2, 3, 1937.**]

Carriers—Railways—Exceptional rates—Competition with coastwise shipping F *—Right of shippers to appear on application to Railway Rates Tribunal—Railways Act,* 1921 (*c.* 55), *s.* 37 (1).

The Great Western Ry. Co. applied to the Railway Rates Tribunal, under the Railways Act, 1921, s. 37 (1), for leave to grant certain exceptional rates more than 40 per cent. below standard, in order that its railway might compete with coastwise shipping. The Chamber of G Shipping of the United Kingdom gave notice of objection, on the ground that the new rates would divert traffic from ship to rail, and would adversely affect members of the Chamber whose vessels were employed in the coasting trade, and place coastal carriers at an undue and unfair disadvantage, and would, therefore, be undesirable in the national interest. The Chamber held a certificate from the Board of Trade that it represented persons likely to be affected by the decision. Counsel H for the railway company took a preliminary objection that the Chamber had no *locus standi* because it did not represent users of the railway, and also an objection that its grounds of objection were irrelevant:—

Held: it being assumed that the Chamber of Shipping had a right to appear upon this application, they could only object to the proposed exceptional rate by reason of its effect upon the revenue of the railway company and not upon the ground that the granting of such a rate would have a prejudicial effect upon a competing carrier.

Great Western Ry. Co. v. *Bristol Corpn.* (1928), 20 Ry. & Can. Tr. Cas. 22, *approved.*

[**EDITORIAL NOTE.** The Railways Act, 1921, provides for two inquiries: one
A under sect. 37, which is an inquiry preliminary to the granting of the exceptional rate, and upon which the Tribunal gives its consent to the rate; and another under sect. 39, repealed and replaced by the Road and Rail Traffic Act, 1933, s. 39, which is an inquiry after the rate has been in force. It is only at the latter inquiry that the competing interests can put forward the argument that the exceptional rate is competing unfairly with them. So far as has been at present decided, such parties
B may appear at the first inquiry, but the only subject that can be discussed at that stage is the effect of the rate upon the standard revenue of the railway company. It is realised that discussing the competitive effect after the rate has been in force for some time is locking the stable door after the horse has gone, but in this case the court is only concerned to construe the provisions of the Acts.

AS TO EXCEPTIONAL RATES, see HALSBURY, Hailsham Edn., Vol. 4, p. 87,
C para. 124; and FOR CASES, see DIGEST Supp., Carriers, Nos. 1323*a*-1323*g*.]

Case referred to:

(1) *Great Western Ry. Co.* v. *Bristol Corpn.* (1928), 20 Ry. & Can. Tr. Cas. 22.

APPEAL from a judgment of the Railway Rates Tribunal delivered by the President, W. BRUCE THOMAS, K.C., on July 24, 1936.

D The Great Western Ry. Co. applied to the tribunal, under the Railways Act, 1921, s. 37 (1), for leave to grant certain exceptional rates more than 40 per cent. below standard, in order that its railway might compete with coastwise shipping. The Chamber of Shipping of the United Kingdom gave notice of objection, on the ground that the new rates
E would divert traffic from ship to rail, and would adversely affect members of the Chamber whose vessels were employed in the coasting trade, and place coastal carriers at an undue and unfair disadvantage, and would, therefore, be undesirable in the national interest.

The Chamber held a certificate from the Board of Trade that it repre-
F sented persons likely to be affected by the decision. Counsel for the railway company took a preliminary objection that the Chamber had no *locus standi* because it did not represent users of the railway, and also an objection that its grounds of objection were irrelevant. He relied on *Great Western Ry. Co.* v. *Bristol Corpn.* (1). Counsel for the Chamber
G of Shipping based his right to appear and oppose the application on the Railways Act, 1921, s. 78 (3).

The President, delivering the judgment of the tribunal, said that it was bound by the *Bristol* case (1), which decided that the only relevant question was the effect of the new rate on the revenue of the railway,
H and that the prejudicial effect on a competing carrier was not relevant.

The Chamber of Shipping appealed.

Sir Robert Aske, K.C., and *J. Roland Adams* for the Chamber of Shipping.

Alfred Tylor and *F. H. Newark* for the respondent company.

Aske, K.C. : *Great Western Ry. Co.* v. *Bristol Corpn.* (1) was wrongly decided. The objectors held a certificate from the Board of Trade that they represented persons liable to be affected, and the tribunal should have permitted discussion of the questions which affected them. Instead of this, they entirely shut out all matters of consequence to the A objectors, and thereby gave a wrong interpretation to sect. 37 (1). The tribunal should take all pertinent matters into account. If local authorities or harbour authorities are not within the terms of sect. 38 (6), allowing traders, or bodies representative of traders, to apply for revision of rates, it is important that they should have rights under sect. 37 (1) B when the rate is being imposed, because otherwise they would have no chance to object. If the tribunal is confined, by sect. 37 (1), to the narrow question of the revenues of the company, there is no reason why a precisely similar determination should not be made with regard to sect. 38 (6). If, under that subsection, the tribunal ought to take into C account all relevant matters affecting the rate, they ought also to take into account all such matters under sect. 37 (1). If the decision of the tribunal is right, then traders, harbour and conservancy authorities, corporations, chambers of commerce and shipping, and the like, would be compelled to wait till the new low rate had been brought into force D and the traffic of their members had suffered, or disappeared altogether, before they could apply to the tribunal. The alteration of consignment arrangements by a corporation is very complicated, and, when once the railway has captured this traffic and is granting such a low rate as this, the ships will never regain it. The whole ground of the railway's application E is admittedly to compete with the coasting vessels. The considerations which guide the tribunal in allowing an exceptional rate under sect. 37 (1) should be identical with those which guide it in varying or cancelling an existing rate under sect. 38 (6).

Tylor : Traders are defined in Sched. 5 as persons who send or receive F traffic over the railway. The Chamber of Shipping is not within this definition, as it is merely interested as a competitor. The words " as aforesaid," in sect. 78 (3), prevent the inference being drawn that any authority or body that receives a certificate from the Board of Trade may, *ipso facto*, object to any application. These words were intended G to introduce a limitation similar to that laid down in subsect. (1), and do not confer upon an authority or body an absolute right to appear, but only a right to appear when it is allowed to appear by the other provisions of the Act. A certificate from the Board of Trade cannot clothe a party with a case to be heard which it does not, on a true con- H struction of the tribunal's jurisdiction, possess. A railway company would be improperly hampered if, whenever it desired to reduce its charges, it could be met with opposition from any of its competitors. By sect. 37 (1) of the Act, the tribunal's sole function is to guard the

standard revenue and maintain the contribution of standard revenue between the various classes of users. Sect. 39 provides for the review of competitive rates at the instance of competitors, but that is very different from allowing objections to a proposed rate. A competitor
A asking for review must show a *prima facie* case to the Minister. Parliament obviously intended to prevent railway companies from being harassed by competitors whenever they applied for an exceptional rate, and therefore severely restricted the right of objection.

Aske, K.C., in reply.

B

LORD WRIGHT, M.R.: This is an appeal by the Chamber of Shipping of the United Kingdom against a decision of the Railway Rates Tribunal. The ground of the appeal is, first the refusal of the Tribunal to amend the notice of objection (that point has not been pursued before this court
C and I need say no more about it), and, secondly, an order to secure that the court of the Railway Rates Tribunal shall be directed to hear the submission of the appellants, the objectors, and their notice of objection. The notice of objection which is here referred to, which is all I need deal with now, contains two paras., 4 and 5. It deals with the grain
D traffic between the Bristol Port Group and Truro, Penryn and Penzance. The railway company was submitting to the Railway Rates Tribunal for approval three proposed exceptional rates, which were respectively 57, 58 and 56 per cent. below the standard charges. The notice of objection is based upon the statement that the granting of the proposed
E exceptional rate would divert the traffic hitherto carried by coastal traders, who are represented by the Chamber of Shipping and are members of the Chamber of Shipping, to the railway. Para. 5 of the notice of objection complains that the proposed rates, which are 57, 58 and 56 per cent. respectively below standard, would "if granted place coastal
F carriers at an undue and unfair disadvantage." There is a further submission "that the proposed exceptional rates, if granted, would by reason of their prejudicial effect upon the interests of coastwise shipping be undesirable in the national interest." These objections raise the issue that the new proposed rates would interfere with the fair competi-
G tion of the vessels employed in the coasting trade, would drive them out of the traffic which at present they carry and would be undesirable in the national interest.

Now the only question relevant on this notice of appeal, and argued here, is the question involved in these two notices of objection. When
H the matter came before the Railway Rates Tribunal they had a further point before them, namely, whether the applicants, the Chamber of Shipping, had a right of audience in opposition to the application at all. The Chamber of Shipping had obtained a certificate from the Board of Trade under the appropriate section. The Tribunal held that the

Chamber of Shipping was entitled to appear in opposition, and that part of the decision is not in question here; it is accepted throughout that the Chamber of Shipping has a right to appear. The only question, therefore, is, what is the scope of the inquiry in which they are entitled to appear? On that the Tribunal, basing itself on an earlier decision of the Tribunal, has come to this conclusion:

> We further interpret that decision [*Great Western Ry. Co.* v. *Bristol Corpn.* (1)] as a finding that the only question which is relevant to the consideration of such an application for consent to grant an exceptional rate is the question of the effect which the rate if granted would have upon the revenue of the railway company concerned; that it is not a relevant ground of objection that the granting of such a rate would have a prejudicial effect upon some competing carrier.

That is the point raised by this appeal, and the only point which I intend to discuss here. Any other points which might have been raised, but were not, may be raised perhaps at some other time, and so far as my decision is concerned they are reserved.

The question turns on the true construction of the Railways Act, 1921, s. 37 (1). That subsection does not in terms directly dispose of the problem raised here, but it must be construed in its place and according to its context as a section appearing in the Railways Act, 1921. It provides that:

> On and after the appointed day an amalgamated company or a railway company to which a schedule of standard charges has been applied shall be at liberty to grant new exceptional rates in respect of the carriage of any merchandise, which rates shall within 14 days, or such longer period as the Minister may allow, be reported to the Minister; so, however, that a new exceptional rate so granted shall not, without the consent of the rates tribunal, be . . . more than forty per cent. below the standard rate chargeable.

I omit certain words which were repealed by the Road and Rail Traffic Act, 1933. In order to understand that it is necessary to turn very shortly to the general scope of the Act in respect of fixing charges by railway companies for the carriage of goods. The scheme of the Act is that at the outset there should be prepared by the companies and settled by the Tribunal a schedule of standard charges, which charges are to be applied by the company except in so far as what are called exceptional rates are granted and fixed. The adjustment of charges is defined by another section of the Act, sect. 58. They are to be fixed, in the first instance, with reference to certain considerations which are set out in sect. 58 at some length. The first matter to be considered is that the charges shall "so far as practicable yield, with efficient and economical working and management, an annual net revenue," referred to as the "standard revenue," which is to be arrived at by consideration of their earnings before the Act came into force. That, however, is not the only matter which is to be taken into account in fixing the standard charges. These are to be fixed partly with a view to encouraging economies in working and management expenses, and the Tribunal are also to have regard to what will be most likely to ensure the maximum development and extension in the public interest of the carriage by railway of merchandise and of passengers and their luggage; and they have also to take into account the charges in respect of any business carried on by the company auxiliary or subsidiary to its railways. These A are the main subject matters which the Tribunal are directed to have regard to in fixing the standard rates.

Now when it comes to the exceptional rates, as they are called—we are concerned here with new exceptional rates; there is a provision, which need not be discussed here, for continuing exceptional rates—we B find in sect. 37 a general liberty, in the words which I have read, in the company to grant or give to the public new exceptional rates, and so far, and speaking generally, these rates must be reported to the Minister within the period of 14 days, or longer, if necessary. There is, however, in one particular class of case, a special provision governing the bringing C into effect of new exceptional rates if those exceptional rates are more than 40 per cent. below the standard rate chargeable. Then they are not to be operative without the consent of the Rates Tribunal. The question here has reference to the granting of a consent of the Rates Tribunal in respect of all exceptional rates, all of which are more than D 40 per cent. below the standard rate chargeable. The Tribunal have held that though the applicants have a right of audience at the proceedings, which the Tribunal gave their consent to in this particular case, yet the scope of inquiry competent to the Tribunal at the date in question under sect. 37 (1) is limited to questions which I may com- E pendiously describe as such questions which arise under sect. 58, the section to which I have already referred; that is to say, in the main, but not exclusively, these are questions relevant to the effect of the new exceptional rate on the standard revenue. The Tribunal have rejected the contention of the applicants that the relevant inquiry must include F questions going far beyond those questions under the section to which I have already referred, questions relating to the effect of these new exceptional rates on the trade position of the members of the Chamber of Shipping, whose vessels are employed in the coastal trade. There is certainly no express provision in sect. 37 (1) giving the Chamber of G Shipping any such right to raise these questions. I agree with the Tribunal that on the fair construction of sect. 37 (1), looking at its purpose and its position in the whole Act, and in particular certain matters which I shall refer to next, the true construction is that these matters are not open on the hearing before the Tribunal under sect. 37 (1). They H go beyond the scope of the inquiry, I think, under that subsection. The inquiry is only necessary in order to obtain the consent of the Tribunal and the consent of the Tribunal which is sought is to the charging of an exceptional rate much less than the standard rate; in other words, primarily that is purely a question of the company's own finance, and to that question I think the matters which the Chamber of Shipping seek to raise are not relevant.

There are some other sections to which I shall have to refer, but I think it important at once to emphasise this point in considering sect. 39 of the Act of 1921, and still more sect. 39 of the Road and Rail Traffic A Act, 1933, which is the same section as sect. 39 of the Act of 1921 so far as it relates to shipping. Sect. 39 of the Act of 1921 is in these terms:

> If and whenever representations are made to the Minister by any body of persons who, in the opinion of the Board of Trade, are properly representative of the interests B of shipping or canals, that exceptional rates are being charged which are competitive with coastwise shipping or canals in such a manner as to be detrimental to the public interest, and which are inadequate having regard to the cost of affording the service or services in respect of which the rates are charged, the Minister shall (if satisfied that a *prima facie* case has been made out) refer the matter to the Rates Tribunal for review, and the Rates Tribunal may, after hearing all parties whose interests are affected, vary or cancel such rates or make such other C order as may seem to them expedient.

That section deals with exceptional rates which have actually been granted and which are in force; and Sir Robert Aske, with some cogency, has argued that an inquiry at that stage may be nugatory for all practical purposes, because it might be closing the door after the horse has gone; D in other words, the shipping concerns may have lost their trade which has been diverted, and which it is difficult to get back, by reason of the special attraction afforded by the newly applied exceptional rate. That may or may not be true, but it is not a matter which can determine the decision of this court. What I observe at once on sect. 39 is that the Act has thought fit to place special conditions, preliminary requirements, E before a body like the Chamber of Shipping is entitled to require the Tribunal to embark upon this complicated inquiry; and it is impossible to believe that that would have been done if, under sect. 37 (1), contrary to my opinion on the section itself, all these matters had been open to the Chamber of Shipping to bring into question and to have investigated F on the proceedings under that subsection.

The matter, however, becomes even clearer when reference is made to sect. 39 of the Act of 1933, which has repealed and replaced sect. 39 of the Act of 1921 so far as it relates to shipping. There you have the same preliminary conditions. There must be a representation to G the Board of Trade by a body which is in the opinion of the Board of Trade properly representative of the interests of the persons engaged in the coastwise shipping business, coastal carriers, that agreed charges or exceptional rates which are being made or charged by a railway company in competition with coastal carriers places them at an undue or unfair H disadvantage or—this is an alternative to part of the language of sect. 39 of the Act of 1921—

> are inadequate, having regard to the cost of affording the service or services in respect of which they are made or charged.

So you have a representation made to the Minister by a proper body and then the Minister is to consult with the Board of Trade on the matter and if it appears to him *prima facie* that the complaint is one which in the national interest should be investigated, he shall refer the matter A to the Tribunal for investigation and review. That is the procedure, carefully guarded and under the control of the Minister and of the Board of Trade, in whose judgment it rests whether the question shall come before the Tribunal at all. Then follow certain sections which I do not need to read, which show very clearly the very comprehensive nature B of the inquiry, the extent to which evidence is to be heard and various other matters carefully stated, which the Tribunal are to consider in dealing with these questions of competition.

There is still one other point to which I must refer, and that is sect. 39 (6), which provides for an addition to the Tribunal when it is C hearing a matter of this sort. There has to be constituted a panel called the—

> "shipping panel" consisting of six persons nominated by the President of the Board of Trade, after consultation with such persons as he may consider to be properly representative of the interests of coastal carriers, and for the purposes of the powers and duties of the Tribunal under this section there shall be added D to the Tribunal one additional member selected by the Minister from the shipping panel—

and various other consequential provisions. To my mind, as I have already said, if all those questions were open to be discussed under sect. 37 (1), without any conditions or any preliminary sanction of the E Minister or of the Board of Trade, it is incredible to me that this elaborate code of procedure should be inserted in the Act. That to my mind is conclusive in support of the opinion which I had arrived at on the language of sect. 37 (1) read with its context.

Reference has been made at some length to certain other provisions F of the Act, sect. 37 (2), and sect. 38. They all deal with proceedings which may be taken after an exceptional rate has been put into effect, and these sections are not limited to cases where the exceptional rate is more than 40 per cent. below the standard rate chargeable. These again permit an enlarged inquiry in the circumstances to which they G apply, but the cases in which that enlarged inquiry into the rates is permissible are carefully limited in all these sections. Under sect. 37 (2), where a new exceptional rate is granted:

> in such manner as prejudicially to affect any class of users of the railway not benefited by such rates, or so as to jeopardise the realisation of the standard revenue of such company—

H

then the Minister may refer the matter to the Rates Tribunal, and they are to give all parties interested an opportunity of being heard and either refuse the new standard charges or cancel or modify exceptional rates. Then there is a provision for a trader at any time applying to the Rates Tribunal to fix a new exceptional rate. Sect. 38 is a complicated section which again deals with exceptional rates. Subsect. (1) deals with increasing or cancelling an exceptional rate which has been fixed by the Rates Tribunal without first obtaining the sanction of the Tribunal. The company shall not be entitled to increase or cancel an exceptional rate which has been already fixed by the Railway Rates Tribunal without obtaining the sanction of that Tribunal, though the company, however, may reduce an exceptional rate so long as it is not reduced :

> so as to be more than 40 per cent. below the standard rate which would be chargeable, but any such reduction shall be reported to the Minister in like manner as if it were the grant of a new exceptional rate. (Subsect. 2.)

Then subsects. (3), (4) and (5) deal with cases where a company seeks to increase an exceptional rate which has not been fixed by the Railway Rates Tribunal, and certain notice is exacted and the traders interested are to have the right of objecting, and if an objection is raised the increase shall not have effect unless and until the Railway Rates Tribunal have given the company an opportunity of being heard, and so determine. Then there is a limit on the right of the trader to object ; he is not entitled to object unless the effect of the increase is to make the rate applicable to his traffic higher than the rate applicable thereto immediately before the reduction. Then there is another similar provision with reference to cancelling an exceptional rate. There again there must be 30 days' notice, and traders interested are to have the power to intervene and to be heard under certain conditions. I say of these provisions, as I have said of sect. 39, that I find it impossible to think that the legislature should have imposed these very stringent qualifications in all these cases if there were the full right of discussion and investigation in a case under sect. 37 (1), such as the appellants have contended for here.

I think the decision of the Tribunal was right, and should be affirmed, and the appeal dismissed with costs.

Romer, L.J. : The only question to be determined upon this appeal is whether the Rates Tribunal, when hearing an application by a railway company, granting an exceptional rate under the Railways Act, 1921, s. 37 (1), are bound to consider the question whether the exceptional rate will prejudice coastal carriers in the sense of placing them under a disadvantage, and will, therefore, be undesirable in the national interest. In my opinion, the Rates Tribunal are not bound to consider that matter when granting an exceptional rate. It must be remembered that the Rates Tribunal is the body which has fixed the standard charges and that the exceptional rate is a variation, or may be a variation when granted, of the standard charge ; and one would *prima facie* at any rate, expect that, when considering whether an exceptional rate should or should not be granted, the Tribunal would merely consider the question whether the exceptional rate would jeopardise the purposes which the tribunal had in mind when fixing the standard charge. Now the purposes which the Tribunal have to bear in mind when fixing the standard charge are set out in sect. 58 of the Act, and there are two purposes, and two purposes only, therein specified. The first purpose is that of securing to the railway company a net annual revenue such as is mentioned in the section. Of course, if the only object in view was to secure a certain revenue to the railway company, that object might be attained by having very high standard charges which would be paid by a comparatively small number of traders and passengers to the prejudice of a great number of people who might otherwise have been able to make use of the railway. And so sect. 58 says there is another purpose to be attained by fixing the standard charges, and that is to see that in the public interest the traffic on the railway is as much as possible. That is really the effect of sect. 58 (2). It is so important that I will read it :

> The Tribunal when fixing charges in pursuance of the provisions of this section shall have regard to the means which in their opinion are best calculated to ensure the maximum development and extension in the public interest of the carriage by railway of merchandise and of passengers and their luggage, and shall accordingly ascertain as far as may be practicable the effect which the existing charges, or any of them, have had upon the merchandise or passenger traffic to which they are applicable, and in particular whether the application of such charges has tended or, if continued, would be likely to tend towards causing the increase or diminution of the said traffic.

The two purposes are, first of all, realisation of what one may call the standard revenue, what in fact in the Act is called the standard revenue, and to ensure that persons using or desiring to use the railway shall not be prejudiced. As I have said, *prima facie*, I should have thought when an application is made to the Railway Tribunal to grant an exceptional rate those are the two things they would have to take into consideration, whether either of the two purposes for which they fixed the standard charges will be prejudiced by the exceptional rate. That those are the only matters to be taken into consideration by the Tribunal is, I think, made plain by sect. 37 (2). Under sect. 37 (1) the railway company itself may grant exceptional rates within certain limits. It must not reduce the standard rate by more than 40 per cent. without the consent of the Rates Tribunal, but up to a 40 per cent. reduction it can do it by itself. It is quite plain that a reduction by the company might jeopardise either one or both of the purposes for which the Rates Tribunal had fixed the standard charge, and so sect. 37 (2) provides this :

> If the Minister is of opinion that any company is granting new exceptional rates in such manner as prejudicially to affect any class of users of the railway [that is one purpose] not benefited by such rates, or [and here is the second purpose] so as to jeopardise the realisation of the standard revenue of such company, he

> may refer the matter to the Rates Tribunal, who may, after giving all parties interested an opportunity of being heard—

take such steps as are therein mentioned. It is to be observed that if the exceptional rate granted by the company prejudices coastal carriers the Minister has no power to intervene under this section and to refer A the matter to the Rates Tribunal. It would be absurd to suppose, if the railway company grants an exceptional rate 40 per cent. below the standard charge and prejudices the coastal carriers, that nothing can be done under this section, the matter cannot be referred to the Rates Tribunal; but if the company is proposing an exceptional rate of B 41 per cent. below the standard charge that the Rates Tribunal is to conduct a lengthy inquiry which Mr. Tylor has shown would be necessitated by having to investigate this question of prejudice to coastal carriers. In my opinion, sect. 37 (2) is a strong indication that what I should have thought was the *prima facie* effect of sect. 37 (1) is the C true effect of that subsection. The matter is placed, I think, beyond all question when one comes to consider sect. 39 of the Act. Under that section, as Lord Wright, M.R., has pointed out, there are special steps prescribed which are to be taken if it is suspected that an exceptional rate which has come into operation is prejudicial to the coastal carriers. D The matter is made even more clear, I think, when one sees that the legislature in 1933 considered that when such a question was raised it should not be referred to the Rates Tribunal as ordinarily constituted, but that there should be added to the Rates Tribunal for that special purpose an additional member, so that there would be four, and, conse- E quently, the chairman of the Tribunal should have a casting vote.

For these reasons, I think this appeal fails, and must be dismissed.

Scott, L.J.: I entirely agree with both judgments which have been delivered, and particularly with the point of view expressed by F Romer, L.J., as to the probability in the circumstances of the design of the Act of 1921, that no such roving commission as indicated in sect. 39 of that Act as it originally stood, and *a fortiori* in sect. 39 of the Act of 1933 as it now is, was contemplated on the inquiry of the Rates Tribunal under sect 37. The essence of the plan of the Railways Act G was to have a complete new classification of charges, charges including both rates on merchandise and fares for passengers and, *prima facie*, that all exceptional rates should be got rid of. That appears in the sections following after sect. 30 down to sect. 36. Sect. 36 says (1) "On and from the appointed day," that is when the new schedule of charges H to be settled by the Rates Tribunal were to come into effect,

> all exceptional rates in operation immediately before the appointed day on the railway . . . shall cease to operate—

with certain quite minor exceptions. Then you get sect. 37 providing that on those new schedules of standard charges, at any rate, very few new exceptional rates may be granted. But as ROMER, L.J., has pointed out so very clearly, those schedules were to be built up upon the hypothesis that the 1913 standard of revenue would be produced as the A result of the application of the charges there fixed; and, consequently, if new exceptional rates were to be allowed they would, so to speak, trespass upon the provision made by the schedules of standard charges and involve a risk of the standard rate of 1913 not being reached. We know, of course, that historically the standard of 1913 has not been B reached, but that does not affect the interpretation of the Act.

I agree entirely with what ROMER, L.J., has said as to the interpretation of sect. 37 (1), as it stands. I think the matters to be considered there must, *prima facie*, be the same matters as had to be considered in fixing the various charges contained in the new schedules. There has C been no indication in the Act down to that point of any new considerations. Then when you look at sect. 38 you find provisions for modification of exceptional rates and very limited powers of other parties being allowed to be heard on those modifications. Then when you come to sect. 39 as altered by the Act of 1933 you find the canal companies being given D certain powers of representation, but always on the footing that those powers are to be exercised solely in relation to the rates which are being charged. As I put it to counsel in argument, it seems to me that the principle upon which Parliament has proceeded has been that unless the shoe has been found to pinch by being worn, no representation shall E be heard to say that there is anything the matter with its design. It is only after the shoe pinches that those other parties who are feeling the pinch shall have a right to represent to the Tribunal that the national or public interest, as the case may be, has been prejudiced by reason of their prejudice. I, therefore, entirely agree that in sect. 37 (1) there F is no right given to the Railway Rates Tribunal to consider the matters in which the coastwise trade are interested. The argument for the appellants, to my mind, is an argument that it would have been good policy to give that power to the Rates Tribunal at that stage and, therefore, that we ought to find in the Tribunal a power that has come G from the silence of the legislature about it in sect. 37 (1). I think the only sound conclusion is that the silence of the legislature means that the power is not given, and I, therefore, agree that the appeal must be dismissed with costs.

Appeal dismissed with costs.

H Solicitors: *Cleminson & Hill* (for the appellants); *G. Cole Deacon* (for the respondent company).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

NEWTON *v.* LAMBTON HETTON & JOICEY COLLIERIES, LTD.

[Court of Appeal (Greer, Slesser and Greene, L.JJ.), **March 5, 8, 1937.**] A

Highways—Streets—Taking over by local authority—Description of street in order—Part of street outside the area of the authority included—Private Street Works Act, 1892 (*c.* 57), *s.* 20.

The defendant company made an application to the local authority under the Private Street Works Act, 1892, stating that it had made up a street to the satisfaction of the surveyor and asking that this street should be taken over by the authority as a street repairable by the inhabitants at large. The local authority thereupon made the order asked. The street was described both in the application and in the order as: 1-15 inclusive, Front Newbottle Row. It was proved in evidence that the street in question so far as Nos. 1-5 abutted upon it was not within the area of the local authority:— B

Held: as part of the street was outside the area of the local authority and the order referred to the whole street, the order was *ultra vires* and invalid. It was impossible to sever the application and the order and treat the order as valid so far as the street was within the area of the local authority. C

[EDITORIAL NOTE. By inadvertence the notices in respect of the adoption of a street under the Private Street Works Act, 1892, included a part of a street outside the area of the authority, the boundary line running across the street a short way from one end. Such notices are altogether invalid and cannot be treated as valid in respect of the part as to which they might properly be made. D

As to Adoption of Streets, see HALSBURY, Hailsham Edn., Vol. 16, pp. 291, 292, para. 362; and for Cases, see DIGEST, Vol. 26, pp. 539, 540, Nos. 2381-2388.] E

Cases referred to:

(1) *Bridgend Gas & Water Co.* v. *Dunraven* (1885), 31 Ch. D. 219; 11 Digest 165, *433*.

(2) *Hornsey Corpn.* v. *Birkbeck Freehold Land Society,* [1906] 1 K.B. 521; 26 Digest 522, *2229*.

(3) *Bishop Auckland Urban Council* v. *Alderson,* [1913] 2 K.B. 324; 26 Digest 542, *2404*. F

(4) *Fairman* v. *Perpetual Investment Building Society,* [1923] A.C. 74; 36 Digest 37, *213*.

(5) *Richards* v. *Kessick* (1888), 57 L.J. M.C. 48; 26 Digest 271, *102*.

(6) *Groves* v. *Western Mansions, Ltd.* (1916), 33 T.L.R. 76; 31 Digest 100, *2384*.

(7) *Dobson* v. *Horsley,* [1915] 1 K.B. 634; 31 Digest 100, *2383*. G

Appeal from a judgment of Lawrence, J., at the Durham Assizes, dated June 30, 1936. The facts of the case are fully set out in the judgments.

Martin Jukes, for the appellant: The onus was on the defendant company to prove where the boundary lay. The plaintiff proved that part of the road was outside the district of the Houghton-le-Spring urban district council; the notice was therefore invalid, because there was no jurisdiction to deal with the whole road. [Counsel referred to H

Hornsey Corpn. v. *Birkbeck Freehold Land Society* (2) and *Bishop Auckland Urban Council* v. *Alderson* (3).] If the notice was bad under the Private Street Works Act, 1892, s. 20, it cannot be transferred to sect. 19. Sect. 20 deals with a whole street only, and not with parts of a street. Moreover, A under sect. 19, the portion being dealt with must be defined. A portion of a street cannot be a street. The notice contains either no definition, or a wrong definition ; it is not good under either section, and so there was a case for the judge to try. [Counsel referred to *Fairman* v. *Perpetual Investment Building Society* (4) and *Bridgend Gas & Water Co.* v. *Dunraven* B (1).]

J. Charlesworth, for the respondent company : A road becomes a highway by dedication to the public, coupled by acceptance. When an owner writes to the local authority and asks for a road to be taken over, that amounts to dedication, and the road becomes a highway, C and so repairable by the inhabitants at large when it is taken over. A notice cannot extend to an area outside the district, but each local authority can deal with streets in its own area only. "Street" here means that portion of a street that is inside the district ; that is all that the authority can take over, and this is the only way in which the street D could be taken over at all. That is all the notice meant, and beyond that it is ineffective. It should be construed so as to be valid, rather than invalid. [Counsel referred to *Richards* v. *Kessick* (5).] This land was a street, within the meaning of the Private Street Works Act, and therefore the notice was good, so far as concerns the portion within the E council's jurisdiction. The judge was entitled to conclude that the boundary proved was not that of the urban district council. If this road was not a highway, the only duty owed would be that owed to a licensee. It is a road over which there is a private right of way to the occupier of No. 9 house. The only duty was not to create a trap. Here F the danger was open and obvious ; even if a new trial were ordered, the plaintiff could not succeed. [Counsel referred to *Fairman* v. *Perpetual Investment Building Society* (4), *Groves* v. *Western Mansions, Ltd.* (6), and *Dobson* v. *Horsley* (7).]

G GREER, L.J. : This is a very unfortunate case, in which the need for this appeal arises from the fact that the judge in the court below decided certain questions before the evidence was completed. The first ground upon which the judge decided against the plaintiff was that the place where the accident happened had become part of a street H taken over by the urban district authority. Undoubtedly, as appears from the opening, the accident happened just near No. 7, Newbottle Row, Houghton-le-Spring, and, if that be right, and if this street, to the extent of No. 7, had in fact been taken over, and had become legally vested—so far as streets do become legally vested—in the local authority, then the action against the defendant company, which was the owner of the soil until the street was taken over, would necessarily fail.

The judge had before him the document which followed an application by two letters, one dated Dec. 14, 1920, and the other dated Sept. 1, 1921. The letters were written by the respondent company, which was anxious to remove from itself the liability of keeping Newbottle Row in order and to put it upon the council. The first letter, dated Dec. 14, 1920, is this:

> The colliery company are busy improving the following streets belonging to them at Houghton-le-Spring by tar macadam, namely, Front Street, Back Lambton Street, Back Quarry Row, Newbottle Row and Newbottle Street.

When one looks at the map which was put in, and the photographs, it is quite clear that the colliery company was asking about the whole of Newbottle Row, and not about part of Newbottle Row. On Feb. 10, 1921, the council wrote:

> Adverting to your letter of Dec. 14, 1920, I am instructed to state that when the streets therein are finished to the satisfaction of the surveyor, the council will be prepared to take them over.

On Sept. 1, 1921, the company wrote to the council, asking it to take the street over, in these words:

> The following streets have now been completed in accordance with the requirements of your surveyor, and we shall be glad therefore if your council will arrange formally to take them over in accordance with your letter of Feb. 10, 1921.

Included in the application were Front Street, Newbottle Row, and Back Street, Newbottle Row. In accordance with that letter, notice was given by the council in this form:

> Whereas the said streets known as . . . 1 to 15 (inclusive) Front Newbottle Row, 1 to 15 (inclusive) Back Newbottle Row [no question arose in regard to Back Newbottle Row], and whereas the greater part in value of the owners of the houses and land in such streets have made application in writing dated Sept. 1, 1921, requesting us to declare the said streets to be highways repairable by the inhabitants at large, now, therefore, we, the urban district council of Houghton-le-Spring, being the sanitary authority for the above-named district, in compliance with such application do hereby declare the said streets to be highways repairable by the inhabitants at large.

When the judge's attention was called to this notice, having regard to the opening, he felt he was in a position to decide the point, which, if he decided it in one way, disposed of the action. He therefore directed his mind to that question, and decided that the notice was a valid notice under the Private Street Works Act, 1892, s. 19, and he also referred to sect. 20, although I think his preference was given to sect. 19. Now, it is not contended by Mr. Charlesworth, for the respondent company, that sect. 19 can be relied upon as having come into operation with regard to Newbottle Row. He says that it is the Private Street Works Act, 1892, s. 20, that applied in this case, not sect. 19. Sect. 20 reads in this way:

> If any street is now or shall hereafter be sewered, levelled, paved, metalled,

> flagged, channelled, and made good (all such works being done to the satisfaction of the urban authority), then, on the application in writing of the greater part in value of the owners of the houses and land in such street, the urban authority shall, within three months from the time of such application, by notice put up in such street, declare the same to be a highway repairable by the inhabitants at large.

A Now, I can read the notice which was put up on the street in only one way ; I read it as meaning that the whole of the street which is known as Newbottle Row, from No. 1 to No. 15, is a highway repairable by the inhabitants at large, and that, after such notice, it has become a highway. There was evidence before the judge which I think was B accepted by both sides as showing that there was a portion of the road, at any rate, that was outside the district of the urban district council, and, that being the case, it seems to me impossible to say that the notice applying to a road, of which part was within the jurisdiction of the authority and part outside the jurisdiction, could be a valid notice, C which would change the status of Newbottle Row. For this reason I think the judge was not entitled to find that this street, at the place where the accident happened, had passed into the possession of the urban district council. I think he was wrong in law in so deciding it.

D SLESSER, L.J. : I am of the same opinion. In my view, it is not possible, having regard to the evidence which has already been given in this case, to say that this road or street, Newbottle Row, has been taken over by the local authority so as to become a highway repairable by the inhabitants at large. In other words, in my opinion, it is not E possible to apply the Private Street Works Act, 1892, s. 20, to this case. The reason for that conclusion depends upon the fact that the evidence goes to show that a part of the street purported to be taken over is outside the boundary of the local authority presuming to act by their order. I think that the evidence in this case was all one way, and it was given F by the clerk to the urban district council, in the first place, who says that he knows that part of Newbottle Row is in, and part out of, the urban district council, and that the major part of the road is within the urban district council area. That view agrees with the letter which he has written to the defendant company to the same effect. It is G corroborated by the evidence of the surveyor, Mr. Hunter, who gave evidence as to the boundary stone between the rural district council and the urban district council area, and he says that the boundary follows that of the church authorities in 1838, which shows the northern boundary of the urban district council. This can well be understood H when it is remembered that the rural district council boundary, unless the boundary has been subsequently altered, is co-terminous with the union of parishes, which would, in its turn, have been situated within the ecclesiastical parishes, and so appeared, as stated in Mr. Hunter's evidence, in the church map of 1838. I am unable to see why, in the face of all that evidence, the learned judge has not been satisfied that, in the absence of evidence to the contrary, the boundary has not been proved. The boundary shown upon the map which was before the learned judge indicates, in regard to Nos. 1, 2, 3, and 4, Newbottle Row, although the boundary is co-terminous with their frontage, that the street abutting on those four houses is outside the area of the Houghton-le-Spring urban district council, and so, apparently, in part, would appear to be the street abutting No. 5 and No. 6.

Now, the Private Street Works Act, 1892, s. 20, contemplates an application in writing by the owners of the houses and lands in the street. It so happens that, in this case, the colliery company owns all the houses in the street, but its application in writing, which is referred to in the notice which was ultimately purported to be made under sect. 20, is clearly an application covering the whole street. It says, among other things: "Front Newbottle Row," and that would include Nos. 1, 2, 3, 4, 5 and 6, of which, as I have said, the ownership of the street was partly outside the area of the local authority. In other words, although it happens in this case that the owner was the same owner, both within and without the local authority, yet the application was made in relation to certain houses and streets, and land in the streets, by persons who were not competent, in relation to those houses and lands outside the boundary, to make the application at all. Then, it is next necessary to consider whether the greater part in value of the owners of the street has made the application. In this case, again, that particular difficulty would not arise, because they were all in that same ownership, but, had they been in different ownership, the confusion which might arise, and the impropriety of going on the property when not the owners but the local authority were the owners of the land, would show, to my mind, that it is not possible to sever this notice and treat it as part good and part bad, when the applicant company is in part persons not entitled to apply The standard which would be applied, on the assumption that it was an applicant, in seeing whether it was the greater part in value, might, in an ordinary case, lead to an entirely improper result.

In my view, the conditions in the section are imperative, and not directive. It is necessary, where there is a change in the local status by application, that the conditions laid down in the section should be construed, and it is the general principle that the formalities prescribed by the statutes within the Companies Acts are to be treated generally as imperative. As was stated by CHITTY, J., in *Bridgend Gas & Water Co.* v. *Dunraven* (1), this was a case of an alleged failure formally to comply with a declaration in writing to be annexed to the valuation and subscribed by the surveyors, in order that the Land Clauses Consolidation Act, 1895, s. 9, might be employed, and it was said that the requirements of the section had been observed in substance, if not in bulk, and Chitty, J., at p. 221, says:

> Passing by the point whether the surveyors were duly nominated in writing under sect. 9, there is no pretence for saying that a declaration in writing was subscribed by the surveyors and annexed to the valuation. Such a declaration is required by the Act, and its absence is fatal to the company's case.

So here I think the fact that the person who was not entitled to apply had applied makes this application under sect. 20 an invalid application, and, in my view, therefore, the notice which was put up, and under which the urban district council, in compliance with the application, declared the said streets to be highways repairable by the inhabitants at large, was bad.

Some time was spent in arguing that the street must be taken to be the street within the area of the local authority. I think that is right. It seems to me that it complies with the definition of a street in sect. 4 of the 1892 Act, applying the Public Health Act, 1875, s. 150, but that does not in any way absolve the respondent company here. Assuming that Newbottle Street is that part of the street which is within its boundary, and the only part which can be covered by the order, it follows, from that very fact, that it has received applications from owners outside that area, and has purported to make an order which goes beyond the extent of its area.

Greene, L.J.: I agree. The only matter upon which I wish to add a few words of my own is the construction of the Private Street Works Act, 1892, s. 20. I am not, as at present advised, prepared to accept the proposition that it is not competent for the authority, under that section, to give a valid notice with regard to that part of a street which is within its area. It appears to me that if a street, or what one would call a street within the definition clause, runs through two areas, or possibly more, each local authority, *prima facie*, would be able, under sect. 20, to deal with that portion within its area; but it is to be observed that it may very well be that in some cases, owing to the peculiar nature of the boundary, it may be impossible to do it, for the reason that the machinery indicated in sect. 20 may not work. Whether or not any such point would arise depends on the particular case. All I am saying for the moment is that I do not accept the general proposition that it is not possible to take over that part of a street which lies within the area of the local authority under this section. That, however, is not sufficient for the present respondent company. In order to succeed upon this point the appellant must satisfy us that the notice was *ultra vires*.

Under the section, there are three things to be done before the results which the section refers to will happen. The first one is that the street must be in a certain physical condition. The second one is that there must be an application in writing by the greater part in value of the owners of the houses and lands in the street. The third one is the affixing of an appropriate notice by the local authorities. There is, of course, a fourth step which is implied, and that is the passing of the necessary resolution by the local authorities authorising the putting A up of the notice. It must be observed that a local authority, in a case where this section applies, is not given any option. Once the first two conditions are fulfilled, it is incumbent upon the local authority to take the step which I have mentioned as the third thing to be done.

If the application which has been made to the local authority is not B of the character contemplated by the section, it appears to me that, if it subsequently purports to issue a notice, that notice will be invalid. When the application in the present case is considered, it proves to be an application made by a company, which, we are informed, owned the entirety of the premises which the application refers to, with regard C both to that portion of the street within the area of the local authority and to that portion which was outside it, and it must be a necessary argument, on the part of Mr. Charlesworth, that that application, in order to be a valid application under the section, must be capable of being severed. In my judgment, it is quite impossible to sever the D application and treat it as such an application as the section contemplates, and therefore valid as regards that part of the street which is within the area. The applicant company is asking for an order taking over the whole street as one entity, and it seems to me that you cannot construe such an application as being, as it were, an application to the local E authority to take over the irregularly defined portion of the street which lies within the authority's area, with something superadded to it. It is an application for one single entity, namely, the street mentioned in it; and it appears to me that, if the attention of the applicant company had been called to the fact that the only valid application it could make F would be one relating to a piece of the street defined in the peculiar and irregular fashion that is caused by the boundary in this case, it is quite impossible to suppose that it would necessarily have made its application.

It appears to me, therefore, that the application itself was an application which was not within the section, and, that being so, the conse- G quential notice given by the local authority upon it must fail also. I prefer myself to consider the plea of *ultra vires* or insufficiency in relation to the application, and to examine the question of severability in relation to the application, rather than to the notice, for the reason that the notice being obligatory one has to look back and see what the applica- H tion was on which it was founded; but it matters not which stage you take. It appears to me to be quite illegitimate to sever either the application or the notice in order to validate it *pro tanto*, because, in this case, in the application and the notice what is being dealt with is one entity, and not a portion of that entity plus an irrelevant addition. On that basis, assuming, as I am assuming, that a portion of the street could validly be taken over, I am satisfied that, in this case, the procedure has been such that there has been no valid taking over of that portion A of the street, and, that being so, that point, in my submission, must be decided in favour of the present appellant.

In regard to the other matters I do not wish to add anything to the judgments already delivered.

Appeal allowed. New trial ordered.

B Solicitors: *Rowley, Ashworth & Co.*, agents for *Sebag Cohen & Co.*, Sunderland (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Cooper & Jackson*, Newcastle-upon-Tyne (for the respondent company).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

C

WRAGG *v.* SAMUEL FOX & CO., LTD.

CHARLESWORTH *v.* SAMUEL FOX & CO., LTD.

[HOUSE OF LORDS (Lord Thankerton, Lord Russell of Killowen, and D Lord Roche), **February 25, 26, March 15, 1937.**]

Workmen's Compensation—Industrial disease—Silicosis—Process—"Any operation underground in any coal mine"—Workman not exposed to dust from silica rock—Various Industries (Silicosis) Scheme, 1931 (*S. R. & O.*, 1931, *No.* 342), *para.* 2—*Various Industries (Silicosis) Amendment Scheme*, 1934 (*S. R. & O.*, 1934, *No.* 1155).

E The appellant had been employed by the respondents for 41 years up to Apr., 1935, the last 20 years being spent underground in a coal mine. From Apr., 1935, he was duly certified as totally incapacitated by silicosis. The material in which he worked was not within the Various Industries (Silicosis) Scheme, 1931, para. 2 (v) or para. 2 (vi), and he was not exposed to the dust of silica rock. Therefore, although F he was within para. 2 (iii) of the unamended scheme, the respondents could successfully invoke the proviso thereto. By the Various Industries (Silicosis) Amendment Scheme, 1934, the scheme of 1931 was amended so that "the processes specified in para. 2" included "any operation underground in any coal mine." The question raised was whether the amendment was an additional sub-paragraph to para. 2 of the scheme of 1931 or whether it was to be included in sub-para. (iii) and therefore G subject to the proviso contained in that sub-paragraph:—

HELD: the amendment created an additional sub-paragraph to para. 2, which was not subject to the proviso to para. 2 (iii), and the appellant was entitled to compensation.

Decision of Court of Appeal (1936), 28 B.W.C.C. 447, *reversed.*

Decision of His Honour JUDGE FRANKLAND (1935), 2 L.J.N.C.C.R. 375, *restored.*

H

[**EDITORIAL NOTE.** The amendment scheme of 1934 made further provision for silicosis contracted in a coal mine. The question is whether upon the two schemes being read together, there must be exposure to the dust of silica rock or whether silicosis contracted in a coal mine where there is no dust of silica rock is within the schemes. The decision is in favour of the latter construction.

As to Silicosis as an Industrial Disease, see HALSBURY, Supp., Master and Servant, para. 346, and for Cases, see DIGEST, Supp., Master and Servant, Nos. 3811*a*-3811*m*. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 902-910.]

Cases referred to :

(1) *Horsnail* v. *Bruce* (1873), L.R. 8 C.P. 378 ; 42 Digest 773, *2011.*

(2) *Morgan* v. *Amalgamated Anthracite Collieries, Ltd.* (1935), 28 B.W.C.C. 358 ; Digest Supp.

Appeals from two orders of the Court of Appeal, dated Dec. 10, 1935, setting aside two awards, made on Nov. 4, 1935, in the county court at Sheffield, of compensation to each of the appellants at the rate of 30*s*. per week and 22*s*. 6*d*. per week respectively. The facts and the arguments are set out in the judgment of Lord Thankerton.

Sir Stafford Cripps, K.C., John Neal, and *G. Granville Slack* for the appellants.

Craig Henderson, K.C., F. W. Beney, and *G. Sutton-Nelthorpe* for the respondent company.

Lord Thankerton : My Lords, the only question arising in these appeals, which have been consolidated by consent, is as to the proper construction of the Various Industries (Silicosis) Scheme, 1931, as amended by the Various Industries (Silicosis) Amendment Scheme, 1934. It is agreed that the facts in the respective appeals, so far as relevant to this question, afford no ground of distinction. Both in the county court and in the Court of Appeal, the decision in the case of the appellant Charlesworth followed the decision in the case of the appellant Wragg by consent and without argument on this question. It will therefore be sufficient to refer to the facts in the case of the appellant Wragg. The appellant Wragg was employed by the respondent company for 41 years up to Apr. 19, 1935, the last 20 years of this time being spent in underground work, heading and ripping on alternate days. For the last few years of his life, the appellant experienced what he called "tightness," and finally ceased work on Apr. 19, 1935. He was examined by the medical board appointed for that purpose, and on June 21, 1935, he was duly certified as suffering from silicosis, and as totally incapacitated. The commencement of the disablement was certified as Apr. 19, 1935. The appellant applied for arbitration on Aug. 16, 1935, and the respondent company filed its answer denying liability. On Nov. 4, 1935, the county court judge made an award in the appellant's favour, which, on appeal, was set aside by the Court of Appeal on Dec. 10, 1935.

The Silicosis Scheme in question was made by the Secretary of State by virtue of the provisions of the Workmen's Compensation Act, 1925, s. 47, as amended by the Workmen's Compensation (Silicosis and

Asbestosis) Act, 1930. The material parts of the section as so amended are as follows :

> 47.—(1) The Secretary of State may by scheme provide for the payment of compensation by the employers of workmen in any specified industry or process or group of industries or processes involving exposure to silica dust or asbestos dust—
>
> (*a*) who are certified in such manner as may be prescribed by the scheme to have suffered death or total disablement from the disease known as " silicosis " (that is to say, fibrosis of the lungs due to silica dust) or from fibrosis of the lungs due to asbestos dust, or from either of those diseases accompanied by tuberculosis ;
>
> (3) Provision may be made by the scheme—
>
> (*f*) for the application with the necessary modifications of any of the provisions of this Act, or of any enactment relating to compensation thereunder, and for defining the industries or processes to which the scheme applies, and generally for such further or supplemental matters, including provisions as to the determination of disputes arising between employers and the authority administering the fund, as appear necessary for giving full effect to the scheme.
>
> (4) Any scheme made under this section may be extended or varied by any subsequent scheme made in the like manner, and shall have effect as if enacted in this Act, but any scheme made under this section shall be laid before each House of Parliament forthwith, and, if an address is presented to His Majesty by either House of Parliament within the next subsequent 21 days on which that House sits next after any such scheme is laid before it praying that the scheme may be annulled, His Majesty in Council may annul the scheme, and it shall thenceforward be void, but without prejudice to the validity of anything done thereunder.

The question in the appeal is whether the appellant was employed in one of the processes to which the Various Industries (Silicosis) Scheme, 1931, as amended in 1934, applied, and it will be necessary to consider the relevant parts of this scheme. The Various Industries (Silicosis) Scheme, 1931, paras. 2-5, provides as follows :

> 2. *Application of scheme.*—This scheme shall apply to all workmen employed at any time on or after the commencement of this scheme in any of the following processes :—
>
> (i) mining and quarrying of silica rock ;
>
> For the purposes of this scheme silica rock means quartz, quartzite, ganister, sandstone, gritstone and chert, but does not include natural sand or rotten rock ;
>
> (ii) drilling and blasting in silica rock, in or incidental to the mining or quarrying of other minerals ;
>
> (iii) in addition to and not in derogation of the provisions of the foregoing paragraph, the following processes :—
>
> (*a*) drilling or blasting in stone in any sinking pit or staple pit or in any cross measure drift or stone drift or other strait or narrow working in any coal mine, or any handling or moving of stone at the working places where these processes are carried on ;
>
> (*b*) operating or assisting in the operation of any power-driven machine used for drilling, cutting, ripping or breaking stone in any coal mine.
>
> Provided that the employer shall not be liable under this paragraph in any case where he proves to the satisfaction of the county court judge or other arbitrator that the workman has not, during the employment to which the disease is alleged to be due, been exposed to the dust of silica rock.
>
> (iv) sawing, planing, dressing, shaping, cutting or carving of silica rock ;
>
> (v) breaking, crushing, grinding, sieving, mixing or packing of silica rock, or of dried quartzose sand or any dry deposit or dry residue of silica or any dry admixture containing such materials ; or any process ancillary thereto ;
>
> (vi) handling or moving of silica rock, or of dried quartzose sand or any dry deposit or dry residue of silica, in or incidental to the processes mentioned in the foregoing paragraphs ;
>
> (vii) breaking, crushing or grinding of flint or materials containing ground flint ; or handling, moving, sieving, mixing or packing of broken, crushed or ground flint or materials containing such flint ;

(viii) in the undermentioned trades, the processes specified and those processes only, namely :—

Foundries and metal works :—

(*a*) in works engaged in the manufacture of steel or in steel foundries ; crushing or grinding of silica rock or any handling incidental to such crushing or grinding, or crushing or grinding of bricks or other articles containing not less than 80 per cent. total silica ($Si\ O_2$) ; A

(*b*) freeing of steel castings from adherent sand or other siliceous substance, excepting work done upon the foundry floor ;

(*c*) sandblasting of metal or articles of metal by means of compressed air with the use of quartzose sand or crushed silica rock or flint ;

The getting and manipulation of granite (including any igneous rock) :—

The dressing of stone by masons for building, civil engineering, or monumental purposes, but not kerb dressing if the workman is wholly or mainly employed on such work. B

Potteries :—

(*a*) the milling of flint or crushing or grinding of silica rock or dried quartzose sand ;

(*b*) any process in or incidental to the manufacture of china or earthenware including sanitary earthenware, electrical earthenware, and earthenware tiles, up to and including the preparation for glazing but excluding underglaze decorating, and modelling and mould-making where these processes are carried on in separate rooms ; C

(*c*) polishing, sorting or grinding on a power driven wheel in connection with the grinding of glost ware, and tile-slabbing.

Tin-mines :—

(*a*) any operation underground ;

(*b*) breaking or crushing of the ore or the containing rock above-ground or any handling or moving incidental thereto.

Provided that nothing in this scheme shall apply to the employment of a workman in any process included in the Refractories Industries (Silicosis) Scheme, 1931, the Metal Grinding Industries (Silicosis) Scheme, 1931, or the Sandstone Industry (Silicosis) Scheme, 1931. D

3. *Definitions.*—In this scheme, unless the context otherwise requires :—

"Processes" means any of the processes mentioned in para. 2.

"The Act" means the Workmen's Compensation Act, 1925.

The expressions "employer," "workman," and "dependants" have the same meanings as in the Act. E

"Medical Board" means the medical board appointed by the Secretary of State under the Silicosis and Asbestosis (Medical Arrangements) Scheme, 1931.

"Prescribed" means prescribed by the Secretary of State.

"Tuberculosis" means tuberculosis of the lungs.

Part I.—Right to Compensation.

4. Where the medical board certify :—

(1) that the death of a workman has been caused by silicosis or by silicosis accompanied by tuberculosis ; or F

(2) that a workman is totally disabled from silicosis or from silicosis accompanied by tuberculosis ; or

(3) that a workman, though not totally disabled, is suffering from silicosis or from silicosis accompanied by tuberculosis to such a degree as to make it dangerous for him to continue work in the processes, and is for that reason suspended from employment ;

and where the disease is due to employment in the processes whether under one or more employers, the workman or his dependants, as the case may be, shall be entitled to claim compensation as if the disease as aforesaid were a personal injury by accident arising out of and in the course of that employment, as provided by the Act, but subject to the modifications hereinafter contained. G

Provided that no compensation shall be payable :—

(*a*) if the medical board certify that the silicosis cannot have been contracted in the processes owing to the shortness of the time during which the workman has been employed therein ; H

(*b*) in cases where the workman has not been employed in the processes or has not been in receipt of weekly payments under this scheme or the Various Industries (Silicosis) Scheme, 1928, at any time within the three years previous to the date of the injury ;

(*c*) in cases where the workman, or his dependants, as the case may be, are in

> receipt of compensation under any other scheme or enactment providing compensation for silicosis or asbestosis whether in Great Britain or elsewhere.
>
> 5. If the workman has been employed in the processes for a period or periods amounting to not less than 5 years, the disease shall be deemed to be due to employment in the processes unless the employer proves the contrary.

The Various Industries (Silicosis) Amendment Scheme, 1934, provides as follows:

> In pursuance of the powers conferred on me by sect. 47 of the Workmen's Compensation Act, 1925, as extended by the Workmen's Compensation (Silicosis and Asbestosis) Act, 1930, I hereby direct that the Various Industries (Silicosis) Scheme, 1931, shall be amended and take effect as if the processes specified in para. 2 of the said scheme as the processes to employment in which the scheme shall apply, included the following, namely:—
>
> Any operation underground in any coal mine.
>
> This order applies to workmen employed in any such operation at any time on or after the date of this order.
>
> This order may be cited as the Various Industries (Silicosis) Amendment Scheme, 1934.

The appellant has been duly certified under para. 4 to be totally disabled from silicosis, and, having been employed for a period of more than 5 years in the process, he has the benefit of the presumption under para. 5, provided that the process is one that is mentioned in para. 2. Further, the county court judge has found in fact that the appellant was constantly exposed to silica dust at his work, that the silicosis was due to the nature of his employment with the respondent company, and that the disease could not have been contracted in any other way.

The appellant's work of heading and ripping entailed driving through a stone termed by the geologist, who gave evidence, "mudstone," and, in addition to the use of pick and crowbar, blasting was carried out. The judge found that the appellant was not exposed to the dust of silica rock, which is referred to in the proviso to para. 2 (iii), and he further stated:

> I am also satisfied that the material in which the applicant worked was not silica rock or dried quartzose sand or dry deposit or dry residue of silica or a dry admixture containing such materials, and that the applicant did not handle or move such materials. That is to say, I find that the material worked in is not within the lists contained in para. 2 (v), (vi), of the scheme. I find that there were in the mudstone minute particles of free silica sporadically scattered through the mass ranging up to about 8 per cent. of the total content. There were no lenticles.

On the other hand, it is clear that the appellant was employed in an operation underground in a coal mine, but the respondent company maintains that the amendment made in 1934 is subject to the proviso of para. 2 (iii). If this contention is upheld, there is no doubt that the claim is excluded, in view of the finding that the appellant has not been exposed to the dust of silica rock.

My Lords, I have difficulty in seeing any justification for the construction proposed by the respondent company. In my opinion, the meaning of the language used in the amendment is plain. The words "the processes specified in para. 2 of the said scheme" clearly comprehend all the eight sub-paragraphs, and the new inclusion must be that of an additional sub-paragraph. The language used, in my opinion, does not mean, and cannot be read as meaning, that the amendment is to be included in any particular sub-paragraph. With all respect to the learned judges of the Court of Appeal, their decision appears to me to go outside the province of the court, and to qualify and restrict the plain language used so as to substitute for the words " as if the processes specified in para. 2 of the said scheme " the words " as if the processes specified in para. 2 (iii) of the said scheme."

In my opinion, the county court judge was right when he held that, in the absence of specific direction, the amendment should not be placed in para. 2 (iii).

There was some question as to whether the effect of the amendment was to render para. 2 (iii) (*a*), (*b*), otiose, which was the view held by all the Lords Justices, or whether there might be some cases, as, for instance, of employment above ground, in regard to which these heads might still find room for operation ; but it seems to me unnecessary to consider this question. If these two heads are in effect superseded, then, in my opinion, the proviso which qualifies them must disappear also ; it has no independent existence : *Horsnail* v. *Bruce* (1), *per* Bovill, C.J., at p. 385. If, on the other hand, there are still cases in which these two heads can be effective, the proviso will to that extent remain. In any event, the survivance of sub-para. (iii) was still necessary for cases in which the date of the injury was prior to Oct. 22, 1934, when the amendment scheme came into operation.

Counsel for the respondent company also sought to maintain, by reference to the previous scheme of 1928 and the amendment scheme of 1930, an argument based on the policy of the Secretary of State in making these schemes. In face of the plain words used in the amendment scheme of 1934, the court is bound to accept them as expressing his policy at that date, but I may add that these earlier schemes merely show a cautious beginning, with a progressive extension in favour of the workmen. It must be borne in mind that the Secretary of State is developing the policy prescribed by Parliament in sect. 47 of the Act of 1925—the provision of payment of compensation in industries or processes involving exposure to silica dust. While I doubt if the subsequent amendment scheme of 1935 is relevant, it may be noted that the amendment scheme of 1930 shows, in its para. 2, that express provision is made when it is desired to link up a new addition with a particular sub-paragraph.

Reference was made to the speech of Lord Atkin in *Morgan* v. *Amalgamated Anthracite Collieries, Ltd.* (2), and in particular to his reference, at p. 362, to the amendment scheme of 1934, but the present question as to the proviso in sub-para. (iii) was not raised or considered by this House in that case.

I am, therefore, clearly of opinion that the respective appellants are entitled to succeed. Accordingly, the appeals should be allowed, the orders of the Court of Appeal should be set aside, and the orders of the county court judge should be restored, the respective appellants to have A the costs of their appeals, and their costs in the Court of Appeal.

LORD RUSSELL OF KILLOWEN: My Lords, unless one starts with the preconceived idea that the Secretary of State intended to make the process described in the Various Industries (Silicosis) Amendment Scheme, B 1934, subject to the proviso which is contained in para. 2 (iii) of the Various Industries (Silicosis) Scheme, 1931, there is nothing to justify the insertion of that process into any particular part of para. 2. There is nothing in the wording of the order of Oct. 22, 1934, to justify it. According to the plain meaning of the language used, a described process C is to be added to the processes specified in para. 2. Nothing more is said, by way of qualification, limitation or restriction, except only that the order applies to workmen employed in the added process at any time on or after the date of the order. To assign, as the Court of Appeal have done, a particular sub-paragraph of the 1931 scheme, and indeed D a particular place in that sub-paragraph as the spot at which the inclusion is to be made, is not to construe the order of 1934, but to amend it and add to it. One hears nowadays of the executive usurping the functions of the judiciary. The decision of the Court of Appeal has all the appearance of the converse process. The effect of the order of 1934, if read E *sans phrase*, would be, no doubt, in the course of a short time, to render sub-para. (iii) of the scheme of 1931 a dead letter, except in so far as, if at all, it covers surface operations. Operations underground in coal-mines seem thus to have been put on much the same footing as were already put operations underground in tin-mines, and as are now put F operations underground in haematite iron ore mines. This we must assume, on the language used in the order of 1934, was the intention of the Secretary of State. There is certainly nothing in the language used which would justify us in arriving at any different conclusion.

Agreeing as I do with the opinion expressed by the noble Lord on the G woolsack, I concur in the view that these appeals should be allowed.

LORD ROCHE: My Lords, I concur.

Appeals allowed with costs.

H Solicitors: *Corbin, Greener & Cook*, agents for *Raley & Sons*, Barnsley (for the appellants); *Johnson, Weatherall, Sturt & Hardy*, agents for *Parker Rhodes, Cockburn & Co.*, Rotherham (for the respondent company).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

R. *v.* INTERNATIONAL TRUSTEE FOR THE PROTECTION OF BONDHOLDERS AKT.

[House of Lords (Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Maugham, and Lord Roche), **January 18, 19, 21, 22, 28, March 15, 1937.**]

Conflict of Laws—Bond—Issued by British Government in America—Law applicable—Intention.

Money—Currency—Bond Issued by British Government in America—Law applicable—Gold clause—American legislation—Effect of option to pay in England.

The respondents (suppliants) were holders of three 20-year 5½ per cent. coupon gold bonds for $1,000, $500, and $100, respectively, issued and repayable by the British government to the bearer or registered holder on Feb. 1, 1937, at the option of the holder in New York or London, and, if in New York, in gold coin of the United States of America of the standard of weight and fineness existing on Feb. 1, 1917, and, if in London, in sterling money, at the fixed rate of $4.86½ to the £. By a joint resolution of Congress passed in July, 1933, which in the United States of America has the force of a statute, the payment of a dollar debt in gold coin was made illegal. The appellant contended that the effect of the joint resolution was that the obligation of the British government, when payment is required in the United States of America, would be satisfied by payment in the United States currency of dollars of the amounts stated in the bonds:—

Held: the proper law of the contract was the law of the United States of America, and on that footing the effect of the joint resolution was that the respondents (the suppliants) were entitled only to be paid dollar for dollar on the nominal amount of the bonds.

Decision of Court of Appeal ([1936] 3 All E.R. 407) *upon the question of the law governing the contract reversed. Judgment of* Branson, J., *restored, but for different reasons.*

[EDITORIAL NOTE. The courts below had felt themselves bound by authority to hold that when a government makes a contract in a foreign country, the law of that government governs the contract in every case. This proposition has been rejected in the House of Lords, and such a case is no exception to the general rule that the law applicable to a contract not relating to immovables is governed by the intention of the parties.

As to Law Applicable to Contracts, see HALSBURY, Hailsham Edn., Vol. 6, pp. 263-270, paras. 321-323; and for Cases, see DIGEST, Vol. 11, pp. 387-392, Nos. 639-663.]

Cases referred to:

(1) *Smith* v. *Weguelin* (1869), L.R. 8 Eq. 198; 43 Digest 628, *682*.
(2) *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476; 6 Digest 451, *2884*.
(3) *Feist* v. *Societé Intercommunale Belge D'Électricité*, [1934] A.C. 161; Digest Supp.
(4) *Norman* v. *Baltimore & Ohio Railroad Co.* (1935), 294 U.S.R. 240.
(5) *Perry* v. *United States* (1935), 294 U.S.R. 330.
(6) *Lloyd* v. *Guibert* (1865), L.R. 1 Q.B. 115; 12 Digest 372, *3094*.
(7) *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79; 1 Digest 296, *246*.

APPEAL from a judgment of the Court of Appeal (LORD WRIGHT, M.R., SLESSER and ROMER, L.JJ.), dated Nov. 2, 1936, and reported in [1936] 3 All E.R. 407, allowing an appeal by the respondents, who were suppliants in a petition of right, against a judgment of BRANSON, J., A dated Nov. 8, 1935, whereby judgment was directed to be entered in favour of the Crown.

The main questions in the appeal were whether the proper law affecting the bonds was the law of England or the law of the United States of America, whether the gold clause could be properly construed as providing B for payment in actual gold coin and whether, even if the law of England was applicable to the bonds, the Crown, when payment was required in New York, was discharged from the obligation of the gold clause, by virtue of the joint resolution of Congress, passed in 1933, which made payment of a dollar debt in gold coin illegal.

C The proceedings in the lower courts are summarised in the opinion of LORD RUSSELL OF KILLOWEN.

The Attorney-General (*Sir Donald Somervell, K.C.*), *Gavin Simonds, K.C.*, *A. Andrewes Uthwatt* and *Valentine Holmes* for the Crown.

Sir William Jowitt, K.C., *Cyril Radcliffe, K.C.*, and *G. C. Dunbar* for D the respondents.

The Attorney-General: The contract is governed by the law of the United States, and, if so, the obligation of the Crown was completely discharged by paying dollar for dollar the number of dollars stated in the bond. The intention of the parties determines the proper law of a E contract. It is wrong to assume that every contract to which a sovereign government is a party must be construed in accordance with the law of that sovereign. Even if the contract is governed by English law, its performance is contrary to the declared public policy of the United States, as it involves payment being enforced other than on a dollar for F dollar basis.

Gavin Simonds, K.C., followed for the Crown.

Sir William Jowitt, K.C.: The contract is governed by English law, and upon its true construction the effect of the gold clause in the contract is to fix a measure of value and not to define a mode of payment, whereby G the obligor contracted not for payment in actual gold coin but for money payments increasing in amount correspondingly with any decrease in the value of the currency in terms of gold from the standard of value established on Feb. 1, 1917. It is therefore not unlawful by the law of the United States to make the full payment prescribed in the gold clause H so construed.

LORD ATKIN: My Lords, this is an appeal brought on a petition of right in which the suppliants claim to have determined by the courts their rights as holders of bonds and the annexed coupons issued by the

British government in the United States in 1917. The bonds contain what is now known as a gold clause in a well known form. The question is whether the holders are entitled to be paid in New York in American currency the present value of the amount of gold represented by the nominal amount of the bonds in gold coins of the specified fineness of A 1917, or are entitled only to be paid in New York in American currency the nominal amount of the bonds. The suppliants do not appear to have tendered either bond or coupon at the place of payment in New York so as to be able either to claim in debt or damages: but the Attorney-General, representing the Crown, agrees with the suppliants B in desiring the real questions at issue to be determined, and the courts have proceeded on that footing.

Various questions have been raised in this case, but that which comes first under consideration is what is the proper law of the contract, for if that be answered in one way no further issues remain. I will therefore C proceed to discuss that matter. The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive. If no intention be expressed, the D intention will be presumed by the court from the terms of the contract and the relevant surrounding circumstances. In coming to its conclusion, the court will be guided by rules which indicate that particular facts or conditions lead to a *prima facie* inference, in some cases an almost conclusive inference, as to the intention of the parties to apply E a particular law, e.g., the country where the contract is made, the country where the contract is to be performed, if the contract relates to immovables the country where they are situate, the country under whose flag the ship sails in which goods are contracted to be carried. But all these rules only serve to give *prima facie* indications of intention: F they are all capable of being overcome by counter indications, however difficult it may be in some cases to find such. The principle of law so stated applies equally to contracts to which a sovereign state is a party as to other contracts. In the present case, both Branson, J., and the Court of Appeal appear to have considered themselves bound by G authority to hold that, where a sovereign state is party to a contract, the only proper inference to be drawn is that it did not intend that any system of law other than its own should be applied to its contract, and that this conclusion is either necessitated or reinforced by the consideration that only in its own court, if at all, can it be sued. For this pro- H position, two cases are cited. The first is *Smith* v. *Weguelin* (1). That was the case of a Peruvian loan negotiated in this country. So far as I can see, Lord Romilly, M.R., in dealing with the topic, is doing no more than negativing a contention that, where a government negotiates a

loan in a foreign country, the law of that country is necessarily the law of the contract. He points to the case, where a foreign loan in this country is negotiated at the same time in the same terms in different foreign countries, as conclusive to negative the inference that English
A law is intended, and he proceeds at p. 213:

> So, if the English government were to negotiate a loan in Paris or in New York, the English law must be applied to construe and regulate the contract.

I cannot think that LORD ROMILLY, M.R., was intending to lay down a rule applicable in all circumstances, as, for instance, if the contract expressly
B made the foreign law applicable. His remarks are in fact *obiter*, but in any event they do not, I think, purport to lay down a rule of universal application. The other case is *Goodwin* v. *Robarts* (2), in a passage in the opinion of LORD SELBORNE approving the remarks of LORD ROMILLY, M.R., in *Smith* v. *Weguelin* (1) with which LORD SELBORNE was specially
C acquainted, having been counsel for the successful party. In *Goodwin* v. *Robarts* (2), what LORD SELBORNE said had little to do with the ground of the decision. The question in that case was whether the scrip of a Russian loan was negotiable. It had been agreed in the Divisional Court that, if English law applied, common-law principles prevented
D the extension of negotiability to any *choses in action* not made so by statute. The Divisional Court held that the scrip was governed by Russian law, and that the question did not arise. In the Exchequer Chamber, COCKBURN, C.J., in that remarkable judgment which is one of the charters of the liberty of the common law, pronounced that the
E proper law was immaterial, for, by English law, commercial custom could attach the qualities of negotiability to forms of contract hitherto not negotiable. The House of Lords took the same view. It would appear, therefore, that these cases afford little authority for the proposition. In principle it must be ill-founded. It cannot be disputed
F that a government may expressly agree to be bound by a foreign law. It seems to me equally indisputable that, without any expressed intention, the inference that a government so intended may be necessarily inferred from the circumstances, as where a government enters into a contract in a foreign country for the purchase of land situate in that country in
G the terms appropriate only to the law of that country, or enters into a contract of affreightment with the owners of a foreign ship on the terms expressed in a foreign bill of lading, or employs in a foreign country foreign labour, in circumstances to which foreign labour laws would apply. It appears, therefore, that in every case, whether a government
H be a party or not, the general principle which determines the proper law of the contract is the same: it depends upon the intention of the parties either expressed in the contract or to be inferred from the terms of the contract and the surrounding circumstances, and, in the latter case, the inference may be drawn that the parties intended a foreign law to apply.

The circumstance that a government is a party is entitled to great weight in drawing the appropriate inference, but it is not conclusive, and is only one factor in the problem.

We can therefore approach the question as to what is the proper
law of this contract untrammelled by any rule binding us to hold that A
it is English law. The contract had its origin in the fact that in 1917,
under the powers of the War Loan Act, 1916, the British Treasury
arranged to borrow the sum of $250,000,000 in the United States of
America upon the security of treasury notes payable as to $100,000,000
one year after date and as to $150,000,000 two years after date. The B
notes were to be secured by the deposit, with the Bankers Trust Co.,
New York, of certain securities, on the terms and conditions contained
in a pledge agreement which is dated Feb. 1, 1917.

It should be noted that no question arises as to the authority of the
Treasury to raise money on these terms, or to agree to apply foreign C
law to the loan if desired. The War Loan Act, 1916, empowers the
Treasury to raise money on such terms as it thinks fit, and it would
seem obvious that, at that stage of the Great War, neither the government
nor the legislature would be likely to hesitate to adopt the law
of any civilised country if the terms of the loan were otherwise agreeable. D
The only provision of the War Loan Act that is relevant is the
provision that the loan is repayable out of the Consolidated Fund,
a domestic matter which concerns only the authority to pay. I have
thought it necessary to mention this matter, for it is obvious that
government contracts may well be made by authority of, and regulated E
by, statutes which will themselves determine the law to be applied;
for at least as far as they are applicable an English court would have
to follow them. There is no difficulty of that kind in the present case,
and this is further indicated by the fact that it is the British government
itself which is contending for the application of the American law. F

My Lords, it appears to me essential to keep in mind the whole of
the documents which in sequence led to the creation of the obligation
of the British government expressed in the bonds in suit. They are
the foundation of the reasoning which leads me to the conclusion that
not English but American law is the proper law of this contract. It G
is necessary, unfortunately, that they should be set out in full:

OFFER.
FINAL PROOF.
$250,000,000.
UNITED KINGDOM OF GREAT BRITAIN AND IRELAND ONE-YEAR AND TWO-YEAR
5½ PER CENT. SECURED LOAN CONVERTIBLE GOLD NOTES. H

Dated Feb. 1, 1917.
Interest payable Feb. 1 and Aug. 1.
$100,000,000 one-year notes due Feb. 1, 1918.
$150,000,000 two-year notes due Feb. 1, 1919.
Principal and interest payable at the office of J. P. Morgan & Co.
Convertible upon notice, at the option of the holder, at any time before maturity

or (if called for earlier redemption) at any time until and including the date of such redemption, into twenty-year 5½ per cent. bonds of the United Kingdom of Great Britain and Ireland, payable Feb. 1, 1937, and not subject to prior redemption.

Principal and interest of the notes, and of the bonds into which they may be converted, is to be payable, without deduction for British taxes, present or future, in New York in United States gold coin, or, at the option of the holder, in London in sterling at the fixed rate of $4.86½ to the pound.

Coupon notes in denomination of $1,000, $5,000 and $10,000.

Redeemable at the option of the government, in whole or in part, on thirty (30) days' notice, as follows:

	One-year Notes.	Two-year Notes.
From Feb. 1, 1917, to Jan. 31, 1918.	101 and interest.	102 and interest.
From Feb. 1, 1918, to Jan. 31, 1919.		101 and interest.

The notes are to be secured by pledge with the Bankers Trust Co., New York, under a pledge agreement executed by the government, of securities approved by J. P. Morgan & Co., of an aggregate value of not less than $300,000,000 calculated on the basis of the then prevailing markets, sterling securities being valued in dollars at the prevailing rate of exchange, viz.:

Group I.—Stocks, bonds and/or other securities of American municipalities and corporations and of the Canadian Pacific Ry. Co. and bonds and/or other obligations (either as maker or guarantor) of the government of the Dominions of Canada, the Colony of Newfoundland and/or provinces of the Dominion of Canada; and/or approved Canadian municipalities:

Aggregate value not less than $150,000,000.

(Of the foregoing there will be somewhat over $100,000,000 in value in the securities of municipalities and corporations of the United States and of the Canadian Pacific Ry. Co.)

Group II.—Bonds and/or other obligations (either as maker or guarantor) of any or all of the several following governments, to wit: Argentine, Chile, Cuba, Commonwealth of Australia, Egypt, Japan, New Zealand and Union of South Africa, and/or bonds and/or other obligations of approved railways in Argentina and/or of the Grand Trunk Ry. Co. of Canada, and/or approximately $25,000,000 value in bonds and/or other obligations of dividend-paying British railway companies:

Aggregate value not less than $150,000,000

Total $300,000,000

Pending the arrival and deposit of definite securities as above, the government is to deposit temporarily with the Trust Co. either approved New York Stock Exchange collateral or cash.

If the pledged securities depreciate in value, the government is to deposit additional securities to maintain the 20 per cent. margin.

The government is to reserve the right from time to time to sell for cash any of the pledged securities, the proceeds of sale to be applied to the retirement of notes by purchase or by redemption by lot.

Upon the retirement of the one-year notes, or upon reduction of the amount of notes outstanding, through conversion, a proportionate amount of the collateral may be withdrawn approximately rateably from each class.

The government also from time to time makes substitutions of securities but such substitutions are not to vary the then relative amounts in value of the groups. All substitutions, withdrawals and valuations of securities are to be approved by J. P. Morgan & Co.

This offering is made subject to the approval by our counsel of necessary formalities.

We offer the above notes for subscription as follows:

The one-year notes at 99.52 and interest, yielding 6 per cent.

The two-year notes at 99.07 and interest, yielding 6 per cent.

Subscription books will be opened at the office of J. P. Morgan & Co. at 10 o'clock a.m., Jan. 24, 1917, and will be closed at 10 o'clock a.m., Jan. 31, 1917, or earlier, in their discretion.

The right is reserved to reject any and all applications, and also, in any event, to award a smaller amount than applied for.

Amounts due on allotments will be payable at the office of J. P. Morgan & Co. in New York funds, to their order, and the date of payment will be given in the notices of allotment.

Temporary certificates will be delivered pending the preparation of the definitive notes.

J. P. Morgan & Co.; First National Bank, New York City; National City Company, New York City; Harris Trust & Savings Bank, Chicago; Brown Brothers & Co.; Wm. A. Read & Co.; J. & W. Seligman & Co.; Kidder, Peabody & Co.; Lee, Higginson & Co.; Lazard Freres; Kissel, Kinnicutt & Co.; White, Weld & Co.; Guaranty Trust Company of New York; Bankers Trust Company, New York City; Farmers Loan & Trust Company, New York City; Central Trust Company of Illinois, Chicago; Halsey, Stuart & Co., Chicago; Continental and Commercial Trust and Savings Bank, Chicago; Marine National Bank, Buffalo; Union Trust Company, Pittsburgh; First & Old Detroit National Bank, Detroit. A

New York, Jan. 22, 1917.

The Government of the United Kingdom of Great Britain and Ireland to Bankers Trust Company.

Pledge, dated Feb. 1, 1917, securing $250,000,000 one-year and two-year 5½ per cent. secured loan convertible gold notes. B

Interest payable Aug. 1 and Feb. 1.

New York City, Feb. 1, 1917.

To Bankers Trust Co., New York City.

Dear Sirs,

The Government of the United Kingdom of Great Britain and Ireland (hereinafter termed the "obligor") is about to issue and to sell its 5½ per cent. secured loan convertible gold notes for the aggregate principal amount of $250,000,000, dated Feb. 1, 1917, of which $100,000,000 principal amount are one-year notes maturing Feb. 1, 1918, and $150,000,000 principal amount are two-year notes maturing Feb. 1, 1919; such notes (hereinafter referred to as the notes) to be substantially in the form (the blanks therein being appropriately filled) marked sched. A 1 hereto annexed, and to be authenticated by the certificate thereon executed by your company. Pending the preparation of the definitive notes, temporary notes without coupons, substantially in said form, may be issued in any denomination and similarly authenticated. The twenty-year 5½ per cent. bonds, into which such notes may be converted as therein provided, are to be substantially in the form (the blanks therein being appropriately filled) marked sched. A 2 hereto annexed. C D

I. In order to secure the payment, principal and interest, of all the notes of said issue at any time outstanding according to their tenor, and in consideration of the purchase and acceptance of such notes by the original and subsequent takers and holders thereof, the obligor hereby pledges with your company certain bonds, stocks and other securities (hereinafter termed, collectively, "pledged securities") of the aggregate value of not less than $300,000,000 as follows: the several issues of such securities which are or may be pledged, and the unit values at which such securities severally and respectively are or are to be pledged hereunder, being set forth in sched. B hereto annexed, viz.: E

Group 1. Stocks bonds and other securities of American municipalities and corporations and the Canadian Pacific Ry. Co., and bonds and other obligations (either as maker or guarantor) of the Government of the Dominion of Canada, the Colony of Newfoundland, and provinces of the Dominion of Canada, and bonds and other securities of approved Canadian municipalities: Aggregate value not less than $150,000,000. F

Group 2. Bonds and other obligations (either as maker or guarantor) of any or all of the several following governments, to wit: Argentina, Chile, Cuba, Commonwealth of Australia, Egypt, Japan, New Zealand, and Union of South Africa, and bonds and other obligations of approved railways in Argentina, and bonds and other obligations of the Grand Trunk Ry. Co. of Canada, and approximately $25,000,000 value in bonds and other obligations of dividend-paying British railway companies: Aggregate value not less than $150,000,000. G

Such pledge to your company is in trust for the benefit of all present and future holders of the notes, so that subject to the terms hereof the principal and interest of the notes shall be secured rateably by such pledge. H

Coupons or warrants for interest or dividends maturing or payable on or prior to Feb. 1, 1918, on any securities held by your company under this writing, may be lodged at the office of Guaranty Trust Co. of New York in London, England, or at such other agencies in London as your company may elect.

II. In case at the time of the authentication by your company of the notes, the obligor shall not have delivered to you all of the securities deliverable under cl. I hereof, the obligor will deposit temporarily with you, as part of the security hereunder, (i) stocks, bonds or other securities that are listed upon the New York Stock Exchange and are approved by J. P. Morgan & Co. as acceptable for the purpose, of a value equal to the difference between $300,000,000 and the aggregate value of the securities that shall have been delivered under cl. I, and (ii) a sum in cash equal to five-sixths of the difference, if any, between $300,000,000 and the aggregate value of the securities delivered under cl. I and the securities under this cl. II.

Thereafter from time to time upon delivery to your company of any securities deliverable under cl. I and not therefore delivered, your company either (*a*) will redeliver such temporarily deposited securities of an amount in value equal to the amount in value of the securities so delivered under cl. I, or (*b*) will repay such temporarily deposited cash of an amount equal to five-sixths of the value of the securities so delivered under cl. I.

III. From time to time, upon the written request of the obligor and the written approval of J. P. Morgan & Co., your company shall release any of the pledged securities, provided that contemporaneously there be substituted for the securities of either group so released, other securities of the same group of equal aggregate value.

IV. If at any time the pledged securities shall have depreciated in aggregate value either because of change in market price or in the rate of exchange, so that such aggregate value shall become less than 120 per cent. of the principal amount of the notes at the time outstanding, the obligor from time to time will deliver to your company, as part of the trust estate, additional securities of one or both of the groups sufficient to bring the value of all the securities pledged to a sum exceeding by not less than twenty per cent. (20 per cent.) the principal amount of the notes at the time outstanding, so that at all times such twenty per cent. (20 per cent.) excess value shall be maintained; provided, however, that if at the time of such depreciation the trustee shall hold, as part of the security under this writing, any cash deposited in lieu of securities, then and in such case the obligor shall not be required to pledge additional securities hereunder unless at the time the aggregate value of the pledged securities held by the trustee shall have become less than 120 per cent. of the difference between the aggregate principal amount of the outstanding notes and the amount of such cash, nor to pledge any additional securities except to an amount sufficient to increase the value of the pledged securities to the amount of 120 per cent. of said difference in amount.

V. For all purposes of cl. I of this writing, the value of the pledged securities is to be computed upon the basis of the unit values respectively set forth in sched. B, or such lower value respectively as J. P. Morgan & Co. shall certify to your company in writing to be in their opinion the values of any units of such pledged securities at the time of the deposit thereof with your company.

For the purposes of cl. II of this writing, (i) the value of the securities therein referred to as deliverable under cl. I, is to be computed upon the basis of the unit values thereof respectively set forth in sched. B, or such lower values respectively as J. P. Morgan & Co. shall certify to your company in writing to be in their opinion the values of any units of such pledged securities at the time of the deposit thereof with your company, and (ii) the value of the securities temporarily deposited shall be deemed to be such as J. P. Morgan & Co. shall certify to your company in writing to be in their opinion the values respectively of such temporarily deposited securities at the time of the deposit thereof when computed upon the basis of the market value on the New York Stock Exchange.

For all purposes of cl. III and cl. IV of this writing the value at any time of pledged securities released and of securities substituted therefor and of additional securities pledged, respectively, shall be deemed to be such as J. P. Morgan & Co. shall certify to your company in writing to be in their opinion the values of such substituted or released or additional securities, as the case may be, at the time of such substitution or release or pledge, as determined upon the following basis, viz.: (*a*) The value of such securities payable in currency of the United States, shall be the market value of the securities on the New York Stock Exchange, if quoted thereon, and, if not quoted thereon, the market value in the general securities market in New York; (*b*) the value of such securities not payable in United States currency shall be the market value in London of the securities in pounds sterling, converted into dollars in the city of New York at the then exchange value of pounds in the New York market; and (*c*) if any of the securities in the judgment of J. P. Morgan & Co. have no quoted market prices, the market value of such securities shall be taken to be such as J. P. Morgan & Co. shall fix for the purpose.

All determinations of value have been made and shall be made without including any amount for accrued interest on any of the securities valued.

VI. The security hereby constituted shall become enforcible in each and every of the following events of default by the obligor (hereinafter termed "events of default"), viz.:

(*a*) Default in the payment of the principal of any of the notes.

(*b*) Default in the payment of any instalment of interest on any of the notes, A
which default shall have continued for the period of thirty (30) days.

(*c*) Default in pledging hereunder additional securities to maintain the margin as provided in cl. IV of this writing, which default shall have continued for the period of thirty (30) days after notice to the obligor from your company.

VII. Until the happening of an event of default, the obligor shall be entitled (i) to collect and to receive for its own account all interest, dividends and other income of the pledged securities, and accordingly at a reasonable time prior to the due date B
thereof to have delivered by your company to the obligor or upon its order all coupons and warrants for such interest, dividends and other income; and (ii) to exercise any voting rights appertaining to any of the pledged securities.

VIII. Upon the happening of an event of default your company in its discretion may, and upon the request of the holders of twenty-five per cent. (25%) of the principal amount of the notes at the time outstanding and upon being indemnified to its satisfaction your company shall, sell, collect and convert into money the pledged securities or any part thereof, and all rights of redemption thereof. C

IX. At any sale, the pledged securities may be sold in one or more lots as in its discretion your company shall determine. Any such sale shall be made at public auction in the city of New York, or in the city of London, or in part in one and in part in the other of said cities. The notice of sale shall contain a brief general description of the pledged securities to be sold, a statement of the time or times of each such sale, and a specification of the terms of sale as determined by your company, and shall be sufficiently given if published once in each week for five D
successive calendar weeks prior to any such sale in two newspapers published in the borough of Manhattan, city of New York, and in two newspapers published in the city of London.

From time to time, any such sale may be adjourned by your company by announcement at the time and place appointed for such sale, or any such adjourned sale; and without further notice or publication, such sale may be made at the time and place to which the same shall have been so adjourned.

No purchaser or any one claiming under him shall be bound to see to the appli- E
cation of the purchase money or to inquire as to the authorisation or regularity of any such sale.

X. In case of any sale of any of the pledged securities by your company under the power of sale above granted, the whole of the principal sums of the notes, if not previously due, shall at once become due and payable.

XI. The avails of any sale shall be applied as follows:

First, to the payment of the costs and expenses of such sale, and also a reasonable F
compensation to your company, its agents, attorneys, and counsel, and of all taxes, expenses, liabilities and advances made or incurred by your company in the care, administration or collection of any of the pledged securities.

Secondly, to the payment of the whole amount then owing and unpaid upon the notes for principal and interest, including interest at the rate of 5½ per cent. per annum on principal after maturity and on overdue coupons; or in case such proceeds shall be insufficient to pay in full the whole amount so due and unpaid upon said notes, then to the payment of such principal and interest rateably, G
without preference of principal over interest or of interest over principal.

Lastly, to the payment of the surplus, if any, to the obligor.

XII. At any such sale, any holder or holders of any of the notes (including your company) may become the purchaser or purchasers of the pledged securities, without accountability except for the purchase price, whether the sale be made under the power of sale herein contained or pursuant to judicial proceedings.

XIII. From time to time, acting by its agents authorised in writing (of which H
authorisation a duplicate shall be filed with your company), the obligor may sell any of the pledged securities, provided that the obligor shall not be in default in the payment of the principal or interest of any of the notes; and provided, further, that any default existing prior to such sale in the agreements of the obligor contained in cl. IV hereof, may and shall be remedied by the application of the proceeds of sale to the redemption of notes as hereinafter provided. Such sales may be made in such manner and at such place, and whether publicly or privately, as the obligor

or its agents authorised as aforesaid may deem advisable. In case of any such sale, your company shall release the securities so sold, upon receipt by your company of the net proceeds of the sale as certified in writing to your company by the obligor or by J. P. Morgan & Co., the date of such release and delivery of such securities to be the date specified in said writing.

XIV. Any and all proceeds of any sale pursuant to the provisions of cl. XIII hereof, shall be applied to the purchase or redemption of notes as follows:

Until the delivery to your company by the obligor of a request to redeem notes by call as hereinafter provided, such moneys shall be applied by your company to the payment of the purchase price of notes secured hereby which shall be delivered to you by J. P. Morgan & Co., for cancellation. The notes so purchased may be either or both of the two maturities, indifferently. A writing signed by J. P. Morgan & Co., stating the amount of notes, and the purchase price or prices thereof (which in no case shall exceed the then redemption prices), shall be warrant to your company for paying to J. P. Morgan & Co., or upon their order, such purchase price or prices and for any other action taken by your company on the faith of such writing.

If the obligor shall deliver to your company a written request to redeem notes by call, specifying therein the date for such redemption which shall be not less than forty (40) days subsequent to the delivery of such request, your company at the expense of the obligor shall publish once in each week for five successive calendar weeks, in two newspapers published in the borough of Manhattan, city of New York, a notice calling for the presentation and surrender at the office of your company, on the date so specified (which date shall be not sooner than thirty days after the first publication) of the notes to be redeemed bearing all unpaid coupons. In case less than all the outstanding notes are so to be redeemed, the redemption moneys shall be apportioned and applied to the redemption of notes of each of the two maturities, for aggregate principal amounts which in relative proportion shall correspond to the relative proportion of the two maturities at the time outstanding; and the notice shall specify, by reference to the serial numbers thereof, the notes called for redemption of each of the two maturities, as determined by lot according to any method deemed proper by your company and approved by J. P. Morgan & Co.

To the extent of any moneys applicable to the purpose at the time thereafter held by your company, upon surrender of any such designated note, bearing coupons as aforesaid, your company shall receive the same and shall pay therefor the principal amount, the premium thereof payable on the designated redemption date, and the accrued interest thereon up to such redemption date.

To avoid partial redemption of any note of a denomination greater than $1,000, your company in any drawing for redemption may apportion as nearly as practicable to the aggregate amount of notes of each denomination of each of the two maturities, respectively, such part of the money available for the redemption of the notes of each maturity as shall bear to the whole thereof the same proportion that the aggregate amount of notes of each denomination of such maturity shall bear to the aggregate amount of all the notes of such maturity then outstanding, and a separate drawing of the notes of each denomination of each maturity, shall be made for such amounts as the money apportioned to such denomination shall suffice to pay at the redemption rates then respectively applicable thereto.

All notes so redeemed or purchased forthwith shall be cancelled by your company and be delivered to the obligor.

XV. The right to enforce the security given by these presents for the benefit of the notes, shall vest exclusively in your company and its successors in the trust, and all action by your company in such enforcement shall be for the rateable benefit of all of the notes at the time outstanding. No holder of any note or coupon shall bring any suit, action or other proceedings for the enforcement of such security.

XVI. Upon payment (or upon the making of provision for the payment by the deposit with your company of the amount payable thereon) of the one-year notes at maturity, and at any time upon the payment or redemption of any of the notes, and in every such case provided that the moneys paid or deposited shall not be the proceeds of the sale of pledged securities, and also at any time upon the retirement of any of the notes through the conversion thereof into the twenty-year bonds of the obligor as provided in the notes, your company shall release and deliver according to the order of the obligor such part of each class of the pledged securities then held by your company as shall bear to the whole of such class so held, approximately the same proportion as the aggregate principal amount of the notes so paid or redeemed or converted shall bear to the aggregate principal amount of the notes outstanding immediately prior to such redemption or payment on conversion —the approximation of the proportion of the pledged securities to be released to be made by your company in the exercise of its sole judgment.

For the purposes of this cl. XVI, the pledged securities of American municipalities collectively shall constitute a separate class; the pledged securities of American corporations (including the Canadian Pacific Ry. Co.) collectively shall constitute a separate class; the pledged securities collectively of the Dominion of Canada shall constitute a separate class; the pledged securities collectively of the Colony of Newfoundland and each of the several provinces of the Dominion of Canada and each of the several municipalities of the Dominion of Canada shall constitute, respectively, separate classes; the pledged securities collectively of each of the several Governments specified in Group 2 of class I of this writing shall constitute, respectively, separate classes; the pledged securities of railways in the Argentina collectively shall constitute a separate class; the pledged securities of the Grand Trunk Ry. Co. of Canada collectively shall constitute a separate class, and the pledged securities of British railway companies collectively shall constitute a separate class; provided, however, that all such withdrawals of securities of American corporations (including the Canadian Pacific Ry. Co.), or of Argentina railways, or of the Grand Trunk Ry. Co. of Canada, or of British railway companies, shall be such as are approved by J. P. Morgan & Co.

When all of the notes, principal and interest, shall have been paid, or when provision for such payment shall have been made by the obligor by depositing with your company the amount payable to noteholders, or when all of the notes not so paid or provided for shall have been retired by conversion thereof as aforesaid, your company, at the cost and expense of the obligor, shall redeliver to the obligor the pledged securities, together with proper instruments of assignment and transfer.

XVII. Any request or other instrument purporting to be signed in behalf of the obligor for any of the purposes of this writing, including the authentication and delivery of the notes, if verified by the countersignature of J. P. Morgan & Co., shall be authority to your company for taking action pursuant to such request or other instrument.

All rights and powers of J. P. Morgan & Co., shall vest in the co-partnership or firm doing business under such name and shall pass to and shall vest in the successors of such firm as from time to time constituted, doing business as such successor.

Any notice to the obligor required to be given under this writing or by law, shall be sufficiently given if addressed "To the Secretary of the British Treasury, care of J. P. Morgan & Co.," and delivered by hand to any member of the firm of J. P. Morgan & Co., at their office in the city of New York.

XVIII. Your company shall be under no duty to take notice of any default on the part of the obligor in any of its agreements contained in the notes or in this writing, or otherwise, unless it shall receive notice thereof and request to take action thereupon by a writing signed by persons shown to your company's satisfaction to be the holders of ten per cent. of the principal amount of the notes then outstanding; but nothing herein contained shall be deemed to limit or affect the right of your company without notice or request from noteholders to take action upon any default.

Any securities delivered hereunder may be retained by your company in the form in which deposited until a default hereunder or until requested by the obligor to have the same transferred.

XIX. In case your company shall be in doubt in any instance as to the meaning of this instrument or its powers or duties thereunder, your company may advise with legal counsel selected by it and shall be protected in anything done or suffered by it in good faith in pursuance of the opinion of such counsel.

For the Government of the United Kingdom of Great Britain and Ireland.

Schedule A1.

[Form of Note.]

No. . . . $ . . .

The Government of the United Kingdom of Great Britain and Ireland.
$250,000,000 5½ per cent. Secured Convertible Loan.
One-year Notes $100,000,000.
Two-year Notes $150,000,000.

. . . . YEAR GOLD NOTE

The Government of the United Kingdom of Great Britain and Ireland (hereinafter termed "obligor"), for value received, promises to pay to bearer the sum of   dollars on Feb. 1, 19   , and to pay interest on such principal sum at the rate of five and one-half per centum (5½ per cent.) per annum, semi-annually, on Aug. 1 and Feb. 1 in each year, until such principal sum shall be paid, but only upon presentation and surrender of the coupons for such interest, hereto attached, as severally they mature. Such principal sum and the interest thereon will be paid without deduction for any British taxes, present or future, and, at the option of the holder, either at the office of J. P. Morgan & Co., in city of New York, state of New York, United States of America, in gold coin of the United States of America of the standard of weight and fineness existing Feb. 1, 1917, or in the city of London, England, in sterling money at the fixed rate of $4.86½ to the pound.

The notes of the loan, for the aggregate principal sum of $250,000,000, are equally and rateably secured by the pledge with Bankers Trust Company, a corporation of the state of New York, of certain bonds, stocks and other securities pursuant to and upon the terms of an instrument in writing (hereinafter termed "pledge agreement") duly executed and delivered by the obligor to the said Trust Company to which pledge agreement, held by said Trust Company, reference hereby is made.

The notes of the loan severally are subject to redemption prior to maturity at the office of said Trust Company, at the option of the obligor, during the several periods prior to maturity and at the respective prices following, to wit:

The one-year notes maturing Feb. 1, 1918, shall be subject to redemption as aforesaid on any day until and including Jan. 31, 1918, at 101 per cent. of the principal sum, accrued interest to the date of any such redemption being also payable.

The two-year notes maturing Feb. 1, 1919, shall be subject to redemption as aforesaid on any day until and including Jan. 31, 1918, at 102 per cent. of the principal sum, and thereafter on any day until and including Jan. 31, 1919, at 101 per cent. of the principal sum, accrued interest to the date of any such redemption being also payable.

Notice of intention to redeem specifying the distinctive numbers of the notes called for redemption, will be given by advertisement thereof in two newspapers published in said city of New York and in two newspapers published in the city of London, once in each week for five successive weeks, the first publication to be not less than thirty days prior to the date fixed for such redemption. If specified in any such notice, this note shall become payable on the redemption date fixed in such notice; and after such redemption date, provided payment be made of the amount payable on this note when presented pursuant to such notice, no interest will accrue hereon and any coupons for interest maturing after such date will be null and void.

Upon surrender for such purpose of this note with all unmatured coupons attached, at any time prior to maturity (or, if called for earlier redemption, at any time until and including the date of such redemption), the obligor without expense to the holder will issue in exchange, at the office of said Trust Company, a bond of the obligor of like principal amount, payable Feb. 1, 1937, and bearing interest at the rate of five and one-half per cent. (5½ per cent.) per annum, payable semi-annually on Aug. 1 and Feb. 1 in each year, and having annexed all unmatured interest coupons; such bond to be payable as to both principal and interest, at the option of the holder, either in the city of New York in gold coin of the United States of the standard of weight and fineness existing Feb. 1, 1917, or in the city of London, England, in sterling money at the fixed rate of $4.86½ to the pound, and such payment of principal and interest at either such place of payment to be made without deduction for any British taxes, present or future; but no such conversion shall be required to be made unless the holder of this note shall have given ten days previous notice of his election so to convert by a writing addressed to the obligor and delivered to said Trust Company.

In case of the sale of any of the pledged securities in enforcement of said pledge agreement upon a default as specified therein, then and in such case the principal sum of this note and of all other notes of the loan, if not previously due, will become forthwith due and payable.

The notes of the loan are issuable in denominations of $1,000, $5,000 and $10,000. Unless previously called for redemption, any note of a denomination higher than $1,000, with all unmatured coupons thereto attached, when surrendered for that purpose at the office of the said Trust Company, may be exchanged for notes (bearing all unmatured coupons) of equal aggregate principal amount of lower denomination or denominations. For any such exchange, the obligor may prescribe reasonable rules and regulations, and may require payment of a reasonable charge.

This note shall not be entitled to the benefit of the said pledge agreement, nor be valid for any purpose, until authenticated by the certificate hereon duly executed by the said Trust Company or its successor in the trust under said pledge agreement.

Dated, Feb. 1, 1917.

For the Government of the United Kingdom of Great Britain and Ireland.
(*Signed*) Cecil Spring Rice.

[Form of Coupon.]

No. $

On the first day of , 191 (unless the note below mentioned shall have been called for previous redemption) the government of the United Kingdom of Great Britain and Ireland promises to pay to bearer, without deduction for British taxes, present or future, dollars gold coin of the United States of America, at the office of J. P. Morgan & Co., in the city of New York, state of New York, United States of America, or, at the option of the holder, the equivalent of said sum in sterling money, at the fixed rate of $4.86½ to the pound, in the city of London, England, being six (6) months' interest on the year gold note No. of the 5½ per cent. secured convertible loan of the said government.

....

[Form of Certificate of Trust Company.]

This note is one of the year notes of the loan within mentioned.

Bankers Trust Company,
By .

The transaction recorded in these documents was duly carried out. The required loan was raised on notes given in the form appended to the pledge agreement. In due course, in accordance with the terms of the offer expressly incorporated in the notes, notes to the value of $143,587,000 were converted into bonds, which were issued in denominations of $100, $500 and $1,000 with coupons attached in the form following :

Bond for $1,000.
The Government of the United Kingdom of Great Britain and Ireland.
Twenty-year 5½ per cent. coupon gold bond.
Payable Feb. 1, 1937.

No. M 153012 No. M. 153012

The Government of the United Kingdom of Great Britain and Ireland (hereinafter termed "obligor") for value received promises to pay to bearer, or, if this bond be registered, then to the registered holder hereof, the sum of One Thousand Dollars on Feb. 1, 1937, and to pay interest on such principal sum at the rate of five and one-half per cent. (5½ per cent.) per annum, semi-annually, on Aug. 1 and Feb. 1 in each year, until such principal sum shall be paid, but only upon presentation and surrender of the coupons for such interest hereto attached as severally they mature.

Such principal sum and the interest thereon will be paid at the option of the holder, either in the city of New York, state of New York, United States of America, at the office or agency which will be maintained in the said city by the obligor for the service of the bonds of this issue in gold coin of the United States of America of the standard of weight and fineness existing Feb., 1917, or in the city of London, England, in sterling money at the fixed rate of $4.86½ to the pound.

Payment at either place aforesaid will be made without deduction from either such principal or interest for any British taxes, present or future. This bond will not be redeemed prior to the due date thereof above specified.

This bond may be registered in the name of the holder, but only as to the principal sum thereof, by presenting the same for such purpose to the bond registrar of the obligor in the city of New York for notation of such registration hereon. After such registration no transfer shall be valid unless made by the registered owner in person or by his duly authorised attorney and similarly noted hereon, but transfer-ability by delivery may be restored by transfer to bearer and like notation thereof hereon. Coupon bonds of this issue, upon surrender thereof with all unmatured coupons attached, to said bond registrar of the obligor in the city of New York, in principal amount aggregating $1,000 or multiples thereof, may be exchanged for a bond or bonds without coupons of authorised denominations, for an equal aggregate principal amount, registered in the name of the holder as to both principal and interest. Coupon bonds of this issue are to be in denominations of $1,000, $500 and $100 and any coupon bonds at any time outstanding may be exchanged when surrendered for that purpose, with all unmatured coupons attached, for coupon bonds of equal principal amount of any other of said denominations. For any registration or exchange of bonds as provided herein, the obligor may prescribe reasonable rules and regulations, and for any exchange of engraved bonds may require payment of a reasonable charge.

Dated Feb. 1, 1917.

For the Government of the United Kingdom of Great Britain and Ireland.
(*Signed*) Gerald Campbell.

(Endorsement on bond.)

As provided on the face of the bond, coupon bonds of this issue are exchangeable for an equal principal amount of coupon bonds of other denominations or of registered bonds, which registered bonds are in turn exchangeable for coupon bonds.

Coupon.

The Government of the United Kingdom of Great Britain and Ireland.
On Feb. 1, 1937.
$27.50

Promises to pay to bearer, at the office or agency which for such purpose will be maintained by the government in the city of New York, United States of America, Twenty-Seven and 50/100 Dollars, gold coin of the United States of America, or, at the option of the holder, in London, England, in sterling money at the fixed rate of $4.86½ to the pound, payment at either place being made without deduction for British taxes present or future being six months' interest on the twenty-year 5½ per cent. bond of the Government.

For the Government of the United Kingdom of Great Britain and Ireland.
(*Signed*) John Bradbury,
Secretary to the Treasury.
No. M 153012
40

Now, beginning with the notes, what is the true inference as to the intention of the parties as to the proper law of the contract contained in them ? They were issued in America, they were expressed in terms of American currency, they were to be paid on one option in America on a value estimated by reference to American coins. But there is the further fact that they were secured by a pledge agreement, also made in America, performed in America by the deposit, with an American company, of securities on terms which appear irresistibly to give rights governed by American law as to maintaining margins of value, redemption, enforcement by sale. They contemplate a judicial sale which, in my opinion, can mean only a sale by orders of an American court ; and they finally stipulate that the company with which the securities are pledged shall be protected if it acts in accordance with the opinion of counsel selected by it, which must, I think, in this context, mean American counsel advising on American law. I do not overlook that there is an option to be paid in England, that there is a clause stating that payment is to be made without deduction of British taxes, and, in particular, the weighty circumstance that the borrowers are the British government. But it is to be noted that the obligation to pay in England is secured only by the American pledge agreement, and that the provision as to British taxes is a provision which might well be inserted *ex majori cautela* in any contract under which a government has to make payment. But, taking all the circumstances into consideration, I think that the A irresistible inference is that the proper law of the contract is American law, meaning thereby in this contract the law of the state of New York. I come to this conclusion without attempting to answer the question put in argument, what would have been the result of the issue in America in 1917 if there had been expressed in the pledge agreement or in the B notes the term that the contract was to be governed by English law ?

Now, if the notes were governed by American law, how is it possible to avoid the conclusion that the bonds into which, at the will of the holders, they were convertible before maturity were intended to be governed by the same law ? In substance, the bonds are long term C renewals, and I find it impossible to assume that the parties who, on the hypothesis, start with an American contract, either in fact intended, or in some way or another signified to each other the intention, no longer to be bound by American law, but for the future to substitute English law. In terms there is no substantial difference, other than time, D between the obligation expressed in the notes and that expressed in the bonds. There is the very material fact that the bonds are not secured by the pledge agreement, but I cannot regard this as countervailing the strong improbability that the holder of an American note surrendered it in exchange for an English bond, the debtor and other terms remaining E for this purpose the same. There are indeed expressions in the bond which bear an American complexion, but in themselves they are far from conclusive, and one must base the inference on the transaction viewed as a whole. It is, I think, unfortunate that the attention of the courts below does not seem to have been directed to the importance of F the notes and the pledge agreement as bearing on the question in issue. I think their decision might have been different. I need add only that the question before us has to be determined as of the time that the bonds were exchanged for the notes. The fact that they were negotiable, and possibly negotiated, in other countries does not affect the question. G Having reached this conclusion in favour of American law as the proper law of the contract, I need add but a few words. It is admitted that the effect of the joint resolution of Congress, dated June 5, 1933, had the statutory effect, in New York state, as well as in all the other states of the United States, of requiring a bond expressed in the present form to H be discharged upon payment dollar for dollar of the nominal amount. As this is so the suppliants who found their petition of right only upon their claim to be paid in America a sum larger than the nominal amount of the bond, must fail, and it becomes unnecessary to consider the other points which came under discussion in the courts below. I think it desirable to add, however, that as at present advised I agree with the construction placed upon the bond by the Court of Appeal applying English law, and that it would appear from recent decisions of the A Supreme Court that the same conclusion would be reached by applying American law. It is not, however, necessary finally to decide this. For the above reasons, I proposed the motion allowing the appeal and restoring the judgment of BRANSON, J., which the House has already adopted.

B

LORD RUSSELL OF KILLOWEN: My Lords, I can state briefly, but I hope adequately, my reasons for having voted in favour of entering judgment for the Crown upon this petition of right.

BRANSON, J., held (i) that the proper law of the contract was the law C of England; (ii) that the relevant clause in the contract provided for payment in gold coin, and not for payment of the value in currency of gold coin, in other words, that what has been sometimes called the "*Feist* (3) construction" did not apply to the clause; (iii) that payment in gold coin in America had by American law become illegal, and that there-D fore the obligation to pay in gold coin in America had become void; (iv) with the result that there remained only the obligation to pay in London at the fixed rate of exchange calculated on the nominal amount of the bond.

The Court of Appeal agreed with the judge in holding that the proper E law of the contract was the law of England, but they applied the "*Feist* (3) construction" to the clause, holding that the contract was for payment of the value in currency of gold coin. Further, they were of opinion that it was neither illegal, by American law, nor contrary to the public policy of America, to make such payment.

F I agree with the Court of Appeal that the clause should be construed as a contract to pay in the city of New York the value in currency of gold coin of the weight and fineness specified. The features which point to that construction are no doubt less numerous and less strong in the present case than in the *Feist* case (3). These gold clauses have, how-G ever, come under the review of judicial tribunals in many countries and the "*Feist* (3) construction" has prevailed, in that they are generally regarded merely as clauses to protect one of the contracting parties against a depreciation of the currency. It would, I think, be regrettable if a uniformity in this respect did not prevail, and that a different con-H struction should be applied, except in cases where the "*Feist* (3) construction" is expressly excluded.

I differ, however, from the Court of Appeal as regards the proper law of the contract, for in my opinion the proper law of the contract is the law which prevails in the city of New York. Both BRANSON, J., and

the Court of Appeal would, I think, have been of this opinion too, had it not been for the fact that one of the contracting parties was the Crown. Their judgments on this point both proceed upon the view that, because a contract cannot be enforced against a sovereign unless he submits himself to the jurisdiction of some court, and because a sovereign will A
presumably not submit himself to the jurisdiction of a foreign court, therefore the matter stands as if the parties had agreed to be bound by the jurisdiction and decision of the courts of a particular country, viz., the country of the sovereign. They both rely also upon certain *dicta* of LORD ROMILLY, M.R., in *Smith* v. *Weguelin* (1), at p. 212, and B
LORD SELBORNE in *Goodwin* v. *Robarts* (2), at p. 494.

The phrase " the proper law of a contract " is a phrase which I conceive bears the meaning attributed to it in Professor Dicey's r. 155, viz. :

> the law or laws by which the parties to a contract intended . . . the contract to be governed; or (in other words) the law or laws to which the parties intended C
> . . . to submit themselves.

The intention must be the intention of both, not of one party alone. For this reason, I feel great difficulty in assenting to the *dicta* referred to, or to the view that the fact of a sovereign being a party to a contract establishes conclusively that the law of that sovereign's country is the D
law which is to apply. It is an element of weight to be considered, but it is no more than that; and, in appraising its weight, it must be borne in mind that to ascertain what rights and obligations arise under a contract is a matter quite distinct from the enforcement of those rights and obligations when ascertained. The fact (if it be the fact) that the E
rights and obligations under a contract can be enforced against a sovereign only in the courts of his own country, seems to me a fallacious basis for ascertaining the law by which those rights and obligations are to be ascertained. There is no inconsistency in the view that rights and obligations defined by the law of one country are capable of enforce- F
ment only in the courts of another.

Let me now consider what law is applicable to this contract on the footing that, notwithstanding the fact that the Crown is a party, the parties may have intended that it should have been governed by some law other than the law of England. We have had placed at our disposal G
some material which was not, I think, brought to the attention of the Court of Appeal. These dollar bonds did not initiate the transaction. The matter started with an offer by J. P. Morgan & Co., in the city of New York, for subscription of $250,000,000, one-year and two-year $5\frac{1}{2}$ per cent. notes. This loan was being raised at a juncture during the H
war, when the United States of America (not yet a belligerent) was the country of all others to whose people applications for a large loan would be successfully addressed. The notes were to be convertible into the dollar bonds, and were to be secured by pledge with the Bankers Trust

Company, New York. The offer was stated to be made "subject to the approval by our counsel of necessary formalities." A copy of the pledge was produced. It takes the form of a letter written on behalf of the government of the United Kingdom and addressed to the Bankers
A Trust Company, New York. It is quite obviously an American document and intended to be governed by American law. J. P. Morgan & Co. are given in many respects a controlling voice, such as powers of approval of securities to be temporarily deposited, of release of securities, and of certifying values. In the event of default, a sale of the securities
B may take place, either under the power of sale expressly conferred upon the Bankers Trust Company, or—I quote the document—"pursuant to judicial proceedings." This, I think, can refer only to judicial proceedings in New York. Any notice to the government required to be given—again I quote from the document—"unless this writing or by law" will
C be sufficiently given if addressed to the Secretary of the British Treasury, care of J. P. Morgan & Co., and delivered by hand to any member of that firm at their office in the city of New York. Here again the reference to law can, I think, be a reference only to the law prevailing in the city of New York. The last clause of the document provides that,
D in case the Bankers Trust Company is in doubt in any instance as to the meaning of the instrument or the company's powers or duties thereunder:

> your company may advise with legal counsel selected by it and shall be protected in anything done or suffered by it in good faith in pursuance of the opinion of such counsel.

E

There can be no doubt that the Bankers Trust Company were to be protected by the advice given to them by New York lawyers advising them as to the effect of the instrument construed according to the law prevailing in the city of New York.

F If, then, the rights and obligations of the respective parties in relation to these notes were to be governed by that law, it would naturally follow that, in the absence of some express provision to the contrary, the same law would apply to the dollar bonds which took their place. It was, however, contended that by some means, when the bonds were exchanged
G for the notes, English law came into play, and applied to them; as the picturesque phrase ran, "the documents were repatriated." I can see no justification for this, either on principle or in fact. Looking at the bonds, apart from any question of their pedigree, I would have been prepared to hold that the proper law of the contract was the law prevail-
H ing in the city of New York. The offer was made in New York and accepted in New York. The loan was a dollar loan. The bonds were registrable only in New York, and, if registered, were transferable only by registration there. The performance of the contract by the lender was complete when the bond was issued: the performance by the

borrower (viz., payment of interest and repayment of capital) might, if the lender wished, take place in England, but *prima facie* the *locus solutionis* is where the contract was made: and I agree with the views of Branson, J., and the Court of Appeal (which are borne out by the frame of the interest coupons) that in this case the primary place of performance was New York, with an option in the lender to require performance in England. But, if any doubt existed as to the proper law of the dollar bonds contract standing alone, it would, in my opinion, be removed by a consideration of the fact that they were issued in replacement of the secured notes.

What, then, was the *obligation* of the government when, on Feb. 1, 1937, the principal sum became payable in New York? I emphasise the word " obligation " because some embarrassment and confusion have been caused by the form of the present proceedings. The petition of right claims to have the suppliants' rights under the bonds ascertained and declared, and compensation for the damages which they have sustained by reason of the Crown having repudiated any obligation to pay in New York anything in respect of interest on the bonds beyond a dollar lawful currency of the United States of America for each nominal dollar of obligation. This repudiation was based upon the contention that the law prevailing in New York city applied to the contract, and upon the provisions of a joint resolution in Congress No. 10 of 73rd Congress. The petition of right does not in terms refer to the repayment of principal. The parties, however, seem to have agreed that the court should determine the true meaning of the contract and declare the *rights* of a bondholder who presented his coupons or his bond for payment in New York. Again I emphasise the word " rights," and for this reason—the Court of Appeal have held that the joint resolution, though it enables the Crown to discharge its obligations under the bonds, whether for payment of interest or principal, by dollar for dollar payments, does not prohibit the Crown from making, apparently by way of gift, the larger payment which results from the *Feist* (3) construction. The declaration which they made is (as to the relevant part) that upon the true construction of the bond in the events which have happened the bearer is *entitled to receive in New York* the larger payment.

Such a declaration cannot, in my opinion, stand consistently with the legislative force of the joint resolution, which provides that such a provision as is under consideration in this case is against public policy, and shall (not may) be discharged upon payment dollar for dollar in any currency which, at the time of payment, is legal tender for public and private debts. In the face of this legislation, in force in the city of New York, it is, in my opinion, impossible to declare that the suppliant is " entitled to receive in the city of New York " the larger payment. No such right could be enforced there.

My Lords, we were not asked merely to decide the construction of the bond as a matter of academic interest. We were asked to decide what were the rights of the bondholders who required to be paid in New York. Those rights are the rights which the Crown has always been A willing to admit, and are not the rights which the suppliants claimed.

The gold clause, designed as a protection against depreciation of the currency, has in this case been defeated in its object by the special legislative provisions of the joint resolution.

In these circumstances, the suppliants were entitled to no relief on B their petition of right, and judgment was therefore entered for the Crown, though not upon the grounds which had influenced BRANSON, J., in arriving at the same result.

LORD MAUGHAM: My Lords, the decision of the petition of right C in this case has raised several important questions in reference to certain dollar bonds issued in New York by the government of the United Kingdom of Great Britain and Ireland during the Great War. The bonds, according to the usual commercial term, are gold bonds, that is, they contain the following clause:

D

> Such principal sum and the interest thereon will be paid at the option of the holder, either in the city of New York, state of New York, United States of America, at the office or agency which will be maintained in the said city by the obligor for the service of the bonds of this issue in gold coin of the United States of America of the standard of weight and fineness existing Feb., 1917, or in the city of London, England, in sterling money at the fixed rate of $4.86½ to the pound.

E There is a similar provision on the interest coupons.

The petition of right, which is in that respect in a very unusual form, prays that His Majesty will cause the suppliants' rights under the bonds held by them:

> to be ascertained and declared and your suppliants to be reimbursed and compensated for the damages so sustained by them as aforesaid. F

Before your Lordships no question was raised as to the right of the suppliants if they exercised their option to be paid in the city of London. The order of the Court of Appeal in that event gives the suppliants a right to require such a sum in sterling, calculated at the rate of 4.86½ G dollars to the pound sterling, as is equivalent to the nominal amount of each payment. But the Attorney-General as appellant, while consenting to the application to have the rights of the suppliants declared, has attacked the other branch of the order, namely, the declaration that the suppliants are entitled in the city of New York to receive by way H of principal and interest:

> such a sum in the money of account of the United States of America as represents the gold value in New York of the nominal amount of each payment such gold value to be ascertained in accordance with the standard of weight and fineness existing on Feb. 1, 1917, and that accordingly every "dollar" comprised in the nominal amount of each such payment ought to be treated as representing the price

> in New York aforesaid in the money of account of the United States of America (calculated at the due date of payment) of 25.8 grains of gold of the standard of fineness prescribed by the law of the United States of America existing on Feb. 1, 1917,

with a further consequential statement which I need not set out as to any fraction of a " dollar " comprised in the nominal amount which might A be due. My Lords, the difficulties arise by reason of a change in the currency of the United States since the bonds were issued. At that date, gold coin, and what was treated as its equivalent, gold certificates, which entitled the holder to gold coin, were in circulation. Ever since the year 1870, or thereabouts, nearly all important obligations of the B nature of bonds and mortgages in the United States have contained a gold clause, the result of which, according to the legal tender decisions (so called), was that, although paper money, commonly called greenbacks, was legal tender in payment of ordinary debts, that did not apply to obligations containing a gold clause. Such clauses, according to the C decision of the Supreme Court of the United States in *Norman* v. *Baltimore and Ohio Railroad Co.* (4) were :

> intended to afford a definite standard or measure of value, and thus to protect against a depreciation of the currency and discharge of the obligations by payment of lesser value than that prescribed.

D

The currency position was, however, radically altered by a joint resolution of Congress passed on June 5, 1933, which is admitted to have the force of law in the United States. It recited that :

> the holding of or dealing in gold affect the public interest . . . that provisions of obligations which purport to give the obligee a right to require payment in gold E or a particular kind of coin or currency of the United States or in an amount in money of the United States measured thereby—

are inconsistent with the declared policy of Congress. It then provided (amongst other things) that :

> every provision contained in or made with respect to any obligation which purports F to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy . . . every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.

G

It should be added that gold coin had already been withdrawn from circulation, that Congress had already authorised the prohibition of the exportation of gold coin and the placing of restrictions upon transactions in foreign exchange, and that there was a number of executive orders and regulations on those subjects.

H

The validity of the joint resolution was at once challenged in two cases. The first, *Norman* v. *Baltimore and Ohio Railroad Company* (4), raised the question as to the validity of the joint resolution with respect to the gold clauses of private contracts for the payment of money. The

second case, decided by the Supreme Court on the same day as *Norman's* case (4) (Feb. 18, 1935), *Perry* v. *United States* (5) presented questions as to the right of the plaintiff as the owner of a bond issued by the United States government containing a gold clause, the bond being one of the
A Liberty Loans issued by the government in 1918. In *Norman's* case (4), the Supreme Court decided that the joint resolution was constitutional, and that the bondholder, notwithstanding the gold clause, was entitled to no more than payment in money constituting legal tender dollar for dollar of the principal of each bond.

B In *Perry's* case (5), the Supreme Court held that the joint resolution went beyond the power of Congress in so far as it attempted to override the obligations of the government of the United States. It then went on to deal with the question of the damages suffered by the refusal of the government to pay more than dollar for dollar. HUGHES, C.J., in
C delivering the opinion of the court, pointed out, at p. 357, that it was inadmissible to assume that the plaintiff, suing for damages which he alleged he had sustained by the alleged breach of a gold bond :

> was entitled to obtain gold for recourse to foreign markets, or for dealings in foreign exchange, or for other purposes contrary to the control over gold coin which the
> D Congress had the power to exert, and had exerted, in its monetary regulation. . . . The discontinuance of gold payments and the establishment of legal tender currency on a standard unit of value with which " all forms of money " of the United States were to be " maintained at a parity," had a controlling influence upon the domestic economy. It was adjusted to the new basis. A free domestic market for gold was non-existent.

In view of these facts, the Supreme Court held by a majority that a holder
E of a Liberty Bond issued by the United States government had not proved that he had suffered any loss whatever by the refusal to comply with the terms of the gold clause, that the plaintiff had therefore failed to show a cause of action for actual damages, and, since the Court of Claims from which the appeal had come had no authority to entertain
F an action for nominal damages, the Supreme Court decided that the bondholder was not :

> entitled to receive from the United States an amount in legal tender currency in excess of the face amount of the bond.

G My Lords, *Perry's* case (5) cannot, in the view I take of this case, be very relevant to the questions raised by the appeal, because it is admitted that the joint resolution applies to bonds or other obligations issued by any foreign government, and therefore applies to the dollar bonds on which the petition of right is based, if and so far as the law of the United
H States is applicable to the matter. If the suppliants were to present their bonds at the office of J. P. Morgan & Co. in the city of New York, it seems clear that the suppliants would not be entitled to receive anything more than the amount in legal tender currency of the face amounts of the bonds. If I correctly understand the argument for the suppliants,

it is that the law of England applies to their bonds even in regard to the presentation of the same for payment in the city of New York, and that they are entitled to recover in this country substantial damages in the event of the refusal (as threatened) of the government of Great Britain to pay in New York city anything more than dollar for dollar, A pursuant to the joint resolution. I agree with the observations which have fallen from my noble and learned friend Lord Russell of Killowen in regard to the declaration made by the Court of Appeal.

My Lords, as I have indicated, questions of difficulty are raised by the petition; but it is not in dispute that, if the proper law of the B contract, using that phrase in the sense in which it is used in Dicey's Conflict of Laws, is the law of the state of New York, then the joint resolution will apply, and the petition of right must be dismissed. Both Branson, J., and the Court of Appeal were led to the view that the proper law was that of England, for the reason that the loan was one C contracted by a sovereign, and that the ordinary criteria were inapplicable. In that respect, both courts thought they were bound to follow the authority of a *dictum* pronounced by Lord Romilly, M.R., in *Smith* v. *Weguelin* (1), at pp. 212, 213, and repeated with approval by Lord Selborne in *Goodwin* v. *Robarts* (2), at p. 494. The *dictum* seems D not to have found its way into any of the English works of authority on private international law, and it has never been argued or considered by any of our courts in any case where the accuracy of the *dictum* called for decision. The matter has been elaborately argued in this House, and, in my opinion, it has been clearly shown that the dictum, if it E purports to enunciate a general rule, is far too widely expressed.

My Lords, it should be noted in the first place that in 1869, when *Smith* v. *Weguelin* (1) was decided, the rule that the interpretation of a contract and the rights and obligations under it of the parties thereto are to be determined by the law or laws to which the parties intended F or may fairly be presumed to have intended to submit themselves (Dicey, rr. 155, 161), had not been authoritatively settled. It is true that *Lloyd* v. *Guibert* (6) had been decided in the Exchequer Chamber, and that, in a case arising on a contract of affreightment, the rule had been laid down in clear terms; but that case was not cited in *Smith* v. G *Weguelin* (1), and no trace of it is to be found in the elaborate report of the arguments of counsel, or in the judgment. Mr. Jessel, Q.C., for the plaintiff, relied on the doctrine laid down in Story's Conflict of Laws, 6th Edn., ss. 549, 550, that the *lex rei sitæ* should be applied, and that, since, as he argued, the loan was an English contract, contracted H in England with English people, and the repayment was to be made in England, the law of England was applicable. Sir Roundell Palmer, apart from the question of jurisdiction, met the contention on the part of the plaintiff by asserting that the material contract on which the action turned was clearly a Peruvian contract, entered into in Peru, before the issue of the bonds between Peruvians, and according to the law of Peru ; and this was the view taken by the learned judge.

Secondly, it is to be observed that the bonds of the Peruvian government were issued both in London and in Belgium. In such a case, it is easy to approve the conclusion that the contracts cannot vary "according to the domicil of the subscriber to the loan." In *Goodwin* v. *Robarts* (2), the Russian government loan was issued in London and in Paris, and the Austro-Hungarian government issued about the same time a Hungarian loan, as regards which the scrip and all the documents connected with it were almost identically in the same form. The only question was whether the scrip which promised to give the bearer a bond for the amount paid was a negotiable instrument. It was admitted that the bonds when issued would be negotiable. Nothing was said in the arguments or in the speeches as to the now accepted general rule for ascertaining the proper law of the contract.

My Lords, I think we are bound to come to the conclusion that, in the case of a government loan, as in the case of any other contract, the law of the contract must depend upon the intention of the parties, to be drawn from all the circumstances of the case. The reasons given by my noble and learned friend LORD ATKIN show, I think, beyond doubt, that the mere fact that a government is a party to a contract is not decisive as to the proper law of the contract. I will add only that there have been systems of law according to which contracts for payment of interest were illegal, and perhaps there are still such systems. It would be indeed strange if the proper law of the contract, involved in an issue of bonds by a foreign government where such a law prevails, were the law of that country. Moreover, there are sovereign powers where in substance there is no systematised law whatsoever. In such a case there would be strong reasons for holding that both parties to the contract intended to submit themselves to the law of the country where the money lent was to be repaid. On the other hand, I accede to the view that, where a foreign loan is being negotiated by a highly civilised government, considerable weight should be given to the circumstance that the sovereign state is the borrower, and some, but not great, weight to the fact that such a borrower cannot be sued in any foreign court without its consent. To my mind, this fact is not decisive, because usually a government cannot be sued in its own domestic court without its consent. It is true that such consent can not infrequently be obtained, but, except by consent, there is generally no means of enforcing the judgment. The truth, I think, is that the lender does not contemplate any such proceedings, and lends in reliance on the credit of the foreign government.

My Lords, in my opinion, the circumstances in which the loan was issued as well as the terms of the offer, the letter of pledge of Feb. 1, 1917, addressed from New York city to the Bankers Trust Company of that city, offering convertible gold notes for subscription, the notes themselves, as well as the forms of the bonds, have to be considered in coming to a conclusion as to whether the proper law of the contract embodied A in the bonds is that of the state of New York or that of England. In my view, something turns upon the War, which had so greatly affected the credit of the great European powers and had resulted in the British government being glad to borrow at a rate unknown in living memory, namely, $5\frac{1}{2}$ per cent. Nor is the position of the United States in relation B to the War wholly immaterial. For many months their government had been greatly concerned with the German plan of ruthless submarine warfare. The *Lusitania* had been sunk (on May 7, 1915), and a minatory note from President Wilson had followed. The sinking of ships by submarines continued. On Jan. 31, 1917, Germany issued a note containing C an announcement of unrestricted submarine warfare to take place in the waters surrounding the British Isles, France and Italy. In this area ships, whether belligerent or neutral, were to be sunk at sight. On Feb. 3, Count von Bernstorff was given his passports and the American Ambassador at Berlin was directed to sail for home. War was then only D a matter of days. On Apr. 2, after it had become clear that Germany was actively carrying out her threat, a special session of Congress was held, and within four days the United States and Germany were officially at war.

I have mentioned these historical facts because they show that, when E the $250,000,000 loan was being issued in New York, in the form of secured notes, there was an extreme probability that the United States, in the course of a few weeks, or at any rate before the end of the year, would enter upon the War, and thus become an ally of the United Kingdom, and this explains the curious nature of the loan, the short-F term secured scrip, with an option to convert into long-term bonds. Nor was there, at that time, any existing ally of this country who could render financial assistance: Great Britain was borrowing largely for the purpose of financing her European allies. It was out of the question to obtain any substantial loan in any country except the United States. G

I proceed to consider the terms of the relevant documents, all of which, except the offer, bore date Feb. 1, 1917, though some of them were doubtless signed or executed a few days before that date. The offer was dated at the foot "New York, Jan. 22, 1917," and purported to be signed first by J. P. Morgan & Co. and beneath that well known name H those of 20 other eminent United States bankers or trust companies. It was headed (beneath the amount, $250,000,000) with the words: "United Kingdom of Great Britain and Ireland one-year and two-year $5\frac{1}{2}$ per cent. secured loan convertible gold notes." The dates when interest and principal were payable followed, and then the line: "Principal and interest payable at the office of J. P. Morgan & Co." There followed the sentence as to the right to convert:

> Convertible upon notice, at the option of the holder, at any time before maturity,
> A or (if called for earlier redemption) at any time until and including the date of such redemption, into twenty-year 5½ per cent. bonds of the United Kingdom of Great Britain and Ireland, payable Feb. 1, 1937, and not subject to prior redemption.
>
> Principal and interest of the notes, and of the bonds into which they may be converted, is to be payable, without deduction for British taxes, present or future, in New York in United States gold coin or, at the option of the holder, in London in sterling at the fixed rate of $4.86½ to the pound.

B I pause to observe that these provisions, and particularly the fact that notes and bonds are included in the same sentence as to mode and places of payment, point strongly to the conclusion that the law of the contract must be the same both for the notes (which might never be converted) and for the bonds. I should add that the reference to freedom
C from British taxes might have been thought desirable having regard to the option to require payment in London.

After a provision as to redemption, the document contained:

> The notes are to be secured by pledge with Bankers Trust Company, New York, under a pledge agreement executed by the government, of securities approved by
> D J. P. Morgan & Co., of an aggregate value of not less than $300,000,000 calculated on the basis of the then prevailing markets, sterling securities being valued in dollars at the prevailing rate of exchange.

There followed descriptions of the securities to be pledged, and a provision that, pending the arrival and deposit of definite securities as
E described, the government was:

> to deposit temporarily with the Trust Company either approved New York Stock Exchange collateral or cash.

There were provisions to meet the case of depreciation in value, and for the right of the government to sell for cash any of the pledged securities,
F the proceeds of sale to be applied to the retirement of notes by purchase or by redemption by lot, and also for a substitution of other securities with the sentence:

> all substitutions, withdrawals and valuations of securities are to be approved by J. P. Morgan & Co.

G Then came the words:

> This offering is made subject to the approval by our counsel of necessary formalities. We offer the above notes for subscription as follows:—The one-year notes at 99.52 and interest, yielding 6 per cent. The two-year notes at 99.07 and interest, yielding 6 per cent. Subscription books will be opened at the office of J. P. Morgan & Co. at 10 o'clock a.m., Jan. 24, 1917, and will be closed at 10 o'clock a.m., Jan. 31, 1917, or earlier in their discretion. . . . Amounts due on allotments
> H will be payable at the office of J. P. Morgan & Co. in New York Funds, to their order, and the date of payment will be given in the notices of allotment.

The above offer was made by J. P. Morgan and the group of bankers and trust companies to the public. The pledge of securities was effected by a letter dated "New York City, Feb. 1, 1917," signed by the British

Ambassador to the United States for the government and addressed to "Bankers Trust Company, New York City." It began thus:

> Dear Sirs, The government of the United Kingdom of Great Britain and Ireland (hereinafter termed the obligor) is about to issue and to sell its 5½ per cent. secured loan convertible gold notes for the aggregate principal amount of $250,000,000. A
> Dated Feb. 1, 1917.

A description followed of amounts and dates of maturity. The notes were to be in the form of Sched. A1, and to be authenticated by the certificate thereon executed by the Bankers Trust Company. The bonds were to be substantially in the forms in the Sched. A2. There followed B
19 clauses containing the terms of the pledge of securities. There can be no doubt that in form it is an American document, providing for an effective pledge according to American law of the pledged securities placed in the hands of a trust company of New York city, providing in case of default for the sale by that trust company of the pledged securities, C
and for the application of what are termed "the avails of the sale" in payment, first, of costs and expenses, then of the whole amount owing upon the notes for principal and interest, and, lastly, in payment of the surplus, if any, to the obligor. Cl. 12 contains a provision that any note holder, including the Bankers Trust Company, may become the purchaser of the D
pledged securities, without accountability except for the purchase price: "whether the sale be made under the power of sale herein contained or pursuant to judicial proceedings." Notice to redeem the notes was to be given by advertisements for five successive weeks in two newspapers published in New York city. The right to enforce the security was to E
vest exclusively in the trust company. Notices to the obligor were to be sufficiently given if addressed "to the Secretary of the British Treasury, care of J. P. Morgan & Co.," and delivered by hand to any member of that firm at their office in the city of New York. The final clause provided that the trust company, if in doubt as to the meaning F
of the instrument or their powers or duties thereunder, might:

> advise with legal counsel selected by it and shall be protected in anything done or suffered by it in good faith in pursuance of the opinion of such counsel.

My Lords, I do not think it can be doubted that the British government, as well as the trust company and the lenders, intended that the law G
of New York should apply to this pledge in all respects, and that the government by the letter agreed that their property so pledged should be free from the immunity ordinarily applicable to the property of a foreign sovereign to the extent necessary for making the pledge effective.

It does not necessarily follow that the law of the contract in other H
respects might not be the law of England, but that view would seem to impute an improbable intention to the parties. So far as the notes were concerned, it is plain that the subscribers were not being asked to rely primarily, if at all, on the credit of the government of the United

Kingdom. Securities to the value of not less than $300,000,000 were being placed in the hands and under the control of the Bankers Trust Company to secure notes to the value of $250,000,000, and it is to be remarked that provision was made for the possible event of the pledged A securities depreciating in value, either because of change in market price or because of change in the rate of exchange between London and New York, so that the aggregate value should become less than 120 per cent. of the principal amount of the notes for the time being outstanding. Moreover, there is nothing whatever in the notes themselves, unless it B be the circumstance that the promise to pay is a promise by the government of the United Kingdom, which tends to support the view that the intention of the obligation was that it should be governed by the law of England.

After the United States had declared war, notes to the value of C $143,587,000 were exchanged into bonds of three denominations, with coupons attached. This was, in effect, a loan by citizens of the United States to an allied power to enable it effectively to carry on the War. There is nothing in the form of the bonds to indicate that the proper law of the contract was not the same as in the case of the notes. On the D contrary, the provisions for registration in the city of New York, and for transfer after such registration, seem to me to suggest that the bond is an American bond, subject to the law of the state of New York.

My Lords, having reached the opinion that the question is one of presumed intention, I am, I think, fully justified, on a consideration of E the documents themselves, read in the light of the surrounding circumstances, not omitting the fact that the borrower was the government of the United Kingdom, in concluding, first, that the intention of all parties to the contract of loan effected by the offer and acceptance of the secured notes was that it should be governed by the law of New York, and, F secondly, that it is impossible to come to the conclusion that the proper law of the contract embodied in the bonds was not the same law as that which governed the issue and acceptance of the notes. It follows, therefore, that the law of New York state applies to the bonds, and that, if the New York option is exercised, the obligation of the government is G simply to pay that which in New York it is liable to pay in respect of the bonds, that is dollar for dollar, pursuant to the joint resolution.

These, my Lords, are the reasons which led me to vote in favour of the motion proposed by the noble Lord on the woolsack; and I will add only that I am by no means clear that BRANSON, J., and the Court H of Appeal would not have come to the same conclusion had the facts been fully before them, and had they regarded themselves as free to regard the *dicta* of LORD ROMILLY, M.R., and those of LORD SELBORNE as requiring the qualifications referred to above, and in the speeches of the noble Lords who have preceded me.

LORD ROCHE: My Lords, I have had the advantage of reading in advance the opinions of the noble Lords which have just been delivered, and there is little that I need add in expressing my concurrence in their reasoning.

As to the construction of the payment clause, I feel that it no doubt A should, by English law, receive the same construction as was given to a similar clause in *Feist's* case (3). As to the proper law of the contract I confess that I have felt serious doubts, during the course of the argument, as to the true conclusion to be reached. The principles stated by LORD ROMILLY, M.R., and LORD SELBORNE, though of course they do not constitute B any absolute rules of law, are based upon considerations of very great weight, and have stood unchallenged for so long a time that I have hesitated before differing from the Court of Appeal and BRANSON, J., as to their effect upon the present case. But, though I regard them as still generally applicable to most transactions of the character of C the transaction now in question, yet this transaction was of a very exceptional character. At the time the notes were issued—and I agree that it would be wrong to regard the issue of the notes and of the bonds otherwise than as one transaction—it was natural that His Majesty's government in making resort to a great, and still neutral, financial D market in the United States of America, should have clothed the transaction with both the appearance and the reality of a transaction domiciled, so to speak, in New York. It is needless that I should again call attention to the clauses in the documents of this import. But in English law a transaction may be regulated in general by the law of one country, E although, as to parts of that transaction, which are to be performed in another country, the law of that other country may be the law applicable: *Chatenay* v. *Brazilian Submarine Telegraph Co.* (7). The question is, can that situation be regarded as the situation here? On the whole, I think it cannot be so regarded. The offer of Jan. 22, 1917, contained F this sentence:

> This offering is made subject to approval by our counsel of necessary formalities.

By the letter to the Bankers Trust Company, dated Feb. 1, 1917, there was entrusted to legal counsel—which phrase meant, in this document, as in the offer, counsel in New York—the power of decision upon, amongst G other things, the meaning of the instrument in question. Stipulations of this nature are properly deemed to be of the greatest weight in the determination of questions as to the proper law of contracts. As a rule, and this case is no exception, the courts and lawyers of any country or locality are taken to be intended to apply their own native law to the H matter submitted to them for decision or advice. The letter of Feb. 1 in effect provides for the decision under the law of New York of any doubtful matter, including any matter of construction. Such a stipulation on the subject of construction goes to the heart of the question of what is the proper law of the contract. Being satisfied that the law to regulate the note part of the transaction was intended to be the law of the state of New York, and thinking that it is impossible to distinguish the various stages of this loan transaction one from another in respect A of their proper law, I am impelled to the conclusion that the law of New York was intended to apply throughout such transaction. The joint resolution of Congress therefore operates to defeat the suppliants' claims, and the Crown is entitled to judgment.

B LORD ATKIN: My Lords, I am authorised by my noble and learned friend, LORD MACMILLAN, to say that he concurs in the opinions which have been delivered.

Appeal allowed with costs.

Solicitors: *Treasury Solicitor* (for the Crown); *Allen & Overy* (for C the respondents).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

EWER *v.* NATIONAL EMPLOYERS' MUTUAL GENERAL D INSURANCE ASSOCIATION, LTD.

[KING'S BENCH DIVISION (MacKinnon, J.), **March, 2, 3, 4, 5, 1937.**]

Insurance—Policy—Disclosure—Claims on other policies in respect of other subject matter—Exaggerated claim—Fraud.

The plaintiff and S., who carried on business in partnership, bought E certain premises in their joint names. In 1928 S. ceased to be a partner, but the premises remained in the joint names and S. from time to time lent sums of money to the plaintiff to enable the business to carry on. In 1930 the plaintiff effected an insurance on the premises and fixtures, and certain business utensils and tools. The insurance was renewed year by year. In 1936 the plaintiff made a claim under the policy for damage by fire. The plaintiff claimed, in respect of the contents of the F premises lost in the fire, the catalogue price of new goods. The insurance company repudiated liability on the grounds that the plaintiff had not disclosed certain facts and that the claim was so grossly exaggerated as to be fraudulent. The insurance company contended that the plaintiff, when effecting and renewing the insurance, should have disclosed, without any question being asked, (i) every claim he had ever had upon any other insurance policy whatever the subject matter, G (ii) the fact that any other insurance company had declined to insure or to renew an insurance upon another subject matter, and (iii) similar details of S.'s insurance history:—

HELD: (i) the plaintiff was not bound to disclose claims upon other policies in respect of a different subject matter, nor was he bound to disclose the fact that another insurance company had declined to renew H an insurance upon a different subject matter. The plaintiff was not bound to disclose S.'s insurance history.

(ii) the plaintiff's claim for the catalogue price of new goods to replace those lost in the fire was not fraudulent, but was merely a bargaining figure.

[**EDITORIAL NOTE.** It was contended for the insurance company in this case that whenever any assured, through his broker or personally, makes any proposal for a fire insurance policy, he is bound to disclose, without any question being asked about it, the fact of his ever having had any claim on any other insurance policy of any sort during the assured's whole life. This was characterised as too wide a claim altogether. It must be restricted to insurances of the same kind, and in addition there will often be a question of the waiver of the condition upon the renewal of the insurance. The present case did not really test the exact limits of disclosure, but it is clear there is no such wide duty upon the assured as that here claimed.

As to Duty to Disclose, see HALSBURY, Hailsham Edn., Vol. 18, p. 416, para. 596; and for Cases, see DIGEST, Vol. 29, pp. 323, 324, Nos. 2649, 2650.]

Cases referred to:

(1) *Becker* v. *Marshall* (1922), 11 Lloyd L.R. 114.

(2) *Arthrude Press, Ltd.* v. *Eagle, Star & British Dominions Insurance Co.* (1924), 18 Lloyd L.R. 382; 59 L.Jo. 529; 29 Digest 325, *2656.*

(3) *Locker & Woolf, Ltd.* v. *Western Australian Insurance Co., Ltd.* (1935), 153 L.T. 334; Digest Supp.

(4) *Glicksman* v. *Lancashire & General Assurance Co.*, [1925] 2 K.B. 593; 29 Digest 415, *3252.*

(5) *Re Yager & Guardian Assurance Co.* (1912), 108 L.T. 38; 29 Digest 325, *2657.*

(6) *Dome Mining Corpn., Ltd.* v. *Drysdale* (1931), 41 Lloyd L.R. 121.

Action for a declaration that two policies of insurance were valid and subsisting and of full force and effect. One of the policies was on certain buildings, with the goods, tools and fixtures therein, and the other on a petrol pump installed on the premises. It was agreed that the defendant company's liability on the second policy should depend on the decision as to the first policy. The facts and pleadings are set out in the judgment.

Charles Doughty, K.C., and *Robert Fortune* for the plaintiff.

H. D. Samuels, K.C., and *Frank Soskice* for the defendant company.

Samuels, K.C.: It is the duty of the assured to make disclosure of every fact material to be known to the underwriters. They must be informed of all facts which would be likely to affect their minds in accepting the risk. Exactly the same position arises at each successive renewal of the policy as at the first inception of the insurance. See *Glicksman* v. *Lancashire & General Assurance Co.* (4), *Re Yager & Guardian Assurance Co.* (5), and *Dome Mining Corpn., Ltd.* v. *Drysdale* (6). The fact that the building was partly owned by Smart rendered it material to be disclosed to the company that a number of fire claims had been made by him in respect of fires which had occurred on other premises owned by him. It was a term of the policy that if the plaintiff made a claim in any respect fraudulent the policy should be forfeited. The claim as put forward is so grossly exaggerated as to be fraudulent. The goods on the premises could not have been worth more than £200 at most. Further, there was no sufficient evidence that many of the articles claimed for were there at all or that some of those there were damaged by the fire. [Counsel also referred to *Becker* v. *Marshall* (1), *Arthrude Press, Ltd.* v. *Eagle, Star & British Dominions Insurance Co.* (2), and *Locker & Woolf, Ltd.* v. *Western Australian Insurance Co., Ltd.* (3).]

A MacKinnon, J.: The plaintiff has for some time carried on the
business of the proprietor of a garage, employing originally charabancs
and lorries, and, since a certain date, lorries only. In 1919 he married
the daughter of Mr. George Smart. From 1920 onwards, under the firm
name of Albert Ewer & Co., or some such name, he and Mr. Smart, in
B partnership, carried on this business of proprietors of charabancs and
lorries. In 1928 there was some litigation, and Mr. Smart ceased to be
a partner, but he had some interest in the plaintiff's business in two
respects. First of all, these premises at Whiston Street were originally
bought in the joint names of Smart and the plaintiff, and they have
C remained the joint property of Smart and the plaintiff ever since.
Secondly, this business of the plaintiff has been carried on, so far as the
accounts appear to show, with conspicuous ill-success, and its continuance
has been possible only by reason of the fact that Mr. Smart has,
from time to time, lent very considerable sums of money to the plaintiff,
D and is a creditor for very considerable loans. The plaintiff sold the
charabanc part of his business to his brother, and, since then, he has
had only the lorry part of it. That was carried on chiefly at this garage
at Whiston Street.

This particular case arises out of an insurance effected on these
E premises in Feb., 1930. The plaintiff employed Messrs. Muir, Beddall &
Co. as his insurance brokers. In Feb., 1930, Messrs. Muir, Beddall & Co.,
the brokers, sent or submitted to the defendant company a document
which they called an order for fire policy. It is headed, "National
Employers' Mutual General Insurance Association, Ltd.," and gives the
F name and residence of the party proposing to insure as Albert Edward
Ewer, of 152, Curtain Road. That was where his office was. The
property to be insured was this garage in Whiston Street. It then sets
out the description of the property to be insured under three items:
the first is the garage building, the sum to be insured being £5,000;
G secondly, on trade fixtures, fittings, and utensils and tools (the insured's
own only), subject to average, £500; and then the third item is £500
on 12 months' rent, "subject to the attached rent clause." That proposal
was entertained by the defendant company. A surveyor was sent
to inspect the garage and premises, and he reported upon them as being
H a desirable risk, with the result that the policy dated Feb. 1, 1930, was
issued. That policy insured the three matters I have mentioned, amounting
to a total of £6,000, at a premium of £13 10*s*. That, of course, was
current for 12 months, from Feb. 1, 1930, but was renewed year by year
until Feb., 1936. No claim was made upon it except in June, 1931,

when a fire occurred at these Whiston Street premises, by reason of some charabanc catching fire and the flames communicating themselves to the building, with the result that a claim was made on the defendant company in June, 1931, which it settled for £76.

On May 23, 1936, being the sixth year of the currency of this policy, a fire took place on the Whiston Street premises. There is no suggestion that it was anything but a purely accidental fire. On the Monday following, a representative of the assessors for the defendant company, having been notified of the fire, came down; there was some discussion, and eventually the plaintiff was told to put forward a claim. He did put forward a claim, but, while negotiations were going on, on Aug. 11, 1936, nearly four months after the fire, he received a letter from the solicitors for the defendant company, saying:

> We are instructed by the National Employers' Mutual General Insurance Association, Ltd., to repudiate liability under their policy with you arising out of a fire which took place on or about May 23, 1936, at 19/21, Whiston Street, Haggerston, E.2. Generally the grounds on which liability is disputed are breaches by you of conditions 1 and 5 of the said policy.

Condition 1 of the policy is:

> This policy shall be voidable in the event of misrepresentation, misdescription or non-disclosure in any material particular.

Condition 5 is:

> If the claim be in any respect fraudulent or if any fraudulent means or devices be used by the insured or anyone acting on his behalf to obtain any benefit under this policy or if any destruction or damage be occasioned by the wilful act or with the connivance of the insured all benefit under this policy shall be forfeited.

As a result of that, the plaintiff issued his writ in this action on Aug. 19, 1936. The claim put forward at first was for the total loss, but one of the heads of defence put forward was a reliance on cl. 11 of the conditions, which requires that any pecuniary claim shall be settled by arbitration, and makes the obtaining of such arbitration award a condition precedent to any right of action or claim on the policy. That is a defence which, on the terms of the policy, is available, and it is not possible for the plaintiff to claim in this action, nor would it be possible for me to entertain any claim for, any sum of money. By reason of that, the plaintiff claims, by an amendment: " A declaration that the said two policies of insurance are valid and subsisting and of full force and effect." That is the only issue I can entertain, and the only issue upon which I can give judgment.

In addition to that defence under the arbitration clause, there are two matters relied upon: first, a claim of non-disclosure of material facts, and, secondly, that the claim put forward is fraudulent. It is the first of those contentions which raises very grave issues, and, so far as I know, raises them in this particularly bald form for the first time in the history of fire insurance. The proposition relied upon by the defendant company is that, whenever any assured, through his broker or personally, makes any proposal for a fire insurance policy, he is bound to disclose, without any question being asked about it, the fact of his ever having had any claim on any other insurance policy of any sort for, as I gather, the whole of his life. Not only is that said in this case in regard to the plaintiff, but it is further said that, when this plaintiff was originally effecting this policy in 1930, he, through his brokers, was then bound to inform the insurance company of any claim that Mr. George Smart (whose interest or connection with the property I have already indicated) had put forward on any insurance policy of any kind throughout the whole of his life. I say " throughout the whole of his life " because the company certainly relies upon matters in the insurance history of Mr. Smart going back to 1912, which would be 24 years before the effective policy in this case, namely, the renewal of this insurance in Feb., 1936. That is what I conceive to be a very grave and serious contention. There is no trace, so far as I know, of any case in which any such duty has ever been suggested, and, as a matter of principle, I find it very difficult to believe that it can be correct. It is necessary to bear in mind that the contract on which this issue is brought, is a contract made by the renewal of the insurance in Feb., 1936, which had in each year been automatically renewed since the policy was originally effected in Feb., 1930. As I gather, the defendant company says: there was, on the effecting of the original policy in 1930, a non-disclosure of material facts, and therefore we can avoid it, and, as a result, we can avoid, if it were necessary, each of the subsequent renewals for each 12 months, and we can avoid this last renewal for 1936. I think the company must put it in that way because, in point of fact, at the last renewal, in Feb., 1936, during the preceding 12 months from Feb., 1935, to Feb., 1936, there had been no incident of what is said to be a serious and material character occurring at all.

When the policy was originally effected, in Feb., 1930, so far as the plaintiff is concerned, the only things that can be said as regards concealment of facts are that he had put forward a number of claims, not under a fire policy, but under a policy which he had taken out as a carrier of goods on his lorries—what is called an all-risks policy—to indemnify him against claims successfully made upon him by the owners of the goods. The defendant company says that he had a lot of claims; it says seventeen, but I am not at all clear that that has been proved; but I think it is true that the plaintiff said:

> I agree I had that policy and I had a number of claims on it, but I do not remember the details. Customers of mine used to send in claims and I sent them on to the brokers for the underwriters to deal with.

Those are claims that he made, not upon a fire policy upon these premises, nor upon a fire policy upon any premises; they were claims upon a policy on goods in transit all over the kingdom. The other thing that is said to be a material matter, which he ought to have disclosed in Feb., 1930, is that, in Dec., 1929, the Lloyd's underwriter who had been underwriting this all-risks transit policy had said he did not want to A go on with it.

Those are the only two matters that can be relied upon as concealment when the original policy in this case was effected in Feb., 1930. It was renewed in Feb., 1931. During the period from Feb., 1930, to Feb., 1931, he had had two claims for damage, I think, by fire, on policies B issued by the London Assurance Co., not on buildings, or anything of the sort, but on these charabancs. One was a claim of £13, in July, 1930, and another a claim for £29 in Aug., 1930. It is also said that, during 1930, the Railway Passenger Insurance Co., which had apparently taken the place of the Lloyd's underwriters' all-risks transit policy, C desired to cease to carry that insurance. In point of fact, I have seen that policy, and there is a provision in it that either side may cancel it by so many months' notice on returning to the assured the unexpired part of the premium, and, for some reason which I know not, the Railway Passenger Insurance Co. exercised its right to do that. But the three D matters relied upon in that year were these two trivial claims in regard to fires of charabancs and this Railway Passenger Insurance Co. exercising its right under the policy to put an end to it. That is the period up to Feb., 1931. In Feb., 1932, the policy was again renewed with the defendant company, and, so far as I can see, during that year the E only matter which it is said the plaintiff, through his brokers, ought to have disclosed in Feb., 1932, is the fact that in June, 1931, he had had a charabanc burned at these very premises in Whiston Street, and had recovered £500 from the London & Guildhall Insurance Co. on a policy issued by it on the charabanc. In point of fact, there is a certain solecism F about that matter, because the defendant company must have known about that fire, inasmuch as that was the fire which resulted in the plaintiff claiming on this very policy the £76 which I mentioned earlier, and which the defendant company paid. In Feb., 1933, the policy was again renewed, and in regard to that year it is apparently said that there G was a fatal concealment of the fact that, during that 12 months, another lorry had suffered some damage, and the London Assurance Co. had paid £85. In 1934, the policy was renewed once again, and in that year there had been a claim for £100 on the London Assurance Co. policy in respect of a charabanc, and another one in respect of a lorry for £35, H and another one in respect of another lorry for £90 odd. The policy was renewed in 1935, and, in the previous 12 months, so far as I know, there was no claim made on any other policy, and therefore none which it could be said he ought to have disclosed. When it was renewed in

1936, there had been, so far as I can see, no incident in his insurance history (as it is called) which had occurred during the 12 months up to Feb., 1936.

All these matters that it is said the plaintiff fatally failed to disclose are all claims on different subject matters, and nothing to do with these particular premises, except the one which did involve a claim in regard to these particular premises, and about which the defendant company knew everything, because it paid the loss in regard to it. The proposition is that, when effecting the original insurance, the assured is bound to disclose any claim he has ever had on any other insurance policy, and, in each yearly renewal, any claim on any other insurance policy that he has had during the previous 12 months. As regards the original effecting of the policy, it apparently goes back to the whole of his life, because, when his disclosure about Mr. Smart is brought in, the matter goes back to 1912 as the earliest date. The proposition is that he must disclose any claim he has ever had on any insurance policy. For that proposition in its bald form there is no authority whatever.

I have been referred by counsel for the defendant company to certain cases which, they suggest, establish it. In my judgment, they do not do that at all. The first case to which I was referred was *Becker* v. *Marshall* (1). That was a case on a fire policy, in which, as so often happens, the company had required the assured to answer certain questions, and, among those questions, were questions as regards previous fire losses, which were answered by the card. By reason of the personality of the firm or its constituent partners, the insurers were able to say that this particular firm which was proposing this insurance had had losses, and as regards that Salter, J., says, at p. 117 :

> I am satisfied that the insurers do in fact rely on the answers to the questions in the proposal form, and that they rely on them throughout, and that the contract was made upon the faith of the accuracy of these answers, and that the accuracy of the answers was a condition of each of these contracts. I have, therefore, to ask myself whether question 10 was correctly answered, and in my opinion it was. The question is one on which minds might easily differ. I think it was correctly answered.

Question 10 was whether or not there had been previous burglaries. It was a policy in favour of Becker & Wise. Becker & Wise, or one of them, had had previous burglaries, but the ambiguity of the question is what Salter, J., is referring to, when he says : " The question is one on which minds might easily differ." The ambiguity was as to whether you, as a firm, have had previous burglaries, or have either of you, or either of the constituent partners, had previous burglaries. He said that that was ambiguous, and that, upon its true construction, it was in fact correctly answered. But then he goes on to say that, having regard to the fact that these questions had been asked, and the fact that the insurance company plainly attached importance to the question whether there had been previous burglaries, he thinks it was a fact material for the assured to disclose :

> With regard to the three burglaries, I confess that I cannot have the shadow of a doubt that these are very material matters to be known to the insurers under the circumstances of the case. A

The circumstances of the case clearly are the fact that those two questions had been asked, because he goes on to refer again to the questions :

> In considering the question of whether this is a risk to take, one of the number of things material is, of course, the safety of the premises, another is the carefulness or careful habits of the person whose goods are to be insured, and that is what this question is directed to. It is not, " Have you ever made a claim ? " It is, " Have B you sustained a loss, are you a person into whose premises burglars have got before now ? " I have no doubt at all that this was a material thing.

It is quite clear to me that Salter, J., decided that case, as he said, on the circumstances of the case. Thus the fact that there had been previous burglaries was a material circumstance, having regard to the fact that C direct questions were asked about it. Nor do I express any opinion in general as to whether it is necessary for a man who is insured against burglary, apart from any questions, to say whether he has had previous burglaries. All I am concerned to say is that *Becker* v. *Marshall* (1) is no authority for the very wide and disastrously general proposition that D is contended for in this case, namely, that one who is proposing an insurance upon any subject matter must reveal the fact that he has had, during the previous course of his life, claims on other policies, and other policies of every kind. The case of *Becker* v. *Marshall* (1) went to the Court of Appeal. There again, in the Court of Appeal, I think Lord E Sterndale, M.R., was basing his judgment upon the same considerations as was Salter, J., namely, that, in the circumstances of that case, it was material, because Lord Sterndale, M.R., also refers to the proposal form, and to the fact that the proposal form contained questions which go on to show that the insurance company wanted to know, not only whether it was likely to be defrauded, but also whether there was suffi- F cient in the facts to show the amount of carefulness in the custody of the property, and so on. He therefore again relies, as one of the most material circumstances in that case, on the existence of that question in the proposal form.

The next case to which I was referred, *Arthrude Press, Ltd.* v. *Eagle,* G *Star & British Dominions Insurance Co.* (2), seems to me to be precisely the same, because there again there were questions, perhaps answered correctly by the card, but involving other matters which were not disclosed. There, questions were asked on the proposal form :

> 1. How long have you been in business at the present premises ? 2. Has H your insurance ever been declined by any office ? 3. Have you ever had a loss by fire ?

Greer, J., discusses these questions, and he says, at p. 384 :

> But the most important question in this particular case is : " Has your insurance

> ever been declined by any office ? " In my judgment, that answer " No " was not true.

And that was sufficient to decide the case, because that was a case where, throughout, answers to the questions were made a condition of the policy.
A He goes on, at p. 385 :

> In my judgment, that answer " No " was not true. The question is broadly stated, " Has your insurance ever been declined by any office ? " I think the truth about that matter is to say, " Yes. The insurance was declined, before our incorporation, by the North British & Mercantile office."

Then he goes on to say :

B
> But, inasmuch as misrepresentation is not made the basis of the defence in this case, it does not matter whether the company knew it or not if in fact the insurance of the company had been refused.

He again discusses this matter in the light of those questions having been asked, having been not untruly answered, but answered; at any
C rate, with great economy of truth, and, in the light of those inquiries, he discusses what was material to be disclosed.

The same observation, I think, is true of the third case to which I was referred, *Locker & Woolf, Ltd.* v. *Western Australian Insurance Co., Ltd.* (3), because once again there was a proposal form with questions.
D In answer to question No. 2, " Have you ever suffered loss by fire ? " the answer was written " Yes, £5, Sea," and to question No. 4, " Has this or any other insurance of yours been declined by any other company ? " the answer was written " No." The arbitrator found that : (1) The answer to question No. 2 in the proposal form was not un-
E true or inaccurate, as the answer was true in so far as it concerned the partnership, and the form of the question was ambiguous. (2) There was non-disclosure or concealment of a fact which the arbitrator held to be material in omitting to bring to the notice of the respondents the fact of the fire at Isaac Woolf's premises—that was one of the
F partners—in Manchester in 1919. (3) The answer to question No. 4 was untrue, and there was a misrepresentation and concealment or non-disclosure of a fact which the arbitrator held to be material in failing to bring to the notice of the respondents the declining of the proposed motor insurance with the National Insurance Co.

G That, therefore, was a case in which the learned arbitrator found that certain matters were material and had not been disclosed. I do not quite know what the question for the court was. I suppose it could only have been that there was no evidence on which the arbitrator could have come to that conclusion. The only other case I was referred to
H deals merely with the general proposition of duty as to disclosure, as to which there is not now any doubt.

Those cases are cited to me as the only authorities for this proposition, which I venture to characterise as of great gravity, and, so far as I know, complete novelty, namely, that, when any assured is effecting an insurance or renewing an insurance upon some subject matter, he has to disclose, first of all, every loss that he has had on any form of policy, and, secondly, the fact that any other insurance company on any other policy has either declined to renew or refused to insure it. In regard to that, by the way, I was told by one of the gentlemen who was called A as an expert that there is some subtle difference between what he was pleased to call a declinature of a policy and its refusal. If a risk has been only refused, that, he says, need not be disclosed, but, if it has been declined, then it must be disclosed. I made strenuous efforts to try to get some explanation, from him and from the other gentleman B who was called, as to what was the difference between declining and refusing a risk, and I am still in a state of complete ignorance as to what the difference is. It only adds to the gravity of the task which appears to be set before the would-be assured, that he has, first of all, to understand the difference between refusing and declining a risk, and then to C bear in mind that, if the risk has been refused, he need not disclose it, and if it has been declined, he must. I think that the defendant company has failed to establish that there was any concealment of material facts by the plaintiff or his brokers, Messrs. Muir, Beddall & Co., in the original effecting of this policy in Feb., 1930, or its successive renewal D each Feb. up till 1936.

Then there is relied on an alleged failure to disclose matters in regard to Mr. Smart's insurance history. As I have pointed out, Mr. Smart was one of the part-owners of these premises, and he was also a creditor of the plaintiff for a considerable amount. What I have said in regard E to the suggestion that the plaintiff had concealed material matters as regards his own insurance history applies *a fortiori* as regards Mr. Smart's insurance history. It is pointed out that it is to be remembered, with regard to that, that apparently the defendant company would put upon the plaintiff or Messrs. Muir, Beddall & Co. the task, when they were F effecting the policy in 1930, of telling the defendant company of something that had happened to Mr. Smart 18 years before in 1912, and it was said that what happened then was that the North British Mercantile Insurance Co. had declined to insure the said Mr. Smart against a fire risk. The plaintiff apparently was under the obligation of going back G in the history of his father-in-law for 18 years to achieve a task which, to my mind, is impossible, of discovering whether the North British Mercantile Insurance Co. had declined to insure Mr. Smart or had refused to insure Mr. Smart. Presumably, it is said that the insurance company declined, because it is said non-disclosure of it was a material H matter. I think this defence of concealment fails.

Then there is a second, comparatively unimportant point raised in the defence. It is said that the claim which was put forward was false and fraudulent. [His Lordship considered the details of the claim.]

The resulting figure of £900 [for the contents of the premises] looks
preposterous, because nearly all these things are claimed at the cost
price of new things bought from the makers. There is no deception
about that. In the list, that was put down quite clearly, and I am
A satisfied it was done from the catalogues of the various makers, and,
where there were no catalogues, by telephoning to the makers and asking
the price. That was apparent on the face of it, because, to start with,
the figures given are £14 10*s*. each, less 15 per cent. trade discount.
That was the new price. Of course, these things were not worth that.
B It was one of those cases where the view of the assured as to what he
was entitled to, or would like to recover, for the things that had been
burned or damaged differed very much from the view of the insurance
company as to the amount the assured would eventually be entitled to
recover. These things were not new; they were all second-hand, but,
C according to the plaintiff, they were efficient, and he could use them in
his business. If the law were otherwise, that might be very reasonable,
but all he can recover is the reasonable value of the second-hand goods
that have been destroyed. The plaintiff here has put down the cost
price of new things. I do not think he was doing that as in any way a
D fraudulent claim, but as a possible figure to start off with, as a bargaining
figure. The plaintiff knew the claim would be discussed, and probably
drastically criticised, by the assessors; he had been asked for invoices,
and he started the bargaining with them by putting down the cost price
of these articles as if they were new. Though I admit the resulting figure
E is preposterously extravagant, I do not think there was any fraud in
putting it forward. The result is that, in my view, the plaintiff is entitled
to the declaration that he asked for, namely, that this is a valid and
subsisting policy. I give judgment for the declaration asked for in the
first prayer at the end of the claim, for the plaintiff, with costs.

F *Judgment for the plaintiff, with costs.*

Solicitors: *De Meza & Menasse* (for the plaintiff); *William Charles Crocker* (for the defendant company).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

BYRNE *v.* DEANE.

[Court of Appeal (Greer, Slesser, and Greene, L.JJ.), **February 26, March 2, 1937.**]

Libel—Accusation of report of crime to police—Whether defamatory—Publication—Proprietary club—Proprietors permitting defamatory statement to remain on club wall.

The plaintiff was a member of a club in which there had been some gambling machines. As a result of a complaint being made to the police, the machines were removed. A lampoon, which the plaintiff alleged referred to him and suggested that it was he who had informed the police, was put up on a wall in the club. The concluding words of the lampoon were: "But he who gave the game away, may he byrnn in hell and rue the day." The defendants, husband and wife, were the proprietors, and the female defendant the secretary of the club. In an action for libel the plaintiff alleged that the words were defamatory and that the defendants had published them by allowing the lampoon to remain on the wall:—

Held (i): it is not defamatory to say of a man he has informed the police of a crime; [*per* Slesser and Greene, L.JJ.] the words in the present case were not defamatory; [*per* Greer, L.J.] the words were defamatory, because they meant something more than the mere fact that the police had been informed of a crime. They meant that the plaintiff had been guilty of disloyalty to fellow-members of his club.

(ii) [Slesser, L.J., dissenting in the case of the male defendant]: there was evidence of publication against both defendants.

Decision of Hilbery, J., *reversed.*

[**EDITORIAL NOTE.** The judgments herein, when the further words of Greer, L.J., at the end of the case are included, make it clear that it is not defamatory to say of a man that he has informed the police of a crime. In this respect it matters not whether the crime be a serious one or one which some think ought not to be a criminal offence at all. The difference between the Lords Justices in the present case is only upon the meaning to be ascribed to the words used. Upon the publication question it would seem that it is the duty of the occupier of premises to remove any defamatory matter placed thereon by third persons, provided that it is readily removable. If the defamatory matter is in a permanent form, and can only be removed at great inconvenience and expense, its non-removal does not amount to publication.

As to Disparaging Statements, see HALSBURY, Hailsham Edn., Vol. 20, pp. 397, 398, para. 485; and for Cases, see DIGEST, Vol. 32, pp. 17-19, Nos. 78-109.

As to Publication, see HALSBURY, Hailsham Edn., Vol. 20, pp. 440, 441, para. 531; and for Cases, see DIGEST, Vol. 32, pp. 76, 77, Nos. 1057-1073.]

Cases referred to:

(1) *Myroft* v. *Sleight* (1921), 90 L.J.K.B. 883; 32 Digest 38, *346*.
(2) *Mawe* v. *Pigott* (1869), I. R. 4 C.L. 54; 32 Digest 60, case *878i*.
(3) *Hird* v. *Wood* (*No.* 1) (1894), 38 Sol. Jo. 234; 32 Digest 85, *1154*.
(4) *Pullman* v. *Hill & Co.*, [1891] 1 Q.B. 524; 32 Digest 76, *1069*.
(5) *R.* v. *Paine* (1696), 5 Mod. Rep. 163; 32 Digest 79, *1094*.
(6) *Graham* v. *Roy* (1851), 13 Dunl. (Ct. of Sess.) 634; 32 Digest 19, case *m*.
(7) *Winn* v. *Quillan* (1899), 2 F. (Ct. of Sess.) 322; 32 Digest 19, case *n*.

Appeal from a decision of Hilbery, J., dated July 27, 1936.

The plaintiff was a member of the Seaford Head Golf Club. The defendants, Mr. and Mrs. Deane were the proprietors of the club ; Mrs. Deane was also the secretary. As a result of a complaint by the police certain gambling machines were removed from the club house. Thereafter, the following lampoon was put up on a wall of the club house near the place where these machines had stood :

> For many years upon this spot
> You heard the sound of a merry bell ;
> Those who were rash and those who were not,
> Lost and made a spot of cash.
> But he who gave the game away,
> May he byrnn in hell and rue the day
> *Diddleramus.*

This lampoon was typewritten, and underneath it there was a carbon copy ; in the top copy the word " byrnn " had been deleted and " burn " substituted. In an action for libel the plaintiff alleged that the defendants were to blame for the exhibition of the lampoon and he pleaded that :

> By the said words the defendants meant and were understood to mean that the plaintiff had reported to the police the presence of the said machines upon the said premises, that he was guilty of underhand disloyalty to the defendants and his fellow members of the said club and that by reason of the said facts his conduct was deserving of the gravest censure, that he was a person devoid of all true sporting spirit and further that he was a person unfit for other members of the club to associate with and should be ostracised by them.

The defendants denied the plaintiff's allegations and they said they had nothing to do with the lampoon being put up in the club house. They also denied that the verse referred to the plaintiff or was meant or understood to refer to him and they declared that it was not capable of bearing the meaning which the plaintiff put on it or any defamatory meaning. HILBERY, J., gave judgment for the plaintiff for 40*s*. The defendants appealed.

Tristram Beresford, K.C., and *Harold J. Brown* for the appellants.

John Flowers, K.C., and *Gerald A. Thesiger* for the respondent.

Beresford, K.C. : There was no publication. One cannot commit the tort of libel by doing nothing. The defendants did not write the lampoon, nor did they authorise its publication. See *Pullman* v. *Hill & Co.* (4). These words are not libellous. To be libellous the words must bring a person into ridicule, hatred, or contempt among all people, not merely among a section of the community. If the plaintiff had told the police that a criminal offence was being committed, that was only the duty of a good citizen, though it might make him unpopular among his fellow club members.

Flowers, K.C. : Publication must depend upon the facts of each case. Here the defendants concurred in the publication. Merely leaving the notice was an act of publication. See *R.* v. *Paine* (5). There was no legal duty to inform the police about these machines ; the only duty

is to report a felony. If it were thought that the plaintiff had told the police, he would be brought into disfavour among the whole body of the clubmen. It was not merely the act of reporting to the police, but reporting without first giving the club warning, so that other action might have been taken. In *Graham* v. *Roy* (6) it was held that to call a man A
an informer was defamatory: see also *Winn* v. *Quillan* (7).

Brown, in reply: Publication involves some positive act. The duty laid by law upon a person is to do nothing to infringe a right; the defendants have done nothing. There is no evidence that this notice was seen by anyone after the defendants had seen it. The presence of B
the machines made the club a gaming house; anyone there could be arrested. The plaintiff merely acted as a good citizen and reported a breach of the law for his own protection. In the Scottish cases cited, in *Graham* v. *Roy* (6) it was said that the pursuer had acted for the sake of reward and not from love of justice; in *Winn* v. *Quillan* (7) he was C
said to have acted for reward and from sinister motives. The test is, does the libel lower the plaintiff's reputation among all right-thinking people.

GREER, L.J.: This is an appeal in a libel action in which the trial D
judge came to the conclusion that defamatory matter had been published. He gave judgment for the plaintiff for nominal damages of 40*s*. with costs. The defendants appeal on two grounds (i) that they did not publish the words complained of, and (ii) that the words were not defamatory of the plaintiff. In my judgment the judge was right on both E
points, and this appeal ought to be dismissed. [His Lordship stated the facts.] There are two questions which arise in this appeal; the first is, can it be said that the judge was right in holding that the defendants had published these words? The second is, if they were published, were they defamatory of the plaintiff? F

The plaintiff complained of the lampoon; he said that it was published by the defendants and that it referred to him. It is said there was no evidence before the judge on which he could find that the two defendants published this defamatory statement. Now, the position was this: it was not put up on the wall by either of the two defendants. It was G
put on the wall by somebody else, probably by some member of the club; but undoubtedly the secretary of the club, under the powers given to her by r. 12, she not having consented to its being put up, was entitled to take it down. By allowing the lampoon to remain upon the wall when she had not consented to its being put up, and therefore could have H
taken it down, she was a consenting party to the defamatory statement, if it was defamatory, remaining upon the wall of the club. She and her husband, as it is pleaded, were directors and proprietors of this club. It was a proprietary club. The difference between a proprietary club

and an ordinary club is that, in a proprietary club, the proprietor or proprietors remain in possession of the club. They are the lessees of the club, and they are the occupiers of the club premises, and the walls are their walls, and, in my judgment, the defendants here allowed a defama-
A tory statement to be put up on their walls, and to remain on their walls, in a position in which it could be read by anybody who came into the club. Undoubtedly it must have been so read, not only by people who were members of the club, but also by people who were not members of the club, and who came in only, possibly, for a drink with a member, or
B to play a game of some sort or another.

Quite a number of illustrations have been put forward as illustrations which give rise to questions similar to the question that arises in this case. The nearest case put forward is this: assume that a defamatory poster was hung upon the garden rail of Mr. Smith's house, which adjoins
C the street, so that the defamatory statement can be read by every one who passes the house. Could it not be said that, by allowing that poster to remain hanging upon the garden rail of his house, the occupier of the house was taking part in the publication of that poster to people passing his house, when by the simplest operation in the world, namely, cutting
D the rope by which the poster was hung upon the rail, and taking the poster away, it would have become from that time innocuous? In my judgment, the two proprietors of this establishment, by allowing the defamatory statement, if it be defamatory, to rest upon their wall, and by not removing it, with the knowledge that they must have had that,
E by not removing it, it would be read by people to whom it would convey such meaning as it had, were taking part in the publication of it.

The second question is a question of much greater difficulty: was the statement defamatory? There is no question that it did in fact refer to the plaintiff, and the defamatory part of it, in my judgment, is contained
F in the words:

> But he who gave the game away
> May he burn in hell and rue the day.

It does not seem to me that that statement meant everything stated in the innuendo, but the plaintiff may rely upon the natural meaning
G of the words, quite apart from the innuendo. One must distinguish between the question as to what a defamatory statement means, and the question whether that defamatory statement is or is not true. It may well be that, if it had been necessary to deal with the matter, it might have been said by the plaintiff that the defamatory statement was not
H true, because he had not been guilty of any disloyalty to his fellow members, because he had done only that which was his duty. But that is not the question. The question is, what is the meaning which any reasonable man would attach to the statement contained in this document? It is a statement which in my opinion means that the plaintiff,

who gave the game away, was guilty of disloyalty to his fellow members of the club. Whether that was justified or not is quite another matter. That it would be regarded by any reasonable person as defamatory to say of a man that he was guilty of disloyalty to the fellow members of the club to which he belonged I do not think there is any question. It A
would be a defamatory statement, and a defamatory statement which would entitle him to bring an action in order to recover damages quite independently of the innuendo. But, if it is necessary to go to the innuendo, I do find in the innuendo this statement, that the words meant, amongst other things, that he was guilty of underhand disloyalty to the B
defendants and his fellow members of the club. In my judgment the words are capable of that meaning, and the judge was entitled to decide that that is what they did mean, and we need not consider whether or not the facts, when proved, would show that that statement was wholly unfounded, that is to say, that it was not true. We have to consider C
only what the words would convey to an ordinary reasonable member of the club, and, in my judgment, they would convey, either in their natural meaning, or as stated in the innuendo that the plaintiff had been guilty of underhand disloyalty to the defendants and to his fellow members of the club, and that, therefore, the judge was justified in finding, not D
only that the words were capable of a defamatory meaning, but also that they were defamatory of the plaintiff.

I have not thought it necessary to refer to the various cases that have been cited. I am inclined to think that the Scottish judges were right in thinking that it does damage a man, in the eyes of reasonable persons, E
to call him an informer. If one had to choose between the Scottish cases and the Irish cases, I should follow the Scottish cases.

For the reasons I have given, I think the learned judge was right on both points, and that the judgment that he gave for the plaintiff for 40*s*. and costs ought not to be reversed by this court; but, as F
SLESSER and GREENE, L.JJ., are of a different opinion, the appeal will be dealt with as they state.

SLESSER, L.J.: My conclusion in this appeal in part applies to both the defendants and in part to only one of them in thinking that the G
appeal must be upheld, and, therefore, it will be convenient first to deal with that aspect of the case which applies to both defendants. That part of the case concerns the question whether these words which appear in this doggerel verse can properly be held to be defamatory of the plaintiff at all, whether, in other words, had there been a jury in this H
case, there would have been any case to go to the jury at all.

Now, in my opinion, the words as set out in the statement of claim cannot, on any view, be taken to be defamatory, apart from the innuendo. I do not think that, taken by themselves, they do form any ground of complaint, and, as I understand the case, it was treated upon the basis that the innuendo contained the alleged defamatory meaning of these words, and not the words in their natural and ordinary meaning. I read the innuendo to mean that all the consequent disfavours which it is alleged the plaintiff suffered at the hands of his fellow members of the club are due, and due only, to the fact that he had "reported to the police the presence of the said machines upon the said premises," and so, that being the meaning, of course the natural objections on the part of his fellow members to that would follow. In my view, to allege of a man—and for this purpose it does not matter whether the allegation is true or is not true—that he has reported certain acts, wrongful in law, to the police, cannot possibly be said to be defamatory of him in the minds of the general public. We have to consider in this connection the *arbitrium boni*, the view which would be taken by the ordinary good and worthy subject of the King (to quote the matter which appears in the old declarations), and I have assigned to myself no other criterion than what a good and worthy subject of the King would think of some person of whom it had been said that he had put the law into motion against wrongdoers, in thinking that such a good and worthy subject would not consider such an allegation in itself to be defamatory. That is the view taken by MCCARDIE, J., in *Myroft* v. *Sleight* (1), at p. 884, where he quotes with approval a judgment of the Irish court in *Mawe* v. *Pigott* (2), at p. 62, where LAWSON, J., giving the judgment of the court, says :

> [Counsel for the plaintiff], however, argued that amongst certain classes who were either themselves criminal, or who sympathised with crime, it would expose a person to great odium to represent him as an informer or a prosecutor, or otherwise aiding in the detection of crime ; that is quite true, but we cannot be called upon to adopt that standard. The very circumstances which will make a person be regarded with disfavour by the criminal classes will raise his character in the estimation of right-thinking men. We can only regard the estimation in which a man is held by society generally.

It is true that there have been cited to us certain decisions in the Court of Session, which appear on the face of them to take a different view. In the first case in Scotland which was cited to us, the actual word which was used about the plaintiff was the word "informer," which, it was said, had, or might have, a sinister meaning as regards himself. I do not think it necessary in this case to express a decided opinion about the Scottish cases ; but I find it difficult to understand how it can be said, so long as the law regards the office of public informer as one to be continued in being, and one to be protected by the law, and recognised, and, in certain cases, to be productive of reward, that to call a person by a name which suggests that temporarily he is promoting the interests of the law is defamatory. But, however that may be, it has been argued here that these words in the present case cannot really be said to be defamatory, because in substance the crime which this gentleman, it is suggested in the libel, is endeavouring to prevent, is really of so trivial a character, and, shall I say, one which is so popular with the mass of the people, that to prevent an innocent indulgence in the use of these machines is not preventing a crime, and that the real substance of the case is the dislike and animosity which was created against the plaintiff in the minds of his fellow members of the club. I find it quite impossible to draw a distinction between one crime and another in this particular. In no case can it be said that merely to say of a man that he has given information which will result in the ending of a criminal act is in itself defamatory, where he is doing no more than reporting to the police that which, if known by the police, might well end in the discovery of an illegal act and its suppression. For that reason, I am unable to see that here there would have been any case to leave to the jury on that head.

Now I pass to the other matter, which is not essential to my decision. If my view that these words are incapable of a defamatory meaning is the right view, it concludes this appeal in favour of the appellants; but I will add, in case this matter be further considered, that also, in my view, the plaintiff has failed to show a publication against the male defendant. With regard to the female defendant, I think it may be said—although it is perhaps extending the evidence of publication rather further than has been done in the past in any case which I have been able to discover—that there was some evidence of publication on her part. There are cases which go to show that persons who themselves take no overt part in the publication of defamatory matter may nevertheless so adopt and promote the reading of the defamatory matter as to constitute themselves liable for the publication. Such was the case of *Hird* v. *Wood* (*No.* 1) (3). There, some person unknown had suspended a placard between two poles on the roadway near a gate leading into certain grounds.

> There was no evidence as to who wrote the words on the placard, or who put it up on the roadway; but it was proved that the defendant took up his position near the placard, and remained there for a long time, sitting on a stool and smoking a pipe, and that he continually pointed at the placard with his finger, and thereby attracted to it the attention of all who passed by. The plaintiff complained of this conduct on the part of the defendant as constituting a publication by him of a defamatory statement of and concerning the plaintiff.

The matter was so doubtful that, when it came before Pollock, B., and a jury, the judge held that there was no evidence of publication; but, on appeal, this court, consisting of Lord Esher, M.R., Lopes and Davey, L.JJ., held that that constituted evidence of publication. Now, the evidence of publication here by the female defendant appears to be this, that she was the secretary of this club, and that, under r. 12 of the club, it was provided that:

> No placard or notice, written or printed, shall be posted in the club premises without the consent of the secretary.

Her evidence is to this effect, that she knew that this alleged libel had been placed on the wall of the club. Her view was that she could see no harm in it. She said: "I read it. It seemed to me somebody was rather annoyed with somebody." I think, having read it, and having dominion over the walls of the club as far as the posting of notices was concerned, it could properly be said that there was some evidence that she did promote and associate herself with the continuance of the publication, in the circumstances, after the date when she knew that the publication had been made. But, with regard to the male defendant, I am unable to see that there was any evidence that he was in any way responsible for the publication. It is true that this club is a proprietary club. It is true that he was a part-lessee of the premises; but he had so arranged matters that, by the contract which is contained in the rules, he had provided in r. 3 that:

> The affairs of the club shall be managed by a committee of seven members—

and that committee was to have power to make and amend the regulations and bye-laws, with the assent of the directors. That power was apparently shared by the directors, that is, the two defendants, and the committee could, with their assent, from time to time make and alter the bye-laws, as seemed right to them. But, taking the matter as it was at the moment when this alleged libellous publication was made, I think that the affairs of the club, including the control of any posters which might be placed on the walls, had passed, if not entirely to the female defendant, at any rate to her so far as the putting up of notices was concerned, and to her and the committee so far as the control of the affairs of the club was concerned, and it does not seem to me it would be proper to say that none the less, in spite of this, in order to stop this publication, the directors of the club, the male and female defendants, might have got together and altered the rules, and taken the control of the club and its affairs out of the hands of the committee, in order to pull down the notice. I think that that is a question altogether too remote and hypothetical, leading, as it might well do, to a revolution inside the constitution of the club, resulting in the resignation of all the members, and, although there is apparently a power, under r. 3 (*b*), in the committee to make and amend the regulations and bye-laws with the consent of the directors, and alter the constitution, I think that that is a matter altogether too remote to take into consideration. Therefore, I think there is no evidence of publication against the male defendant.

For these reasons, because there is no defamatory matter shown, the appeal should be allowed, in my view, in favour of both defendants. Were the matter defamatory, and if I am wrong on that point, the appeal should, I think, be allowed on behalf of the male defendant, for want of publication by him.

Greene, L.J. : On the issue of publication, I agree that there was evidence of publication by both the defendants. I agree with Greer, L.J., that no distinction is to be drawn between the two defendants, for the reasons which he gave. To those reasons I may add these considerations : first of all, the suggested distinction was not one which, it appears to me, was taken by the present appellants in the court below. But, however that may be, the affixing of this notice to the walls of the defendants' property, as it was not authorised by the rules of the club, was in fact a trespass, and they were entitled, as proprietors, to remove the trespassing article from the walls. It was a matter which fell right outside the rules of the club ; it was not authorised, and, therefore, it appears to me that they had ample power, notwithstanding the position and rights of the committee, to remove from their property something the presence of which could not be justified under the rules.

I may also add, so far as any substance in the matter is concerned, that, under r. 2, it is provided that :

> No member of the club or of the committee who is not also a director shall be under any liability whatsoever, or become liable or responsible for any expense in respect of the club.

The effect of that would be that, if the committee was sued in respect of this matter, and held liable, the directors would be bound to indemnify it. Therefore, quite apart from the fact that I think they were rightly sued, even if that were not the case, and the committee had been sued, the directors would have been bound to indemnify it.

Now, on the substantial question of publication, publication, of course, is a question of fact, and it must depend on the circumstances in each case whether or not publication has taken place. It is said that, as a general proposition, where the act of the person alleged to have published a libel has not been any positive act, but has been merely the refraining from doing some act, he cannot be guilty of publication. I am quite unable to accept any such general proposition. It may very well be that, in some circumstances, a person, by refraining from removing or obliterating the defamatory matter, is not committing any publication at all. In other circumstances, he may be doing so. The test, it appears to me, is this : having regard to all the facts of the case, is the proper inference that, by not removing the defamatory matter, the defendant really made himself responsible for its continued presence in the place where it had been put ? As an example of a case which would fall on one side of the line : suppose somebody with a mallet and a chisel carved on the stonework of somebody's house something defamatory, and carved it very deeply, so that the removal of it could be effected only by taking down the stonework and replacing it with new stonework. In a case of that kind, it appears to me that it would be very difficult, if not indeed impossible, to draw the inference that the volition of the owner of the house had anything to do with the continued presence on his stonework of that inscription. The circumstance that to remove it would require very great trouble and expense would be sufficient to answer any such aspersion.

On the other hand, you have a case such as the present, where the removal of this particular notice was a perfectly simple and easy thing to do, involving no trouble whatsoever. The defendants, having the power of removing it, and the right to remove it, and being able to do it without any difficulty at all, and knowing that members of the club, when they came into the room, would see it, I think must be taken to have elected deliberately to leave it there. The proper inference, therefore, in those circumstances, it seems to me, is that they were consenting parties to its continued presence on the spot where it had been put up. That being so, it seems to me that they must be taken to have been parties to its publication to each member who saw it. The learned judge so held, and not only do I think that there was evidence of publication on the facts of this case, but I agree with his conclusion on that matter.

With regard to the question whether these words are defamatory, the point raised is one of importance and of difficulty. The alleged meaning of the words is set out in the innuendo which is pleaded. With regard to that innuendo, it is to be observed that the learned judge in his judgment did not in terms, as I read it, accept that innuendo as it is drawn. Looking at his judgment, I find that the meaning which he attributes to the words is this: that the plaintiff was the one who had informed the police, and thereby lost for the members of the club the fun of the "diddler" machines, and then he says again:

> I cannot help thinking that this did aim at Mr. Byrne the accusation that he had given information to the police.

That is the only part of the innuendo which the judge in terms accepts. I should have thought, with great deference to those who think otherwise, that that is the meaning, in the circumstances, of the language used. It is to be observed that the complaint in the lampoon is that the plaintiff gave the game away, and, reading that in connection with the first four lines of the lampoon, I should myself read it as meaning that he gave the game away with the result that the members were deprived of their sport. When the innuendo is looked at, this is said:

> That he was guilty of underhand disloyalty to the defendants and his fellow members of the said club. . . .

I read that myself in this sense: that he was guilty of disloyalty by reporting the matter to the police. If that be the true meaning of it, and if that be the meaning of the words, it does not appear to me that by adding the reference to disloyalty the matter is carried any further. If the allegation that he reported the matter to the police is not defamatory, in my judgment the allegation that in reporting the matter to the police he was guilty of disloyalty cannot be defamatory. If that be right, the matter resolves itself into this: are words capable of a defamatory meaning which say of the plaintiff that he reported to the police that, on the premises of the club of which he was a member, a criminal offence was being habitually committed? Now, it is said that the ordinary sense of society would say of a man who had done that, in the case of this particular criminal offence, that he had behaved in a disloyal and underhand fashion. It is said that this particular offence is one which can be looked at with an indulgent eye, and that there is something dishonourable in setting in motion the constitutional machinery provided in this country for the suppression of crime. I myself find it embarrassing to take into consideration questions of the way in which members of clubs might regard such an action. It seems to me that no distinction can be drawn in a court of law between various categories of crime. I suggested, in the course of the argument, the case where members of a club were habitually engaged in having cock-fights conducted on the club premises, and I asked whether to say of a man that he had reported that to the police would be defamatory, and the answer that I got was not, to my mind, a satisfactory one. But to take the matter further; supposing in the club the members were engaged in habitually defrauding guests at cards, could it be said to be defamatory if a member of the club reported that to the police? It seems to me that, if the argument is to be accepted, it would involve the court in this position, that it would have to differentiate between different kinds of crime, and put in one category crimes which are of so bad a character as to call for universal reprobation, even among the more easy-minded, and in another category crimes which many people think are stupid, and ought never to have been made crimes at all.

It seems to me that, whatever may be the view of individuals on matters of that kind, this court cannot draw a distinction of that description. In point of fact, it may very well be that the legislature, in its wisdom, has made into a crime something which the public conscience of many persons in this country does not consider involves any sort of moral reprobation; but this court cannot be concerned with considerations of that kind, and to say of a man that he has put in motion the proper machinery for suppressing crime is a thing which, in my judgment, cannot, on the face of it, be defamatory.

Reference was made to reports of two Scottish cases in which the contrary appears to have been held. I myself do not find very great assistance from those cases. The judgments are not reasoned judgments; they are very shortly reported; they are cases that were dealt with at an interlocutory stage, and in one case there was a dissent, of, I think, Lord Young. I do not find that those cases really afford me any guidance, and, in so far as anything that I have said in this judgment is inconsistent with those authorities, in my opinion they ought not to be followed, for the reasons which I have given.

In my opinion, therefore, the words in question are words that are not capable of a defamatory meaning, and on that ground I consider that the appeal should be allowed.

Greer, L.J.: I should like just to say, in order to prevent any misconstruction of my judgment, that, if I had come to the conclusion Greene, L.J., has come to, that the only meaning of this lampoon was that the police had been informed by the plaintiff of what was going on, I should have been of the same opinion as he is, that that was not defamatory. It was because the words contained something more than that and they were not true because they were not a proper inference from the fact that the police had been informed. It is similar to a case in which there had been a statement that the police had been informed by the plaintiff, and, therefore, the plaintiff was a blackguard. It would obviously be no answer, in such a case as that, to prove that informing the police did not make him a blackguard. It would still be defamatory of him to say that he was a blackguard, though the foundation for the statement was quite insufficient to prove that he was a blackguard.

Appeal allowed with costs. Leave to appeal refused.

Solicitors: *Gordon Gardiner, Carpenter & Co.*, agents for *F. H. Carpenter & Veale*, Brighton (for the appellants); *Barnes & Butler*, agents for *Hillman & Sons*, Seaford, Sussex (for the respondent).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

DE STEMPEL *v.* DUNKELS

[King's Bench Division (Swift, J., with a special jury), **February 23, 24, 25, 1937.**]

Libel and slander—Slander—Words spoken in relation to conduct of business—Special damage.

Master and servant—Contract of service—Termination—Notice—Commercial contract for an indefinite term—Reasonable notice.

The plaintiff was employed by D., a member of the Diamond Corporation, under an agreement for a year beginning on Jan. 1, 1928. The agreement provided that "It is the intention of both parties to renew this agreement on expiry for a further period if mutually satisfactory terms can then be arranged." The plaintiff continued in D.'s employment until he was given notice of dismissal on Nov. 19, 1935, to take effect on Dec. 31, 1935. The plaintiff alleged that the defendant had made certain statements to D. which were defamatory of the plaintiff and he also alleged that the defendant wrongfully and maliciously induced D. to commit a breach of contract by dismissing the plaintiff from his employment without proper notice. In an action for damages the jury found *inter alia* that the expression "[the plaintiff] is a Jew hater" was defamatory and that the words referred to the plaintiff in relation to his business, but that no special damage had been proved. The jury also found that D. had committed a breach of his contract with the plaintiff, and that the defendant had wrongfully and maliciously A induced such breach. The defendant and D. were both of the Jewish faith, and the diamond business is largely carried on by persons of that faith:—

Held: (i) the words complained of could not refer to the plaintiff in relation to his conduct of his business, and in the absence of special damage, they were not actionable. The plaintiff therefore failed on the first issue.

(ii) the contract between the plaintiff and D. was a commercial B contract for an indefinite term in which the law implied a term that it should be terminated by a reasonable notice. As the jury in their finding had implied that the notice given by D. was not reasonable, the plaintiff was entitled to damages on the second issue.

[**EDITORIAL NOTE.** The length of notice which can be described as reasonable notice is generally a troublesome matter. The present case shows that six weeks' C notice is not sufficient apart from express contract in the case of a person in a responsible position. The question of the termination of a yearly hiring is also discussed, and the judge favoured the view that such termination requires reasonable notice.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 22, pp. 149, 150, para. 247; and for the Cases, see DIGEST, Vol. 34, pp. 63-67, Nos. D 384-444.

As to Slander in Relation to Business, see HALSBURY, Hailsham Edn., Vol. 20, p. 401, para. 488; and for Cases, see DIGEST, Vol. 32, pp. 20-22, Nos. 110-129.]

Case referred to: E

(1) *Jones* v. *Jones*, [1916] 2 A.C. 481; 32 Digest 28, *177*.

Action by Baron Victor de Stempel against Walter Dunkels for slander and for maliciously inducing Otto Dunkels to dismiss the plaintiff from his service.

In 1928 the plaintiff married the defendant's step-daughter, and in F the same year the defendant had secured employment for the plaintiff with Otto Dunkels, who was a member of the Diamond Corporation. The defendant and Otto Dunkels were both of the Jewish faith, and the diamond business is largely carried on by persons of that faith. The plaintiff and his wife separated in 1932. On Nov. 19, 1935, Otto G Dunkels dismissed the plaintiff from his service. The plaintiff alleged that the defendant wrongfully and maliciously induced Otto Dunkels to commit a breach of contract by dismissing the plaintiff from his service without proper notice. He also alleged that certain statements made by the defendant to Otto Dunkels were defamatory of the plaintiff. The H defendant did not admit that he spoke the words complained of, or that they were defamatory. He pleaded privilege and justification, and he denied that he had induced Otto Dunkels to dismiss the plaintiff. The jury found that two of the statements complained of were defamatory and they gave the following answers to the further questions put to them :

2. If so are they actionable : (*a*) because they referred to the Baron in relation to his business ?—Yes ; (*b*) and/or by reason of special damage flowing from their publication ?—Yes ; (*c*) has any special damage been proved—i.e., did Mr. Otto Dunkels improperly dismiss the Baron as a reasonable and probable consequence of hearing the words ?—No.

3. Privilege : Was Mr. Walter Dunkels, in publishing any defamatory words which he did, actuated by malice ?—Yes.

4. Were the words "Victor is a Jew hater" true ?—No.

5. What damages, if any, for the alleged slanders ?—£200.

6. Did Mr. Otto Dunkels commit a breach of his contract with the Baron ?—Yes.

7. Did Mr. Walter Dunkels induce and procure Mr. Otto Dunkels to commit a breach of his contract with the Baron ?—Yes.

8. If "Yes" to No. 7, did he do so wrongfully and maliciously ?—Yes.

9. Was Mr. Walter Dunkels justified in what he did ?—No.

10. Damages, if any, for procuring breach of contract ?—£6,000.

Norman Birkett, K.C., and *Gerald Gardiner* for the plaintiff.

Sir Patrick Hastings, K.C., and *Valentine Holmes* for the defendant.

Swift, J. : What I have to decide is whether there is any evidence proper to have been left to the jury, either of any slander of an actionable nature for which damages should be awarded, or any evidence of any breach of any contract which has been induced by Mr. Walter Dunkels wrongfully and maliciously resulting in injury to the Baron. With regard to the matters which are alleged to be slanders, I have little doubt. At a very early stage, it was agreed by counsel, and agreed with my full assent, that certain matters would have to be determined by the jury in the event of my holding that there was any evidence. It was also agreed by them that it was much better, the issues being well-defined and capable of being resolved into a number of questions, that the jury should be asked to answer the questions first, on the assumption that there was something for them to answer, but that all questions of law as to whether there were any actionable causes or not should be determined after the answers to the questions. The jury have found that two sentences were in fact defamatory. "Victor is a Jew hater," and :

> Regardless of the outcome of the negotiations between Victor and Dawn, Victor must never enter my premises again ; this will ease things for you. As Victor is no longer allowed to assist you at the corporation, he is worth much less to you, you can kick him out or reduce his salary to £500 because any clerk receiving less than £500 could do his work and it would make it more difficult for him to employ solicitors.

Knowing the relations which existed between Mr. Walter Dunkels and the Baron, and knowing them as well as Mr. Otto Dunkels, who was the only person to whom these words were spoken, I should have thought that neither of these passages was capable of a defamatory meaning, taking the whole of the circumstances of the case into consideration, but the jury have said that they were defamatory. Although I should have

been inclined to have said that they were not, I shall deal with the case on the basis that they were capable of a defamatory meaning. On that assumption, therefore, the question to be decided is: Are they actionable? For not every slander and not every defamatory statement is actionable in a court of law. In order that a slander may be actionable, A
it must either be such as to impute unfitness to mingle in society, or such as to show that some person has been guilty of some grave crime, or it must relate to him in the way of his trade or business, or it must be followed by some special damage which probably and reasonably flows from the publication of the slander. The question which has to be B
considered here is: Was there any evidence to go to the jury that these words were spoken of the Baron Victor de Stempel in relation to his business or trade, or were they words which were followed, as a consequence of their publication, by any special damage? The jury said: Yes, they did refer to the plaintiff in relation to his business, and secondly C
they said: Yes, they did, and they were actionable because of the special damage flowing from their publication. Now, the only special damage which was suggested in this case was that he was dismissed from Mr. Otto Dunkels' employment. Therefore another question was put to the jury: "Has any special damage been proved, that is, did Mr. D
Otto Dunkels improperly dismiss the plaintiff as a reasonable and probable consequence of hearing the words?" The answer to that question is "No." Therefore, the answer of the jury is that the words complained of are actionable by reason of special damage, but no special damage has been proved. It is therefore clear that the only ground upon which E
an action can be sustained in regard to these words is that they refer to the plaintiff in relation to his business.

Now I am quite satisfied, on the authority of *Jones* v. *Jones* (1), that these words did not refer to the plaintiff in relation to, or in the way of, his trade. They were words which were spoken to one member, possibly F
a distant member, of the family, by a second member of the family, with reference to a third member of the family, with whom he was in dispute. They had nothing whatever to do with his fitness to buy or to sell diamonds. They had nothing to do with the financial stability of a trader, which has to be protected. They did not cause him injury in G
his profession or business, although they might have been an imputation of such conduct as, if believed, would be seriously prejudicial to a person in his position, and might lead to the loss of an appointment. But it was pointed out, in *Jones* v. *Jones* (1), that it is not sufficient that language used about a man may adversely affect him in his business. H
The language which is used must be such as has relation to him in his conduct of the business, and I cannot see that to say about Baron de Stempel, "He is a Jew hater," or to say about him, "I will not have him on my business premises again," to a man who knew the whole of

the circumstances of the dispute between Mr. Walter Dunkels and the Baron, could be any reflection on the Baron in relation to the way in which he carried on his business. I do not think that there was any evidence which would support that suggestion. In my view, the words A are not actionable at all. The jury have found that there was no special damage proved, and in my view there is no evidence that they refer to the plaintiff in the way of his trade. Therefore, on the issues of slander there will be judgment for the defendant, Mr. Walter Dunkels.

That does not dispose of this matter, because the more important B part of the action was the claim by the plaintiff for damages for wrongfully and maliciously inducing Mr. Otto Dunkels improperly to break his contract. On behalf of the defendant, it can very strongly be said that the findings of the jury that Mr. Otto Dunkels did commit a breach of his contract, and that the defendant did induce and procure him to do C so, are quite inconsistent with their finding that no special damage had been proved. Impossible as I think it is to reconcile those answers, I have got to deal with them, and I have got to deal with them as separate answers. I have already dealt with the first, the question of the slander. With regard to the second one, I have to ask myself: Is there any D evidence that Mr. Otto Dunkels did commit a breach of his contract with the plaintiff? The engagement between these parties, which was determined in Nov., 1935, began with a written agreement of Jan. 2, 1928. It is an agreement for a period of one year, beginning on Jan. 1, 1928, and ending on Dec. 31, 1928. If the agreement stopped there, I E do not think there could be any doubt that it was an agreement for a year, and for no more than a year, and that, at the end of the year, either party could retire from it, and there would be an end of the whole matter. If, at the end of the year, without anything more being said, the parties continued to work together, they would not be working under F that agreement at all. But the matter does not stop there, because, by cl. 2, it is provided:

> It is the intention of both parties to renew this agreement on expiry for a further period if mutually satisfactory terms can then be arranged.

When the period of 1928 did expire, the parties went on working together, G not for a fixed period of time, as they had been working under the agreement of Jan. 2, 1928, but indefinitely, and without anything being said as to how long, or under what terms, a termination of the contract could be arrived at. Now, it is said, on behalf of the defendant, that that indefinite arrangement is really a yearly hiring, which can be determined H without any notice at the end of any particular year. It cannot be determined before the end of the year, and, no matter how much notice may be given, it cannot legally be brought to an end before the end of the year has arrived. Whether notice to terminate at the end of the year is necessary or not is the question which has to be decided upon this matter. It is said, on the other hand, that this arrangement between them amounts to an agreement in regard to which the law implies that it shall be terminated only on reasonable notice. No evidence has been given as to what is a reasonable notice. Whether it be six weeks, which was the period in which the parties were engaged in discussing whether they could settle their differences or not, or whether it be three months, or six months, or twelve months, when it should be terminated, has not been the subject matter of any evidence. It has not been suggested that there is, in the diamond merchants' business, any custom or any usage about it, and the matter was left entirely at large as to whether any, and, if so, what, notice ought to have been given to terminate such an agreement, or such a contract, as the plaintiff was saying existed. Between the conflicting views expressed quite clearly, on the one side, in the passage which has been cited to me from Halsbury's Laws of England, Hailsham Edn., Vol. 22, p. 144, and, on the other side, in the passage which has been cited to me from Diamond's Law of Master and Servant, p. 184, there is a marked difference. The one speaks of the rule that a yearly hiring can be determined, without notice, at the end of the year, as being quite clear. The other says that it is an anachronism, which, in these days, may not be applied, except in very particular or special circumstances or kinds of contracts. I have had the advantage of looking at cases which are cited in support of the propositions in those books, and I have come to the conclusion that, in a commercial contract, such as this is, between a city merchant and his clerk for an indefinite period, the law of this country at the present time requires that reasonable notice should be given to terminate the relationship.

I hold, for the purpose of this case, that some reasonable notice was necessary to terminate the relationship existing between Mr. Otto Dunkels and Baron de Stempel in Nov., 1935. If that were so, it is a question for the jury: What was a reasonable notice? What notice the jury thought was right, I do not know, and I sympathise with them in the difficulties which they may have had about it, because no witness gave the slightest evidence as to what was a reasonable notice, and the jury were left to speculate in the dark, or to determine out of their own experience of life, what was a reasonable notice. But they must have come to the conclusion that a proper notice was not given, because they have said that Mr. Otto Dunkels improperly broke his contract, and they could have said that only if they thought that some notice ought to have been given which had not been given. They were then asked the question whether or not Mr. Walter Dunkels induced and procured Mr. Otto Dunkels to commit a breach of his contract with the plaintiff. Now, it is said that there is no evidence of such inducement or procuration fit to be left to the jury. The weight of evidence is not for me; it does not matter what conclusion I or anybody else, except the jury, might come to, from the evidence which was given in this case. If there was any evidence for the jury, they had to give such weight to it as they thought proper. The question I have to decide is: Is there any evidence fit to be left to the jury on this issue?

A Now, it is conceded that the jury might, if they liked, disbelieve all the evidence for the defendant, and apparently they have done so. They might also have disbelieved or have believed the evidence for the plaintiff. Apparently, they have not believed the whole of the evidence for the plaintiff. Be that as it may, what I have to consider is: Was there any
B evidence at all which could properly be left to the jury? I have come to the conclusion that I cannot say that there was not. Mr. Norman Birkett has satisfied me that, whatever its weight may have been, there was something for the jury to consider, some evidence that they might deal with, and, therefore, I cannot say that there was no evidence in
C support of the finding that the defendant, Mr. Walter Dunkels, did induce and procure Mr. Otto Dunkels to commit a breach of his contract, and of course, if once that is admitted, there was some evidence, at any rate, to justify the answers which are given to questions 8 and 9.

With the question of damages which the jury have awarded, I am not
D concerned. The jury have awarded the plaintiff £6,000, and he must have judgment for that amount upon the second part of this case.

Solicitors: *J. D. Langton & Passmore* (for the plaintiff); *Wordsworth, Marr Johnson & Shaw* (for the defendant).

[*Reported by* W. J. ALDERMAN, ESQ., *Barrister-at-Law.*]

E

ADAMSON *v.* BIRKENHEAD CORPORATION.

[CHANCERY DIVISION (Bennett, J.), **November 26, 1936, February 18, 1937.**]

F *Practice—Costs—Taxation—Apportionment—Practice since repeal of R.S.C., Ord.* 65, *r.* 2.

The plaintiff sought to restrain the defendant corporation from causing a nuisance to certain lands of which he was the owner. The nuisance was alleged to have been caused by the negligent construction by the corporation of a street and the drains and sewers lying there-
G under, whereby certain field drains had been damaged. At the trial the judge directed that the corporation was to get its costs except such costs as were incurred by the plaintiff in proving that the making up of the street did obstruct his drainage as apart from the making of the sewer under the street. Bills of costs were duly carried in for taxation. The plaintiff objected to the taxation on the ground that the registrar had not apportioned any of the general costs of the action. The plaintiff
H contended that the repeal of R.S.C., Ord. 65, r. 2, had the effect of restoring the practice of the Chancery Division in taxing costs which existed before 1902, when an addition was made to the then existing Ord. 65, r. 2, which precluded apportionment of costs:—

HELD: the repeal of R.S.C., Ord. 65, r. 2, did not affect the practice of the masters of the Supreme Court Taxing Office in cases of this kind and the registrar had acted rightly when he did not apportion the general costs of the action.

[**EDITORIAL NOTE.** Before 1902 it was the practice of the taxing masters in the Chancery Division to apportion the general costs of the action when an order was made giving the unsuccessful party costs of one or more issues. The contrary practice obtained in the King's Bench Division. In 1902 the practice was by an amendment of the rules made uniform. In 1929 a proviso in R.S.C., Ord. 65, r. 1, and the whole of r. 2 were repealed, and it is here contended that this repeal had had the effect of reinstating the old practice of apportioning the general costs. The practice of the taxing masters since 1929 had not been altered in this respect, and it is held that no such apportionment is proper.

As to Apportionment of Costs, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 178-180, para. 324; and for Cases, see DIGEST, Practice, pp. 917-922, Nos. 4610-4651. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 1371-1372, and pp. 1423-1426.]

Cases referred to:

(1) *Holloway (George) & Webb, Ltd.* v. *Crompton*, [1916] 2 Ch. 436; 28 Digest 543, *1504*.

(2) *Knight* v. *Purssell* (1879), 49 L.J. Ch. 120; 28 Digest 542, *1498*.

(3) *Jenkins* v. *Jackson*, [1891] 1 Ch. 89; 28 Digest 542, *1500*.

(4) *Harley* v. *Hunt*, [1887] W.N. 184; Digest, Practice, 917, *4616*.

Summons by the plaintiff to vary an order as to costs made by the registrar of the Liverpool District Registry.

Gerald Upjohn for the plaintiff.

W. F. Waite for the defendant corporation.

Bennett, J.: In this action the plaintiff claimed an injunction to restrain the defendant corporation from causing a nuisance to certain lands of which the plaintiff was the owner. The nuisance was alleged to have been caused by the negligent construction by the defendant corporation of a street known as Birch Avenue and the drains and sewers lying thereunder. The plaintiff's case was that in executing these works the defendant corporation had cut through certain field-drains draining his land, with the result that the land had become waterlogged. The defendant corporation denied the negligence, and as a public authority pleaded the Public Authorities Protection Act, 1893, as a defence to the action. The action was tried before Atkinson, J., at the Liverpool Summer Assizes, in June, 1934, and on July 2, 1934, judgment was entered in the following terms:

> This action having been tried before Atkinson, J. (Judge of Assize) without a jury and the said judge having directed that judgment should be entered for the defendants, the defendants to have the costs of the action (to be taxed as between solicitor and client) except the costs attributable to the issue of whether the work done in making up Birch Avenue caused the plaintiff's land to become waterlogged The costs on that issue to be the plaintiff's and to be taxed as between party and party The two sets of costs to be set off against each other as by the associate's certificate appears

> THIS COURT DOTH ORDER AND ADJUDGE that the plaintiff's claim for an injunction and damages be dismissed out of this court, but doth order that the plaintiff recover against the defendants his costs of the issue as to whether the work done in making up Birch Avenue in the pleadings referred to caused the plaintiff's land to become waterlogged such costs to be taxed as between party and party AND THIS COURT DOTH ORDER AND ADJUDGE that the defendants recover against the plaintiff their costs of defence to this action to be taxed as between solicitor and client (excepting such costs as are attributable to the above mentioned issue) and to be set off against the plaintiff's said taxed costs.

It appears from the pleadings, and is clear from the transcript of the shorthand notes of the judgment, that there were performed in Birch Avenue two separate operations: the first was the laying of the sewers, and the second was the making up of the street. The first operation was carried out in 1927. The second operation, which was distinct from the first, was carried out in July, 1928.

The plaintiff and the defendant corporation carried in for taxation the bills of the costs to which they respectively claimed to be entitled under the judgment, and these were taxed by the registrar of the Liverpool district registry, who taxed the plaintiff's bill at the sum of £82 12*s*. 9*d*., and the defendants' at £180 5*s*. 4*d*. The plaintiff lodged objections to this taxation, contending that upon two points of principle the registrar had fallen into error.

The first objection in point of principle was that in taxing the two bills the registrar had not apportioned any of the general costs of the action. The submission was that, having regard to the form of the judgment, the registrar should have apportioned the general costs of the action incurred by the plaintiff, and allowed him some part thereof as costs of the issue awarded to him by the judgment, and that, in taxing the defendant corporation's costs, the registrar should have apportioned the general costs incurred by him, and disallowed some part thereof, upon the footing that some part thereof had been incurred in connection with the issue of which it had been ordered to pay the plaintiff's costs. The registrar had made no apportionment of the general costs. To illustrate the plaintiff's point, I will give two examples. He claimed that he should have been allowed some part of the costs he incurred in having his statement of claim settled. He was allowed nothing in respect thereof. He claimed that there should be taxed off the defendant corporation's bill some part of the costs it had incurred in having its statement of defence settled. Nothing was taxed off. This is the substance of the first ground of objection to the taxation.

The second objection was based upon the submission that the registrar had misconstrued the words in the judgment:

> The issue as to whether the work done in making up Birch Avenue caused the plaintiff's land to become waterlogged.

The registrar construed these words as meaning the plaintiff was entitled to recover only the costs he had incurred in proving that the waterlogging of his land had been caused by negligence in the making up of

Birch Avenue exclusive of the sewering of it, and he disallowed the plaintiff all the costs he had incurred in attempting to prove that there had been negligence in constructing the sewer under Birch Avenue. The registrar overruled both these objections, and the present application is in effect an appeal by the plaintiff against this decision.

I will give my judgment first on the first objection. The plaintiff's argument was rested entirely on the repeal, on Jan. 1, 1930, of R.S.C., Ord. 65, r. 2. That rule read as follows:

> When issues in fact and law are raised upon a claim or counterclaim, the costs of the several issues respectively, both in law and fact shall, unless otherwise ordered, follow the event. And an Order giving a party costs except so far as they have been occasioned or incurred by or relate to some particular issue or part of his proceedings shall be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings, but the court or judge, if the whole costs of the action are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs and payment of such proportion thereof as the court or judge shall determine.

It was admitted by Mr. Upjohn, on behalf of the plaintiff, that, if R.S.C., Ord. 65, r. 2, had been in force at the date of the judgment, he would have been unable to support the first objection taken on behalf of the plaintiff. The effect of the judgment interpreted by the rule would have been to give to the defendant corporation the costs of the action, excluding only the sum by which those costs had been increased by the issue upon which they had failed, and to confine the plaintiff to the costs of the issue awarded to him. There would have been no apportionment: see *Holloway* (*George*) *& Webb, Ltd.* v. *Crompton* (1). In the judgment of SARGANT, J., at p. 441, he states the history of the rule:

> Until the year 1902 Ord. 65, r. 2 consisted only of what is now the first sentence of that rule; and while that was the case the practice of this court was well settled, and there could, I think, have been no doubt as to the effect of an order in the present form. If a party was not ordered to pay or was given the costs of a particular issue he was relieved of or given, as the case might be, not only the costs of that particular issue, but also an apportioned part of the general costs of the action. To limit the costs of the issue merely to such extra or increased costs as had been occasioned by the addition of the issue it was necessary to use words expressing that it was the increased costs only which were being excluded or given. This is quite clearly stated in SETON ON DECREES, 4th Edn., Vol. 1, pp. 129, 130 and in the 5th Edn., Vol. 1, pp. 226, 227, and is undoubtedly the result of such cases as *Knight* v. *Purssell* (2), *Jenkins* v. *Jackson* (3), and *Harley* v. *Hunt* (4). But then came the addition made in Jan., 1902, which is in the following terms: "And an order giving a party costs except so far as they have been occasioned or incurred by or relate to some particular issue or part of his proceedings shall be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings, but the court or judge, if the whole costs of the action are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs and payment of such proportion thereof as the court or judge shall determine." This addition plainly consists of two parts operating in entirely different ways. By the first part a rule of construction is applied to orders couched in one or other of three alternative forms; by the second part a discretion is given to the court to award in suitable cases a proportion of the whole costs of the action in lieu of awarding the costs of a particular part of the action.

Now the plaintiff's argument, resting entirely on the repeal of R.S.C., Ord. 65, r. 2, was that the well settled practice of the Chancery Division in taxing costs under an order in the form of the judgment in the present case, as stated by SARGANT, J., was restored. This argument has, in my judgment, overlooked an important consideration bearing upon the force of it. Before 1902, there were two separate offices in the Supreme A Court in which bills of costs were taxed. There was the Chancery Taxing Office, of which there were masters, who taxed the bills of costs ordered to be paid in actions tried in the Chancery Division. There were also masters of the Supreme Court, who taxed the bills of costs ordered to be paid in actions tried in the King's Bench Division. As B appears from the report of *Jenkins* v. *Jackson* (3), the practice of the Chancery Taxing Masters differed from that of the Common Law Masters in the principles they applied when taxing costs awarded by a judgment or order in the form of the judgment in the present case. Under such an order, the Chancery Masters would have apportioned the general C costs, whilst the Common Law Masters would not. When, in 1902, the addition referred to by SARGANT, J., was made to R.S.C., Ord. 65, r. 2, a rule was made amalgamating the Chancery Taxing Office with the Central Office of the Supreme Court, and R.S.C., Ord. 61, r. 1B, was added in 1903. That rule read as follows :

D

> The Chancery Taxing Masters transferred to the Central Office by virtue of r. 2 of the rules of the Supreme Court of Jan., 1902, and all persons appointed as Taxing Masters of the Supreme Court, hereinafter called Masters of the Supreme Court (Taxing Office), shall be masters of the Supreme Court. The Masters of the Supreme Court (Taxing Office) shall have power and jurisdiction to tax and settle all costs, charges, and expenses taxed in the Central Office, or directed by any statute to be taxed or settled by a Master of the Supreme Court, or by any master E as the prescribed authority for any such taxation. The Supreme Court Taxing Office shall be under the control and superintendence of the Masters of the Supreme Court (Taxing Office) and they shall perform the duties thereof, but save and except the taxation of costs and all duties incidental thereto or consequent thereon the Masters of the Supreme Court (Taxing Office) shall not perform any other duties hitherto performed by Masters of the Supreme Court.

F The effects of these changes in the rules seem to me to have been, first, to establish one taxing office, the masters of which taxed bills of costs of actions tried in the Chancery Division and the King's Bench Division, and to abolish the Chancery Taxing Office, and in taxing costs under such a judgment as the present to establish the principles of taxation G theretofore applied in such cases by the Common Law Masters. The plaintiff's argument must be considered in the light of those matters.

The differences in practice which existed before 1902 between the taxing officers of the two divisions was not based upon any judicial interpretation of the language of the orders. The practice before 1902 H differed in the two divisions, not because there had been any decision by the judges of one division that the language of an order meant one thing, whilst the same language had been decided by the judges of the other division to mean something else. It differed because of the difference in understanding, by the taxing officers of the separate taxing offices, of

the same language: *Jenkins* v. *Jackson* (3). Now, to give effect to Mr. Upjohn's argument would inevitably lead to a restoration of the difference in practice between the methods of taxing bills of costs in actions in the Chancery Division and bills of costs in actions in the King's Bench Division. I will now read the concluding passage of the judgment of A
BOWEN, L.J., in *Jenkins* v. *Jackson* (3) at pp. 98, 99:

> I have been constantly pressed for the last 12 years during which I have been a judge, with the difference of opinion and practice that exists as to taxations in the Chancery Division and the Queen's Bench Division, and it seems to me that nothing could be more important than that this difference should be methodically inquired into with a view to establishing a uniformity of practice in this respect between the B
> two divisions.

It would be lamentable, in my judgment, to give effect to the plaintiff's argument unless one is compelled to do so. Now, there is nothing in the language of the judgment which settles this matter either in favour of the plaintiff or in favour of the defendant corporation. The question is: C
What has been the practice of taxing officers since Jan. 1, 1930? The very experienced and learned registrar who taxed the bills now in question had no doubt about it. I have inquired of the Chief Master of the Supreme Court, and he informs me that the repeal of R.S.C., Ord. 65, r. 2, has made no difference to the practice of the masters of the D
Supreme Court Taxing Office, and that they never apportion where an order or judgment gives one party the costs of an action, except so far as they relate to a particular issue, and to the other party the costs of the issue. I, therefore, propose to hold, with respect to the plaintiff's first objection, that the learned registrar was right in the principle he E
applied.

As regards the second objection taken by the plaintiff, I hold that the learned registrar was right in overruling this. The transcript of the shorthand note of the judgment of ATKINSON, J., makes it clear that he distinguished between the sewering of Birch Avenue and the making up F
of it, and regarded these as two separate issues. On the first, he found that the sewering had not caused the plaintiff's land to become waterlogged. On the second, he found that the making up of the Avenue was the cause of the waterlogging. In the light of these facts, I decide that the plaintiff is not to be paid any of the costs incurred by him in his G
attempt to prove that the sewering was a cause of the waterlogging of his land. The result is that the summons fails, and must be dismissed with costs.

Summons dismissed with costs.

Solicitors: *Jaques & Co.*, agents for *Harling & Co.*, Liverpool (for the H
plaintiff); *Hamlins, Grammer & Hamlin*, agents for *Thompson, Rigby & Co.*, Birkenhead (for the defendant corporation).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

BIRD & CO. (LONDON), LTD. *v.* THOMAS COOK & SON, LTD., AND THOMAS COOK & SON (BANKERS), LTD.

[KING'S BENCH DIVISION (Goddard, J.), **February 16, 1937.**]

A *Bills of Exchange—Indorsement -Cheque—Rubber stamp—Various names—Intention of indorser.*

Thomas Cook & Son, Ltd., carried on a tourist and ticket business, and Thomas Cook & Son (Bankers), Ltd., an allied but quite separate company, carried on a money-changing business in the same room. An employee of the plaintiff company, having in his possession in the course of his employment certain cheques drawn in favour of the plaintiff B company, obtained that company's indorsement upon them, wrote above the indorsement " Pay to the order of Messrs. Thos. Cook & Son, Ltd." and gave the cheques to Thomas Cook & Son (Bankers), Ltd., in exchange for foreign currency. The cheques were then further indorsed by Thomas Cook & Son (Bankers), Ltd., by means of a rubber stamp "*per pro* Thos. Cook & Son. *per pro* Thos. Cook & Son, Ltd. *per pro* Thos. C Cook & Son (Bankers), Ltd." and countersigned in the usual way. In an action for conversion of the cheques, the plaintiff company contended that either Thomas Cook & Son, Ltd., was liable because that company had converted the cheques and had not given value for them, or that Thomas Cook & Son (Bankers), Ltd., was liable because it gave value for the cheques when Thomas Cook & Son, Ltd., in whose favour they were indorsed, had not indorsed them :—

D HELD : when the plaintiff company's employee wrote the words " Pay to the order of Messrs. Thos. Cook & Son, Ltd." he intended the cheques to pass to Thomas Cook & Son (Bankers), Ltd., in exchange for the foreign currency, and although he misdescribed that company, the cheques were in law indorsed to that company. Thomas Cook & Son (Bankers), Ltd., had given value for the cheques and neither defendant company was liable.

E

[EDITORIAL NOTE. There is now a well known practice among companies of indorsing cheques by means of a rubber stamp which prints upon the back of the cheque all the usual forms or variations of the company's name used by persons dealing with it. In the present case there were two companies, closely allied and with very similar names, and the indorsement effected by the stamp included the F names of both companies. There was evidence, however, that this particular stamp was only used by one of the companies In such circumstances it is held that an indorsement to pay to the order of company A. may be read as an indorsement over to company B., where the names of the companies are similar and the intention of the indorser is proved or shown by the facts of the case to have been to indorse over to company B.

G AS TO INDORSEMENTS, see HALSBURY, Hailsham Edn., Vol. 2, p. 656, para. 903 ; and FOR CASES, see DIGEST, Vol. 6, pp. 211, 212, Nos. 1309-1314.]

ACTION for damages for conversion of cheques for £3,450, the property of the plaintiff company. The facts are fully set out in the judgment.

F. P. M. Schiller, K.C., and *Philip Vos* for the plaintiff company.

H *Herbert Samuels, K.C.*, and *Gilbert J. Paull* for the defendant companies.

GODDARD, J. : This is an action in which the plaintiff company sues Thomas Cook & Son, Ltd., and Thomas Cook & Son (Bankers), Ltd., for the sum of £3,450, the amount of cheques which the plaintiff company says was its property and has been converted by one or other of the defendant companies.

At first sight, the case seemed, especially in the attractive way in which it was presented by Mr. Schiller, to raise some interesting and A
unusual points; but, now the facts have been elucidated, in my view there is no doubt about the case at all.

The facts are these: the plaintiff company is a firm of merchants. As I understand, the late Lord Cable had a considerable interest in the company, or in the firm which was the predecessor of the company. B
Some, at any rate, of his executors are directors of the company, and, under the will of Lord Cable, there were certain annuities which had to be paid half-yearly to named annuitants, who, however, were in the habit of coming to the plaintiff company, who were the effective managers of Lord Cable's estate, and getting advances from time to time. Those C
advances would be repaid by the executors drawing cheques in favour of the plaintiff company, in repayment of sums of money which the company had advanced to the annuitants.

Now the plaintiff company had in its service a man of the name of Boughton. As I understand it, Boughton acted not only as a clerk to D
the plaintiff company, but also as a sort of clerk or secretary to the executors of Lord Cable, and he from time to time, as occasion required, had to draw cheques, which he put before the directors for signature. If they were cheques in favour of the plaintiff company in repayment of these advances which I have mentioned, his duty was, having got the E
executors' signature, to take them to the secretary of the company, get his indorsement, and then hand them over to one of the senior clerks in the company, who would pay them into the National Bank of India, the plaintiff company's bankers.

With regard to the cheques which are the subject matter of this F
action, Boughton misappropriated them, for which he has been tried and sentenced. What he did was this: he got the secretary's indorsement in blank, thus making the cheques payable to bearer. He then took the cheques over to a building in Gracechurch Street, which is occupied by, to use a neutral expression, Cooks. He, again for purposes G
of his own, I suppose, and probably to make the transaction look more regular, wrote above the indorsement of the secretary: "Pay to the order of Messrs. Thos. Cook & Son, Ltd." With these cheques he obtained foreign currency. The cheques were indorsed: "*per pro* Thos. Cook & Son. *per pro* Thos. Cook & Son, Ltd. *per pro* Thos. H
Cook & Son (Bankers), Ltd.," and they were signed by some person who apparently has authority to sign.

Now, the case which was presented for the plaintiff company was this. It was said: We agree we cannot recover against both these

defendant companies; but, not knowing the internal arrangements between the two, we seek to recover against one or the other. We say we are entitled to recover against Thomas Cook & Son, Ltd., if that company converted the cheque, because it is not pretended that the
A company ever gave value for it. It cannot, therefore, protect itself under the law merchant under which a person who gives value for a negotiable instrument, complete and regular on the face of it, and in good faith, is protected. On the other hand, if Thomas Cook & Son (Bankers), Ltd., which is the company which, it appears, actually paid
B the cheque, gave value for it, it cannot get protection, because Thomas Cook & Son, Ltd., never indorsed the cheque. Therefore, if Thomas Cook & Son, Ltd., indorsed the cheque, and gave no value, it is liable; if it did not, and never handled the cheque, then Thomas Cook & Son (Bankers), Ltd., is liable, because it had no title to the cheque, because
C there was no indorsement to it.

As I say, that sounded an attractive argument, and it was rather remarkable that there was no account current between Thomas Cook & Son, Ltd., and Thomas Cook & Son (Bankers), Ltd. Therefore, it would not look as though Thomas Cook & Son (Bankers), Ltd., had been
D indorsing on behalf of Thomas Cook & Son, Ltd., because, if it had been indorsing on that company's behalf, and paying on its behalf, one would have expected to find an account current between those two companies.

But, now I have heard the evidence, I think the position is perfectly clear, and it is this: as so often happens in these days, there are two
E allied companies—closely allied, but separate legal entities. The well known tourist agency, Thomas Cook & Son, in the year 1924 was assigned to a company, Thomas Cook & Son, Ltd. That company attends to what one may call the tourist and ticket business, and I suppose for convenience confines itself to that. At the same time there was registered
F a company the correct and full name of which is Thomas Cook & Son (Bankers), Ltd., and that company attends to the foreign exchange department, because, as everybody knows, the old firm was one of the best known money-changers in England.

In Gracechurch Street, at the office at which these transactions were
G carried out by Boughton, both these companies have a habitation; they are both in the same building, and in fact in the same room: on one side of the room is the ticket business, on the other side of the room is the money-changing business. It is quite clear that a person going into this room would not bother himself very much, or bother himself at
H all, if he were going in there merely for an ordinary transaction, as to whether he was dealing with Thomas Cook & Son, Ltd., or Thomas Cook & Son (Bankers), Ltd. But in fact Thomas Cook & Son (Bankers), Ltd., does not act as banker for Thomas Cook & Son, Ltd. If a cheque is paid by a member of the public, in buying a ticket or arranging a tour,

to Thomas Cook & Son, Ltd., it takes that cheque and deals with it itself, and Thomas Cook & Son (Bankers), Ltd., has no concern with it at all; it is not indorsed or paid over to Thomas Cook & Son (Bankers), Ltd., because that company is not the banker for Thomas Cook & Son, Ltd. They are—at any rate, as far as Gracechurch Street is concerned—merely dealers in foreign exchange. If, therefore, you want foreign currency, you go to the part of the counter where in fact Thomas Cook & Son (Bankers), Ltd., operates, and get your money there; and, as I understand the evidence, if I went to the ticket side of the counter and asked for some foreign exchange, I should be referred to the other part of the counter, where in fact this other company is operating.

Again, it is very common in these days to find that one of these big companies indorses its cheques with a rubber stamp containing a whole number of descriptions. That is because the average member of the public does not concern himself very closely with the correct legal description of the company, but he gives either the correct legal description of the company, or what he believes to be the correct description, or at any rate a sufficient description. If one may, without offence, take the name of one well known company, with which probably most of those in court have dealt, and to which they have made out cheques, if one looks at Harrods' indorsements on a cheque, one finds there are six or eight different descriptions given above the signature of the secretary, or whoever it is who is signing *per pro*, because some people write their cheques payable to "Harrods," some write them to "Harrods, Ltd.," some to "Harrod & Co.," and some to "Harrod & Co., Ltd." As every cheque, before the banker will pay it, has to be indorsed exactly in accordance with the way the cheque is drawn, this device is adopted so that there may be no question raised, when the cheque is presented for payment, as to whether the indorsement is correct. But, however it is written out, whether the full description of the company is given or whether an incorrect description of the company is given, the person who draws the cheque is intending that the company, whatever its correct designation may be, should have the cheque. Now, here I have not the least doubt that the only thing that Boughton was concerned with, and the only thing that he thought about, was how to get the money for these cheques which he had misappropriated. I suppose because he thought it might assist him in concealing his frauds, he decided to take the money in foreign currency. The books have been put in. I was told it was sometimes francs, sometimes lire, and sometimes belgæ. He put on this indorsement: "Pay to the order of Messrs. Thos. Cook & Son, Ltd." The stamp which is in the possession of Thomas Cook & Son (Bankers), Ltd., and with which it indorsed the cheques, runs: "*per pro* Thos. Cook & Son. *per pro* Thos. Cook & Son, Ltd. *per pro* Thos Cook & Son (Bankers), Ltd." Now, that stamp, I am quite satified, is not intended to be used as an indorsement of Thomas Cook & Son, Ltd., the ticket-sellers; it is meant to be used entirely for the indorsement of cheques paid to Thomas Cook & Son (Bankers), Ltd. The reason why these other two lines of indorsement —"*per pro* Thos. Cook & Son. *per pro* Thos. Cook & Son, Ltd."—are put on the stamp is merely because the public, in drawing cheques which they intend to pass to Thomas Cook & Son (Bankers), Ltd., do not always describe the company correctly. We all know that, when we are writing a cheque, we generally want to write as few words as possible; it is shorter and more convenient to write "Thos. Cook & Son" than it is to write "Thos. Cook & Son (Bankers), Ltd.," and I have no doubt, and indeed the evidence is, that many members of the public do it.

I am quite satisfied that Boughton wrote "Thos. Cook & Son, Ltd.," simply and solely because he wanted the people at the particular desk, who happened to be Thos. Cook & Son (Bankers), Ltd., to give him money; he intended that his cheque should pass to the person, whatever the correct designation was, who would exchange that sterling cheque for foreign currency. Therefore, in my opinion, this description, "Thos. Cook and Son, Ltd.," is merely *falso demonstratio*: it is simply that he has written "Thos. Cook & Son, Ltd.," instead of "Thos. Cook & Son (Bankers), Ltd." But the only person who handled the cheque, who dealt with the cheque, and who paid the cheque, and the only person intended to deal with or pay the cheque, was Thos. Cook & Son (Bankers), Ltd., although very likely Boughton did not know the precise name of the company.

Therefore, it seems to me that the action fails entirely against Thomas Cook & Son, Ltd., the ticket-sellers, because it never had the cheque, it never indorsed the cheque, and the cheque was never indorsed with its authority. Equally I think the action fails against Thos. Cook & Son (Bankers), Ltd., because it has given value for the cheque. The cheque was indorsed to it, although it was indorsed to it in an incorrect name. But it is the intention of the indorser that matters, and the indorser intended it to go to the company which would actually cash the cheque.

In one way, one is glad to be able to arrive at this decision, because it is admitted that this question could never have arisen if the thief or the defaulter had not himself written on it, "Pay to the order of Messrs. Thos. Cook & Son, Ltd." That is not really what affects the plaintff company in this action. What really affects the plaintiff company in this action is that it had a dishonest servant who stole its money. While one may always sympathise with people who have dishonest servants, it is always more satisfactory when the employer of a dishonest servant has to suffer from the result of his defalcations rather than some other perfectly innocent person.

My attention has also been called to the provisions of the Bills of Exchange Act, 1882, s. 34 (4), which provides that:

> When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.

Therefore, the alteration which was put on the bill was, so far as discharging the bill was concerned, wholly ineffective, because it was a wholly immaterial alteration.

Action dismissed with costs.

Solicitors: *William Charles Crocker* (for the plaintiff company); *Stanley & Co.* (for the the defendant companies).

[*Reported by* W. J. Alderman, Esq., *Barrister-at-Law.*]

Re G. WINTERBOTTOM (LEEDS), LTD.

[Chancery Division (Simonds, J.), **March 16, 1937**.]

Companies—Winding up—Voluntary winding up—Distress levied before commencement of winding up—Landlords also directors of company—Discretion of court to stay—Companies Act, 1929 (*c.* 23), *s.* 252.

Two directors of a company were also the landlords of premises occupied by the company. Rent was 5¼ years in arrear. The landlords levied a distress upon the goods of the company, but the distress had not been completed when the company passed a resolution for a voluntary winding up. The liquidator sought to prevent the completion of the distress:—

Held: in the circumstances it was inequitable that the landlords should complete their distress. They should be allowed to proceed with the distress only to the extent necessary to meet two years' arrears of rent due, a figure based upon the sum which might have been allowed to accrue due, by a landlord who was not also a director of the company.

[**EDITORIAL NOTE.** The court has a statutory jurisdiction to restrain a distress levied prior to the winding up of a company and not completed at the time of the passing of the resolution to wind up. The authority upon the exercise of this discretionary power is very little and the present decision, though upon rather special facts, may be very helpful. It would appear from the decision herein that the distress ought to be limited in order to prevent the landlord being put into the position of, and having the advantages of, a secured creditor, since in the case of such a creditor, the ordinary creditors would generally have had notice of his security, and would thus be informed that their own debts were likely to be postponed.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 5, pp. 778, 779, para. 1337; and for Cases, see DIGEST, Vol. 10, pp. 1014, 1015, Nos. 7040-7044.]

Cases referred to:

(1) *Re Roundwood Colliery Co., Lee* v. *Roundwood Colliery Co.,* [1897] 1 Ch. 373; 10 Digest 964, *6616*.

(2) *Re Great Ship Co., Ltd., Parry's Case* (1863), 4 De G. J. & Sm. 63; 10 Digest 964, *6619*.

(3) *Venner's Electrical Cooking & Heating Appliances, Ltd.* v. *Thorpe,* [1915] 2 Ch. 404; 10 Digest 1014, *7042*.

Motion to restrain the respondents from proceeding with a distress upon the goods of the company and from levying any other distress upon the goods of the company.

The respondents were the landlords of the company and they were also directors of the company, which was a private company. The distress had been levied, but not completed, when the company passed an extraordinary resolution that it be wound up voluntarily.

J. A. Reid, for the liquidator : The court will only interfere to restrain a distress for the benefit of unsecured creditors. If the winding up had been by the court, the distress would be saved by the Companies Act, 1929, s. 172, and the landlords would have to get leave to proceed with it and the burden would be upon them to show cause. The winding up in this case being voluntary, the court must be satisfied that there is a case for interference. This unfortunate company has never made a profit. The fact that makes it inequitable that the distress should be proceeded with is that the rent is 5¼ years in arrear and that is inconceivable except upon the footing that the company is the creature of the landlords. They were always in a position to see that there were sufficient assets upon the premises to meet any distress, and their peculiar position gave them an advantage over the other creditors which makes it inequitable that they should take advantage of that position. If the landlords had been outside the company, the directors might have found that they had to find money for the rent. If so, they would have got tired of paying the money and the ill-starred company would have come to an end, and some of those who are now creditors would not be. Or, the directors might have advanced money without security and they would then have ranked as unsecured creditors. Or, they might have advanced money on debentures and then anybody who had dealings with the company would have had notice that there were debentures in existence. The landlords, in the present case, have put themselves into the position of secret secured creditors. [Counsel referred to *Re Roundwood Colliery Co., Lee* v. *Roundwood Colliery Co.* (1) ; *Venner's Electrical Cooking & Heating Appliances, Ltd.* v. *Thorpe* (3).]

Stanley Price, for the respondents : The court is asked to say that it is inequitable to allow the respondents to complete the distress. *Prima facie*, the distress is good and to come to the conclusion that it is inequitable, the court must find that there are special circumstances making it so. In order to take away their right, the special circumstances must be in the conduct of the directors and not in the special circumstances of their relationship to the company. There is nothing inequitable in the conduct of the landlords as they have only received three quarters' rent since the formation of the company in 1931, and they have received no directors' fees, and they have received no interest upon their loan to the company. Allowing the rent to remain unpaid is not a sufficient degree of impropriety to justify the depriving of the landlords of their legal rights.

SIMONDS, J.: This is a motion on the part of the liquidator of a company in voluntary liquidation—G. Winterbottom (Leeds), Ltd.— A to restrain the respondents Thomas Raine and David Waterhouse Raine from proceeding with a distress levied by them upon the goods of the company. The relevant facts are these. The company was incorporated in the year 1931 with a capital of £7,000. A lease was granted to the company on Apr. 1, 1931, of certain premises in York St., Leeds, at a B rent of £280 per annum, payable quarterly on Apr. 12, July 12, Oct. 12, and Jan. 12 in each year. The landlords are also directors of the company. Rent was paid under the lease up to and including Oct. 12, 1931. Since that date no rent has been paid, so that on the relevant date, Mar. 2, 1937, when the company by extraordinary resolution went into C liquidation, there was owing to the landlords no less than 5¼ years' rent, amounting to £1,470. The position is that under sect. 172 and sect. 252 of the Companies Act, 1929, the court may, if it thinks fit, restrain a distress which has been put in before the date of the winding up, but which has not been completed. The position appears to be this: D that in a voluntary winding up, where the liquidator comes to the court and asks that the completion of the distress may be restrained, he has to show some special circumstances why that should be done. I have been referred to the case of *Re Roundwood Colliery Co.* (1), where STIRLING, J., cited what TURNER, L.J., had said in *Re Great Ship Co., Ltd.* (2), E and added, at p. 381:

> The result, as I understand it, is this: that a creditor who has issued execution, or a landlord who has levied a distress, before the commencement of the winding up will be allowed to proceed to sale unless there is established the existence of special reasons rendering it inequitable that he should be permitted to do so.

F

That case throws no light upon what are the special reasons which are inequitable. One other authority has been cited, and that is the case of *Venner's Electrical Cooking & Heating Appliances, Ltd.* v. *Thorpe* (3), where the question was in regard to a distress levied for rent payable in advance, the distress having been put in before the winding up, G but not completed at the date of the winding up. In that case, LORD COZENS-HARDY, M.R., after citing what TURNER, L.J., had said in *Re Great Ship Co.* (2), said, at pp. 407 and 408:

> Applying that to the present case, here the landlord is exercising his legal rights, and I think it is indisputable that no equitable ground has ever been made out H for restraining the landlord from levying the distress, unless there have been some circumstances outside the levying, such as fraud, or unfair dealing, which would entitle the tenant to an injunction.

In the present case it has been argued that there has been something of the nature of unfair dealing for this reason. The landlords have allowed the rent to get into arrear for a period of 5¼ years. During the whole of that time the company has been carrying on business at a loss and has been incurring debts and trade creditors have been allowing the company credit without knowing, and without the means of knowing, that there has been a debt accumulating to the landlords in respect of which the landlords might put in a preferential claim. It has been pointed out that that is a position which could only arise in a case where the landlords were also the directors, because it is inconceivable that any other landlords would have allowed the rent to remain so long in arrear. Trade creditors were allowing credit without knowledge of this, and it is a sort of commercial risk they could not envisage. They were dealing with a company which had not raised money by mortgage or charge, in which case they would have known. But they were dealing with a company which, if the landlords' claim is substantiated, has incurred a debt which will rank in front of theirs for a substantial sum and of which debt they could not have known. There is very little authority to guide me as to whether there are here special circumstances which would justify me in saying that the distress should not be levied for the whole period for which the rent was due. Mr. Reid said that if I entertained the opinion that some part of the arrears ought to be paid, the liquidator would fall in with that view. I think it is open to me to take that course, and I shall limit the distress to a period of two years before the date of the winding up. That estimate is based on the view that it is the amount in arrear which might conceivably have been allowed by the indulgence of landlords other than directors. I shall therefore grant an injunction restraining the landlords from proceeding further with the distress except to the extent necessary to meet two years' arrears of rent due at the date of the winding up. They will also be entitled to levy an amount sufficient to cover the costs of the distress. There will be no costs on the motion. The costs of the liquidator will come out of the assets.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Harrison & Sons* Leeds (for the liquidator); *Maxwell, Batley & Co.*, agents for *Simpson Curtis & Burrill*, Leeds (for the respondents).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

HARRODS, LTD. *v.* TESTER.

[Court of Appeal (Lord Wright, M.R., Romer and Scott, L.JJ.), **March 11, 12, 1937.**]

Execution—Garnishee—Wife debtor—Bank account—Account in wife's name—Payments in made by husband—Resulting trust in favour of husband.

A husband opened a banking account in his wife's name, all payments into the account being made by the husband. The account was used for domestic and other purposes. The wife always asked her husband's consent before she drew on the account and she had given the bank a mandate to allow her husband to draw on the account. Judgment creditors of the wife sought to garnishee the account :—

Held : on the facts there was a resulting trust in favour of the husband and as the moneys were therefore the property of the husband, the wife's creditors could not garnishee the account, although it was in her name.

[**EDITORIAL NOTE.** The Divisional Court in this case thought that as the account had been purposely provided for the payment of debts of this nature, it was just and equitable that a garnishee order should be made. The Court of Appeal, however, rejected this principle, because, if the account were impressed with a trust for creditors, it should be administered by payment of their accounts *pari passu,* without giving priority to anyone. Apart from this view, the Court of Appeal were of opinion that the result of the facts of the case was that there was a resulting trust of the money in the account for the husband and, upon that ground, no order could be made.

As to Accounts in Name of Wife, see HALSBURY, Hailsham Edn., Vol. 16, p. 630, para. 1001 ; and for Cases, see DIGEST, Vol. 27, pp. 94, 95, Nos. 730-739, and pp. 163-165, Nos. 1321-1343.]

Cases referred to :

(1) *Marshal* v. *Crutwell* (1875), L.R. 20 Eq. 328 ; 3 Digest 190, *391.*
(2) *Lloyd* v. *Pughe* (1872), 8 Ch. App. 88 ; 3 Digest 187, *369.*
(3) *Hancock* v. *Smith* (1889), 41 Ch. D. 456 ; 3 Digest 185, *364.*
(4) *Gascoigne* v. *Gascoigne,* [1918] 1 K.B. 223 ; 21 Digest 277, *935.*
(5) *Barrack* v. *M'Culloch* (1856), 3 K. & J. 110 ; 21 Digest 487, *668.*

Appeal from a judgment of the Divisional Court of the King's Bench Division (Macnaghten and du Parcq, JJ.), delivered on Nov. 2, 1936. The facts are fully set out in the judgments.

J. P. Eddy, K.C., and *Robert Fortune* for the appellant.

A. E. Beecroft for the respondent company.

Eddy, K.C. : All this money belonged to the husband. The account was in Mrs. Tester's name, but there was no evidence that she had any beneficial interest in it. She was simply Dr. Tester's agent to pay domestic accounts. There was no evidence of a gift to her. Where a husband supplies his wife with money for paying domestic accounts, any residue belongs to him and not to her : *Barrack* v. *M'Culloch* (5). The wife was a trustee for the husband.

Beecroft : There was no resulting trust. The debtor could have drawn on the account without her husband's leave ; she gave the bank a mandate to honour his cheques, and there was no evidence that she was bound to repay him or account to him. Where a wife has a banking account, presumably any balance in it is her money. If that were not so, it would be dangerous for any firm to rely upon a reference given by a bank A in respect of a wife's account, for a garnishee order could not succeed unless the creditor could prove that the wife had separate means of her own. The husband could always say that any unused money must go back to him.

There is the strongest possible evidence here that this money was B intended for the wife, and for her advancement, for the general purposes of herself and the home. In deciding whether there is a resulting trust, the court will inquire into the purpose for which the money was paid into the bank. The purpose here was to pay the domestic accounts, of which that of Harrods, Ltd., was one. The money in this account was C earmarked for that purpose, and, if there was a balance at any time, the husband could claim it back only if the purposes for which it was placed in the bank had been completely fulfilled. In *Gascoigne* v. *Gascoigne* (4), where a husband took a lease in his wife's name, with her knowledge and connivance, in order to defraud his creditors, he D was not allowed to set up his fraud to rebut the presumption that the property was a gift to her.

Lord Wright, M.R.: In this case the matter arises upon an interpleader issue in which Harrods, Ltd., judgment creditors, are defendants E to the issue, and a Dr. A. A. Tester is plaintiff to the issue. What has to be determined is the position of certain moneys standing at the Westminster Bank, Ltd., at its Broadstairs branch, in the name of Mrs. Tester, a married woman, the wife of Dr. Tester. Mrs. Tester had incurred an indebtedness for various goods, principally clothing, F to Harrods, Ltd., and the company had sued her. The matter had been contested; I suppose the issue was whether she was personally liable, and eventually judgment was entered in that action against Mrs. Tester. Thereupon Harrods, Ltd., served a garnishee order *nisi* on the account in question. The amount which the garnishee order *nisi* covered was G £217 1*s*. 10*d*., of which £115 11*s*. 6*d*. was for the indebtedness and the balance for costs. At the material time, the judgment was unsatisfied to the extent of £197 10*s*. 6*d*. The material time, for the purposes of this issue, was the date at which the garnishee order *nisi* was served on the bank, which was Mar. 18, 1936. It is therefore necessary to ascer- H tain the position of the banking account as at that date.

Merely to deal with the figures, to begin with: the account had been overdrawn at the beginning of March, but various payments were made which brought the account into credit. Three cheques were paid in: one on Mar. 1, 1936, for £450, a second on Mar. 6, 1936, for £50, and a third on Mar. 18, 1936, for £55. MASTER BALL, before whom the garnishee issue came, found that all these moneys belonged to Dr. Tester and were paid by him into his wife's account, and that that account, which had been current for some time, had been throughout fed by his own money, and not by her money. He says, and she agrees, that she had no money A of her own. The case of Dr. Tester is that this account was, from beginning to end, an account of his moneys, and that he paid them into this bank in his wife's name, partly for his own convenience, because he was a bankrupt who had received his discharge only on July 11, 1933, and partly for convenience, to enable the wife, Mrs. Tester, to B pay out of it the household accounts. The two affidavits put that matter quite clearly. Dr. Tester's affidavit says:

> I further say that the said account at the Westminster Bank in the name of Mrs. Charlotte Tester has been opened by Mrs. Charlotte Tester for the payment of domestic accounts only, and all money paid into this account has been solely C provided for by me and at no time has ever been paid into this account amounts belonging to Mrs. Charlotte Tester personally. The account was only kept for my own convenience in the name of Mrs. Charlotte Tester as I am frequently on the continent and I was desirous that accounts should be settled during my absence by Mrs. Charlotte Tester. The account is completely controlled by me and no cheques have been drawn by Mrs. Tester without my instructions and/or my consent.

D

That affidavit, as the master has pointed out, is not precisely correct. It is not correct that the account was opened for the payment of domestic accounts only, because it is clear that Dr. Tester used it for his own purposes, and the convenience which he had in mind was no doubt partly that, owing to his history and actual position when the account E was opened, there were objections to his having a banking account in his own name. Accordingly, it appears from the account that in several respects, and to quite substantial amounts, he used it to discharge his own indebtedness, or to draw out money for his own purposes. Mrs. Tester had given the bank a mandate requiring them to honour Dr. F Tester's signature. The wife's affidavit is to the same effect. Both husband and wife were cross-examined at considerable length by the master, who has accepted the substantial accuracy of their statements.

The master decided in favour of Dr. Tester, on the ground that the moneys in question in the bank, and the moneys with which this issue G is concerned, belonged to Dr. Tester. The divisional court has reversed that decision, and, as I follow what they have said, it amounts to this. They do not question the facts as found by the master, but their conclusion is based, as I read it, on the proposition that, as the sworn purpose of the account was to enable the wife to pay domestic accounts, H and as this account was a domestic account, therefore the money in the bank, on that ground, and on that ground alone, would be subject to these garnishee proceedings. I find it difficult to follow that course of reasoning. It would apparently give a right to Harrods, Ltd., as creditors of the wife, to claim either a trust or some contractual right in these moneys on the ground that he had somehow appropriated them to the payment of Harrods, Ltd.'s debt in such a way as to give Harrods, Ltd., a right to claim these moneys as against the husband. With great respect to the divisional court, I find it impossible to accept that view, and it remains to consider whether the view adopted by the master was correct or not in the result. I have throughout referred to this account as moneys. That is a time-honoured phrase, though of course there are no specific moneys in question. The position here is the ordinary position of a bankrupt customer—in other words, the customer has lent money to the bank, in so far as that money has been paid in, and the account is in credit. Nevertheless, in cases of this character the practice has always been to talk of the account as consisting of moneys, and to ask the question, to whom do these moneys belong ?

It is true that where, as in a case of this nature, the husband has paid moneys into an account in his wife's name, there is a *prima facie* presumption of a gift or provision of an advancement in favour of the wife. It is, however, equally clear that that is only a *prima facie* presumption, and that the court is bound to investigate all the facts of the case in order to ascertain whether there has been such a gift, or whether in truth the case is one of a resulting trust in favour of the husband, so that money in equity is the money of the husband. I have taken the case of husband and wife, but of course the same question may arise in different relationships. In this case the money, being that of the husband, would remain his money. If he had put it in someone else's name, there would then *prima facie* be a resulting trust for him. Where, however, the position is, as here, between husband and wife, the presumption falls in the other direction. Then, again, the facts have to be ascertained, to see whether that presumption is to receive effect, or whether, notwithstanding that presumption, there is still a resulting trust in favour of the husband. On an examination of the facts of this case, I confess I feel no doubt that this is one of the cases in which there is a resulting trust in favour of the husband. As far as authority goes, I think *Marshal* v. *Crutwell* (1) contains a very clear statement of the law. In that case, the plaintiff was the wife, and the husband, in certain circumstances which are set out, transferred his banking account from his own name into the joint names of himself and his wife, and directed the bankers to honour cheques drawn by himself or his wife, and paid considerable sums into that account. Cheques were afterwards drawn by the plaintiff at the direction of her husband, and the proceeds were applied in payment of household and other expenses. It was held that the transfer of the account was not intended to be a provision for payment, but merely a mode of conveniently managing her husband's affairs, and, consequently, that she was not entitled to claim as against the estate, on her husband's death, this money as being her own. Sir George Jessel, M.R., states the law in this way, on p. 329:

> The mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favour of the purchaser if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or a child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So in the case of a stranger, you may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust. A

Then, at the end of the judgment, on p. 331, Sir George Jessel, M.R., says: B

> I must infer from the surrounding circumstances what the nature of the transaction was, I come to the conclusion that it was not intended to be a provision for the wife, but simply a mode of conveniently managing the testator's affairs, and that it leaves the money therefore still his property.

C

He said that the judge in such a case has to review all the circumstances as a juryman. That case applied an earlier decision of *Lloyd* v. *Pughe* (2), where Lord Selborne, L.C., sitting in the Court of Appeal, said at p. 89:

> There were many cases in which a husband, or a stranger, had transferred property into the name of a married woman, or had placed it in the hands of a third party, upon a contract that it was to be for the benefit of the wife. D

Then he goes on to say of the case before him:

> This was an ordinary case of an agency account opened by a husband with bankers for the purpose of convenience, and the husband did not intend to give the wife any title at law or in equity which she had not before.

I need not point out that, under *Hancock* v. *Smith* (3), a bank cannot E be garnisheed, though the account is in the name of the judgment debtor, if it be shown that no part of the moneys in the bank was the debtor's own. In other words, regard must be had to the property in equity. Applying these authorities to this case, and looking at all the facts as a juryman, I feel no doubt that the money in the bank was the F money of Dr. Tester, and, accordingly, that it cannot be garnisheed at the suit of Messrs. Harrods.

Mr. Beecroft has rather strenuously contended that there is, at the back of all these transactions, a fraudulent scheme on the part of Dr. Tester to defeat creditors like Harrods, Ltd. He refers to *Gascoigne* v. G *Gascoigne* (4), where, on a transfer of a building by a husband to his wife, it appeared that that transfer had been made for the sole purpose of misleading, defeating, and delaying present or future creditors, while the husband retained the beneficial interest in the property. In those circumstances, the court refused to admit any equity in favour of the H husband as against the wife, who stood upon her legal title. The court quoted Lord Eldon as saying that, in a case of that sort, where the plaintiff was coming into equity to be relieved against his own act, and the defence was dishonest, between the two species of dishonesty

the court would not act, but would say: Let the estate lie where it falls. But here there is no evidence at all of such a fraudulent scheme concocted between the husband and the wife, and I do not think any such question arises in this case. For these reasons, I think that the
A order of the divisional court should be set aside and the order of the master restored. That involves setting aside the garnishee order *nisi*, and the costs here and below will be paid by Harrods, Ltd.

ROMER, L.J.: I agree. The money standing to the credit of Mrs.
B Tester at the Broadstairs branch of the Westminster Bank, at the date when this garnishee order *nisi* was made, was a balance of three sums, of £450, £50, and £55, paid into the account by Dr. Tester on Mar. 1, Mar. 6 and Mar. 18, 1936, respectively. As regards the £450, Dr. Tester says that he got it from a moneylender against a bill of exchange. As
C regards the £50, he says it was paid by a company, L. C. & Co., to him; and as regards the £55, he says it was paid in from the Naldera, Ltd., account. The attitude of Dr. Tester on his cross-examination, as recorded by the master in his evidence, does not give one a very favourable impression of that gentleman as a witness, but, after all, the master
D saw him—we have not had that opportunity—and the master has accepted his evidence on these points as being true. The master finds that all the moneys recently paid into the account were paid in by the husband, and that they were the husband's property.

That is really an end of this case, because, although when a husband
E pays money into a banking account standing in the name of his wife, in the absence of any explanation, it must be taken that the husband has made a gift of the moneys to the wife, the presumption in favour of a gift is easily removed. As one knows, it is very common for the husband to open and maintain a banking account in his wife's name,
F for the purpose of enabling household accounts to be paid more conveniently. The evidence given in this case makes plain what took place here. The account was opened and maintained in the wife's name; the three sums that I have mentioned were paid into that account for purposes of convenience in order that the wife might, without having
G to resort to the husband from time to time, pay the domestic accounts. In my opinion, therefore, the presumption in favour of a gift to Mrs. Tester has been displaced, and the moneys standing to the credit of the wife remain the property of the husband, and not that of the wife.

I want to add only this. The divisional court apparently regarded
H the sums standing to the credit of Mrs. Tester in this account as being affected by some kind of trust in favour of the creditors of the domestic account. What MACNAGHTEN, J., said was this:

> If every word that Dr. and Mrs. Tester have said be accepted as true—

that is, if it be taken to be the fact that the money was paid into the account for purposes of convenience, so that Mrs. Tester might have a fund available for the payment of domestic accounts—

> this money was paid into the account for the purpose of paying domestic accounts, and so far from Mrs. Tester having no right to deal with the money for the purpose of paying domestic debts which she had incurred, Harrods, Ltd., by invoking the assistance of the court under R.S.C., Ord. 45, would in fact assist Dr. Tester to carry out the very purpose which he desired should be carried out when he enabled his wife to open this banking account.

I cannot read that statement as meaning anything else but that the money was affected with some kind of trust in favour of Harrods, Ltd. But, if it were, I would venture respectfully to point out to the divisional court that this is not an appropriate way of enforcing that trust in favour of a creditor, to garnishee money in this way. Further, I would respectfully point out that, if there is a trust in favour of the creditors, it ought not to have been administered by paying one creditor alone. It should be administered by being divided amongst the creditors of the domestic account *pari passu*.

SCOTT, L.J.: I agree, and on the merits of the case I add nothing. I should like to say one word about the form of the issue. The master says, in his judgment, that it was not settled by him, and the divisional court criticised the form. R.S.C., Ord. 45, r. 1, refers to debts owing to the judgment debtor, and says that, where another person is indebted to such debtor, then the debt may be attached. "Indebted," in that rule, means indebted in the sense not simply of an estoppel, such as there is between a bank and its customer, but indebted in the sense that the legal and equitable rights to the money standing to the credit of the account are those of the judgment debtor. Therefore the form which you find on p. 1777 of the ANNUAL PRACTICE, which expresses the issue as an issue on the question whether the garnishee was indebted to the judgment debtor in any and if so what account, is the right form; and to add a question, as was done here in the form of the issue, whether there was a debt to the judgment debtor or her husband, is wrong and merely misleading. In my view, the form on p. 1777 of the ANNUAL PRACTICE carries out correctly the intention of R.S.C., Ord. 45, r. 1.

Appeal allowed with costs in both courts. Garnishee order nisi discharged.

Solicitors: *E. C. Randall* (for the appellant); *McKenna & Co.* (for the respondent company).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

BERESFORD *v.* ROYAL INSURANCE CO., LTD.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Scott, L.JJ.), **February 21, 22, 23, 24, March 22, 1937.]**

A *Insurance—Life insurance—Exception—Suicide "within one year from commencement of insurance"—Suicide nine years after issue—Public policy.*

By a condition in an insurance policy issued in 1925 it was provided that: "If the life assured shall die by his own hand, whether sane or insane, within one year from the commencement of the insurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof." The premiums were regularly paid upon B the policy until 1934, when the assured committed suicide. It was found as a fact by a jury that the assured was sane at the time of his death:—

HELD: the personal representatives of the assured were not entitled to recover the sums assured.

Decision of SWIFT, J. ([1936] 2 All E.R. 1052) *reversed.*

C **[EDITORIAL NOTE.** In this case there is a conflict between two grounds of public policy. The first is the duty of the court to enforce contracts and the other that no man or his estate is allowed to benefit by his own crime, or, as it may be more aptly put here, no man is allowed to insure himself against the commission of a crime. In the court below SWIFT, J., held that sanctity of contract is of paramount importance, but the Court of Appeal have held that it is the over-riding D duty and inherent power of the court to refuse its aid to enforce a promise where the plaintiff has to set up his own crime or the estate of a deceased seeks to benefit from a crime of the deceased.

AS TO DEATH DUE TO ASSURED'S CRIMINAL ACT, see HALSBURY, Hailsham Edn., Vol. 18, pp. 519, 520, para. 817; and FOR CASES, see DIGEST, Vol. 29, pp. 366-369, Nos. 2945-2967.]

E

Cases referred to:

(1) *M'Naghten's Case* (1843), 10 Cl. & Fin. 200; 14 Digest 56, *229*.

(2) *Anctil* v. *Manufacturers' Life Insurance Co.*, [1899] A.C. 604; 29 Digest 350, *2835*; 68 L.J. C.P. 123; 81 L.T. 279.

(3) *Amicable Society* v. *Bolland* (1830), 4 Bli. N.S. 194; 29 Digest 369, *2968*.

F (4) *Re Sigsworth, Bedford* v. *Bedford*, [1935] Ch. 89; Digest Supp.; 104 L.J. Ch. 46; 152 L.T. 329.

(5) *Re Pitts, Cox* v. *Kilsby*, [1931] 1 Ch. 546; Digest Supp.; 100 L.J. Ch. 284; 145 L.T. 116.

(6) *Felstead* v. *R.*, [1914] A.C. 534; 14 Digest 325, *3402*; 83 L.J.K.B. 1132; 111 L.T. 218.

G (7) *R.* v. *Mann*, [1914] 2 K.B. 107; 15 Digest 814, *8863*; 83 L.J.K.B. 648; 110 L.T. 781.

(8) *Cleaver* v. *Mutual Reserve Fund Life Assocn.*, [1892] 1 Q.B. 147; 29 Digest 369, *2969*; 61 L.J.Q.B. 128; 66 L.T. 220.

(9) *In the Estate of Crippen*, [1911] P. 108; 12 Digest 244, *1998*; 80 L.J.P. 47; 104 L.T. 224.

H (10) *Burger* v. *South African Mutual Life Assurance Society* (1903), 20 S.C. 538; 29 Digest 367, case *a*.

(11) *Horn* v. *Anglo-Australian & Universal Family Life Assurance Co.* (1861), 30 L.J. Ch. 511; 29 Digest 366, *2945*; 4 L.T. 142.

(12) *Borradaile* v. *Hunter* (1843), 5 Man. & G. 639; 29 Digest 366, *2952*; 12 L.J.C.P. 225; 1 L.T.O.S. 170.

(13) *Clift* v. *Schwabe* (1846), 3 C.B. 437; 29 Digest 366, *2949*; 17 L.J.C.P. 2; 7 L.T.O.S. 342.

(14) *Dufaur* v. *Professional Life Assurance Co.* (1858), 25 Beav. 599; 29 Digest 372, *2987*; 27 L.J. Ch. 817; 32 L.T.O.S. 25.

(15) *Rowett, Leakey & Co., Ltd.* v. *Scottish Provident Institution*, [1927] 1 Ch. 55; 29 Digest 366, *2950*; 95 L.J. Ch. 434; 134 L.T. 660.

(16) *Ritter* v. *Mutual Life Insurance Co.* (1898), 169 U.S.R. 139.

(17) *Whitfield* v. *Aetna Life Insurance Co.* (1907), 205 U.S.R. 489.

(18) *Northwestern Mutual Life Insurance Co.* v. *McCue* (1912), 223 U.S.R. 234.

(19) *Northwestern Mutual Life Insurance Co.* v. *Johnson* (1920), 254 U.S.R. 96.

(20) *Tinline* v. *White Cross Insurance*, [1921] 3 K.B. 327; 29 Digest 408, *3214*; 90 L.J.K.B. 1118; 125 L.T. 632.

(21) *James* v. *British General Insurance Co.*, [1927] 2 K.B. 311 Digest Supp.; 96 L.J.K.B. 729; 137 L.T. 156.

(22) *Haseldine* v. *Hosken*, [1933] 1 K.B. 822; Digest Supp.; 102 L.J.K.B. 441; 148 L.T. 510.

(23) *Alexander* v. *Rayson*, [1936] 1 K.B. 169; Digest Supp.; 105 L.J.K.B. 148; 154 L.T. 205.

(24) *Wainewright* (*or Wainwright*) v. *Bland* (1835), 1 Mood. & R. 481; *subsequent proceedings* (1836), 1 M. & W. 32; 29 Digest 345, *2781*.

(25) *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816; 42 Digest 980, *112*; 68 L.J.Q.B. 545; 80 L.T. 591.

APPEAL from a judgment delivered by SWIFT, J., on July 13, 1936, and reported in [1936] 2 All E.R. 1052. The facts and issues are fully stated in the judgments.

Roland Oliver, K.C., *Harold L. Murphy, K.C.*, and *E. Ryder Richardson* for the appellant company.

Sir William Jowitt, K.C., and *A. T. Denning* for the respondent widow.

Oliver, K.C.: No one can get a benefit for himself or for his estate by committing a crime. It is grotesque to say that the assured may wilfully destroy the thing he has insured and still claim payment under the policy, and the personal representative has no greater right than the assured. Every policy contains an implied condition that the assured shall not wilfully burn his house, sink his ship, or kill himself. In *Amicable Society* v. *Bolland*, *Fauntleroy's* case (3), where the assured was hanged for forgery, the House of Lords held that it was not in accordance with public policy that his assignees should recover the sum for which his life was insured. The present case is much stronger, for in that case the fact of the insurance had nothing to do with the forgery; here the assured is asking to be given the fruits of his crime. In *Horn* v. *Anglo-Australian & Universal Family Life Assurance Co.* (11), the court held that, if the assured committed suicide while insane, the company must pay, but WOOD, V.-C., assumed, in his judgment, that the policy would have been void if the assured had been sane when he took his life, and similar *dicta* fell from the court in *Wainewright* v. *Bland* (24). In *Cleaver's* case (8), the estate was held entitled to recover the amount of an insurance on the life of one James Maybrick, who was murdered by his wife, but in that case the insurance company received the full consideration and the assured did no wrong. In the present case, the assured deprived the insurance company of the right to receive premiums during his natural life. If any act is manifestly unlawful, an action based on that act cannot be maintained, nor can anybody claim a contractual indemnity: *Burrows* v. *Rhodes* (25). Cases where death is caused by a motor accident are, however, distinguishable, for in those cases the death is caused by negligence, not by felony, and the driver is insured against the results of his negligence. [Counsel also referred to *Anctil* v. *Manufacturers' Life Insurance Co.* (2), *Borradaile* v. *Hunter* (12), and *Tinline* v. *White Cross Insurance* (20).]

Jowitt, K.C.: A contract of life insurance is not the same as a contract of indemnity. This is the first time a court has distinguished between the two kinds of contract. There are, broadly speaking, two groups of cases: (i) where the assured does something against somebody else, in which case he cannot recover on a policy insuring that person's life: *In the Estate of Crippen* (9); *Cleaver* v. *Mutual Reserve Fund Life Assn.* (8). In those cases, public policy forbade payment of moneys under the contracts. Erskine, J., said, in *Borradaile* v. *Hunter* (12), at p. 658, that a felon might not benefit by his own felony but a court must not extend public policy one step further than is necessary. The other group of cases concerns, (ii) persons who endeavour to benefit themselves without doing anything hurtful to anybody else. The true inference is then that the parties can be entrusted to arrive at what terms they think fit. This action is brought for the benefit of the creditors in a Chancery administration. While it conceivably might be against public policy to allow a widow and child to claim, it is hard to say that public policy demands that the insurance company shall retain all the premiums that have been paid and the creditors shall receive nothing. Motorists are compelled by law to insure themselves against claims by third parties. If it were contrary to public policy that an insurance company should pay when a motorist injured a third party through criminal negligence, many unfortunate victims and their relatives would receive no compensation. The motorist is indemnified against the consequences of his own criminal act because public policy is thus better served than it would be by strictly applying the doctrine in *Cleaver's* case (8). In olden times the goods of a suicide were forfeited to the Crown as a punishment for his offence, so that his surviving relatives could not take. The forfeiture took place at the moment the act was committed, and it is difficult to see how forfeiture could have operated on rights under a life policy which never vested in the felon.

Lord Wright, M.R.: This is an appeal from a judgment of Swift, J., which held that the plaintiff was entitled to recover on certain policies effected on his life by Major Charles William St. John Rowlandson, the sums insured amounting in all to £50,000. The plaintiff sues as administratrix, with the will annexed, of Major Rowlandson.

The principal defence as pleaded was that Major Rowlandson died by his own hand, and that thereby the policies became void. It is not A
necessary to criticise the sufficiency of this plea, because, the jury having found by its verdict that the assured feloniously died by his own hand, the contention on behalf of the appellant company before the judge, as he stated, was that public policy prevented the company from paying the policy moneys to his estate, and prevented his representative from B
recovering. The case was fought upon this plea as though properly raised. This description by the judge of the conduct of the case before him equally applies to the conduct of the argument before this court. No point of pleading was raised in this court. Indeed, as will appear later, the facts are such that the court would, in our opinion, have been C
bound on its own initiative to determine whether the policies were legally enforceable, even if the appellant company had not raised the objection.

The undisputed facts are that the deceased had insured himself with the appellant company some years before for sums amounting in all to £81,000, at annual premiums totalling about £3,000; but he became financially D
embarrassed, and cancelled some of the policies, so that the insurances were reduced to £50,000 in all at the time of his death, which was Aug. 3, 1934. Until the last premiums fell due, he had managed to find money to pay the premiums, partly by borrowing from the appellant company against the surrender value of the policies. A balance of E
£400 remained due for premiums on July 16, 1934. In order to help him as far as it possibly could, the appellant company gave him gratuitous extensions of time. These ran out finally at 3 p.m. on Aug. 3, 1934, when the policies would lapse if the premiums were not paid. He was unable to find the premiums. He was in debt to the extent of more F
than £60,000. He had no assets, and was at the end of his credit. At two or three minutes before 3 p.m., he shot himself in a taxicab in St. James's Street. He had left a letter with his solicitor, written that very morning, in which he said in effect that, though what he was about to do would be technically defrauding the insurance company, yet it G
would not notice a small matter like £50,000 less the loans, whereas, if the policy moneys were not paid, it would be a serious matter for the people who had believed in him and lent him these large sums of money. The jury, in answer to the questions put to it by the judge, found that, according to the formula laid down in *M'Naghten's Case* (1), H
he was not insane. The jury also found that when he shot himself he was possessed of that degree of physical, intellectual and moral control over his actions which a normal man would have. These findings beyond question amounted to a finding that the case was one of *felo de se*,

or felonious suicide. It is clear that the assured deliberately killed himself in order to enable his estate to collect the insurance moneys. In two or three minutes, the policies would have automatically expired, because he had no means of raising the premiums.

A The respondent filed a cross-appeal, claiming that the verdict should be set aside on various grounds of misdirection by the learned judge. That cross-appeal was, at the respondent's request, not proceeded with at this stage, but was reserved until this appeal has been decided, which, accordingly, has proceeded on the basis that the verdict of the jury
B stands. On that basis, SWIFT, J., decided in the respondent's favour, on the ground, as it may be very summarily stated, that, whatever considerations of public policy might be urged against a company paying on a life policy where the assured has feloniously taken his own life, yet, where there was no idea of that kind when the policy was effected,
C and where felonious suicide was not expressly excepted, but impliedly covered, the dominant public policy to be observed was that of the sanctity of contract. SWIFT, J., held that the appellant company must fulfil its contract.

The policies expressed that the sums thereby assured were payable
D on the death of the life assured to the executors, administrators or assigns of the assured, and contained a term that, subject to the indorsed conditions, they were "indisputable." Of the indorsed conditions, only condition 4 is material. It runs :

> If the life . . . shall die by his own hand, whether sane or insane, within one
> E year from the commencement of the insurance, the policy shall be void as against any person claiming the amount hereby assured or any part thereof, except that it shall remain in force to the extent to which a *bona fide* interest for pecuniary consideration, or as a security for money, possessed or acquired by a third party before the date of such death, shall be established to the satisfaction of the directors.

No part of this condition applied. The action, it is true, was brought
F by the plaintiff on behalf of the deceased's creditors, since the estate was being administered in Chancery, and the right, if any, under the policies constituted the sole asset of the estate available to pay the creditors, but there was no assignment of any right under the policies to any creditor, nor were they held as security. Several years had
G elapsed since the commencement of the assurances.

On behalf of the respondent, it was contended that the effect of condition 4 was that the appellant company, by expressly providing that felonious suicide should discharge it if it occurred within one year of the policy commencing, impliedly undertook that, after that period, it should
H be no defence, or, more precisely, the argument was that the policy, after the first year, became indisputable unconditionally, even in the event of felonious suicide. No question of public policy or illegality, it was said, was then open to the appellant company. It was contended that the express limitation for the first year excluded any limita-

tion whatever for any subsequent year, attention being particularly directed in this regard to the case of the assured committing suicide while sane, because condition 4 no longer applied. The importance of this to third parties becoming assignees or chargees for value was emphasised. A

If the only question were the construction of the policy on ordinary principles, there might be much plausibility in the contention that it was implied that it was to be enforceable in all events, including that of suicide by the assured while sane; but we do not think that the question is so concluded. B However absolute in terms the policy might be, the court will not enforce it if it is illegal, or contrary to public policy, or if it is otherwise such an agreement as the court, in its inherent jurisdiction, will refuse to enforce. To take an extreme instance, the court would not enforce a promise to pay a sum of money in consideration of the plaintiff having, according to contract, committed a murder, or C if the assured, having an insurable interest in another's life, had murdered the life insured, and was seeking to collect the policy moneys. The same principle has been applied to other types of illegality. Thus, in *Anctil* v. *Manufacturers' Life Insurance Co.* (2), a policy was expressed to be incontestable after one year during which premiums had been paid; D but it was held that it was not enforceable, because the assured had no insurable interest, and the policy was, therefore, void under art. 2,590 of the Civil Code of Lower Canada. Lord Watson said at p. 609:

> The rule of the code appears to them [their Lordships] to be one which rests upon general principles of public policy or expediency, and which cannot be defeated by the private convention of the parties. E

It may here be convenient to deal with a contention made on behalf of the respondent, that she does not merely stand in the shoes of the assured, but, as an administratrix appointed by the court, has, as it were, an independent root of title, and is not affected by defences which F would have been available if the assured had been suing, or even if his assignees had been suing, as was the case in *Amicable Society* v. *Bolland* (3), where the suit by the assignees of the policy was dismissed, on the ground that the assured had been guilty of forgery, and had been executed for the felony. We do not think that this argument is well G founded. We think the personal representative of the assured, though appointed under the Administration of Estates Act, 1925, has no better or other right to sue than the assured himself would have had. The promise is to pay the personal representatives or assigns, but it is a promise to the assured only, and can be enforced, if at all, by the personal H representative as such, and not in her own right. The same is true of assigns. This rule was in principle involved in the decision of Clauson, J., in *Re Sigsworth, Bedford* v. *Bedford* (4), following the opinion of Farwell, J., in *Re Pitts, Cox* v. *Kilsby* (5).

The question, therefore, is whether the felonious suicide of the assured is a bar to the present action. If the assured had taken his life while insane, the fact would not have constituted a defence. The act of an insane person is not in law his act: see *Felstead* v. *R.* (6), and such a death is a death within the terms of the policy, unless there are special conditions excluding it; but suicide when sane is, by English law, a felony. This has been so from very early times. The law is thus succinctly stated in Stephen's Digest of the Criminal Law, art. 319:

> A person who kills himself in a manner which in the case of another person would amount to murder is guilty of murder, and every person who aids and abets any person in so killing himself is an accessory before the fact, or a principal in the second degree in such murder.

Hence, where there has been what is called a suicide pact between two persons, and one survives, the survivor is guilty of murder. The Forfeiture Act, 1870, which abolished attainder, corruption of blood, forfeitures, and escheats in the case of treason or felony or *felo de se*, has not changed the law. Thus, in *R.* v. *Mann* (7), Lord Reading, C.J., said at p. 108:

> We are of opinion that an attempt to commit suicide is an attempt to commit a felony.

It may be noted that the forfeiture in the case of *felo de se* did not extend to lands of inheritance, nor was his blood corrupted, nor was his wife barred of her dower: Hawkins' Pleas of the Crown, Bk. 1, ch. 9, sect. 8. The law is discussed in Hale's Pleas of the Crown, ch. 31, pp. 411, 412, and other writers.

This being the nature of *felo de se* by English law, and as the plaintiff, as personal representative, stands in the shoes of the assured, who has committed, as it were, murder on himself, the present claim is equivalent technically to a claim brought by a murderer, or his representative or assigns, on a policy effected by the murderer on the life of the murdered man. In that latter case, it is, we think, clear that neither the murderer nor his estate nor his assigns could take a benefit under the policy. In principle, this rule is involved in *Cleaver* v. *Mutual Reserve Fund Life Assocn.* (8), where the murdered man had effected a policy on his life in favour of his wife. She murdered him. It was held that her assigns could not recover on the policy. In that case, it is true, there was held to be a resulting trust of the policy in favour of the deceased man's estate, on the ground that the deceased man, who was the assured, being innocent, and the wife's interest being forfeited, the policy rights vested in his estate. No such trust, however, can arise here. Similarly, a murderer cannot benefit under the will of the murdered man: *In the Estate of Crippen* (9), or under an intestacy: *Re Sigsworth, Bedford* v. *Bedford* (4). The general principle was stated by Fry, L.J., in *Cleaver's* case (8), at pp. 156, 157:

> It appears to me that no system of jurisprudence can with reason include amongst

the rights which it enforces rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from felony or misdemeanour. It may be that there is no authority directly asserting the existence of the principle ; but the decision of the House of Lords in *Fauntleroy's* case (3) appears to proceed on this principle, and to be a particular illustration of it. This principle of public policy, like all such principles, must be applied to all cases to which it can be applied without reference A to the particular character of the right asserted or the form of its assertion. In *Fauntleroy's* case (3) it was held to prevent the assignees of a forger from claiming the benefit of a policy on his death at the hands of justice by reason of his forgery. It would equally apply, it appears to me, to the case of a *cestui que trust* asserting a right as such by reason of the murder of the prior tenant for life or of the assured in a policy ; and it must be so far regarded in the construction of Acts of Parliament that general words which might include cases obnoxious to this principle must be B read and construed as subject to it.

In *Fauntleroy's* case (*Amicable Society* v. *Bolland*) (3), the judgment in the House of Lords was delivered by Lord Lyndhurst, L.C., who thus stated the position, at p. 211 :

> The question under these circumstances is this : whether the assignees can recover against the insurance company the amount of this insurance ; that is to say, whether C a party, effecting with an insurance company, an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, whether, under such circumstances, the parties representing him and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the noble Lord [Lord Radnor] now present, and we have both come to the conclusion that the assignees cannot maintain this suit. It appears to me that this resolves itself into a very plain and simple con- D sideration. Suppose that in the policy itself this risk had been insured against : that is, that the party insuring had agreed to pay a sum of money year by year, upon condition, that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained ? Is it not void upon the plainest principles of public policy ?

This was a less obvious case than a case of suicide. The forger had E no intention of being executed ; he presumably hoped to escape detection. The essential feature of the decision was that the court would not allow a claim in contract to be based on the contracting party's crime as a necessary constituent of the cause of action, even though an interval of time and circumstance separated the crime from the resulting death. F

In a case like the present, the crime (for so it is regarded by English law) and the resulting death are identified. The precise facts in *Fauntleroy's* case (3) could not come into question in these days, and the case is cited only for the general principle.

It may seem curious that there is, so far as we know, no decided case G precisely in point in England. It may be explained by the notorious fact that juries will seldom find *felo de se*, but generally bring in a verdict of suicide while insane. *Fauntleroy's* case (3) was discussed, but not applied, by the Supreme Court of the Cape of Good Hope in *Burger* v. *South African Mutual Life Insurance Society* (10), where the assured, H being a British subject, had been killed while in arms against the British government. De Villiers, C.J., refused to extend the principle of public policy to such a case, and gave judgment for the executrix. It is not here necessary to express any view on the soundness of that decision, but De Villiers, C.J., refers to the case of suicide. The policy contained a clause similar to condition 4 of the policy now in question. De Villiers, C.J., thus expressed himself, at p. 543 :

> The possibility of suicide was contemplated, and it was accordingly provided that if this should be the mode of death within one year from the date of the contract the policy should become void. If, instead of being killed in action, the deceased had committed suicide ten years after the date of the contract, there would have been good ground for invoking the principle of public feeling against the payment of the amount claimed, for there would have been some evidence that the illegal act causing his death had been contemplated. In the present case there is no evidence whatever that the deceased contemplated rebellion, or that he became a rebel with the object of thus hastening his death, and securing the amount of the policy for his representatives. Having regard to the principle that where a person seeks to excuse himself from the performance of a contract in respect of which he has received the full consideration, the rule as to public policy should not be carried further than the protection of the public requires, I am of opinion that the defendant company is not protected by the rule.

If De Villiers, C.J., is meaning to say that inability to recover in the case of the assured's felonious suicide depends on proof that such suicide was contemplated as a possibility when the policy was effected, we cannot, with deference, agree with that view. It may be that, in *Burger's* case (10), De Villiers, C.J., might have been led to the conclusion that the policy was not enforceable, if he regarded such a clause as he sets out as being some evidence that suicide was contemplated when the policy was effected. It is not necessary to discuss here this way of looking at the matter. Reference has also been made to a *dictum* to be found in *Horn* v. *Anglo-Australian & Universal Family Life Assurance Co.* (11), where Wood, V.-C., after referring to *Fauntleroy's* case (3), said at p. 511 :

> So the argument might be pursued—although I do not know that any case has so decided—to the same extent in the case of a person committing suicide while in a sane state of mind, thus committing a felony, and losing his life thereby ; but I know of no rule of law that can justify me in extending that to the case of a person committing suicide while in a state of insanity, and therefore committing no legal offence.

The finding there was that the assured committed suicide while insane, and his personal representative recovered under the policy. A number of cases was cited, but in no one of these was there a finding of felonious suicide. It was found in each case that the suicide had been committed during a period of temporary insanity. In some of these cases, the questions arose under a condition common for many years in policies of life insurance.

An illustration is furnished by *Borradaile* v. *Hunter* (12). The general form of the condition was that, if the assured should die by his own hand, or by the hands of justice, or in consequence of a duel, the policy should be void. That condition was held to cover a case where the assured took his own life, intending to do so, but at the time not capable of judging between right and wrong, and in that sense was insane. In *Clift* v. *Schwabe* (13), it was held that the word "suicide" in such a condition should be similarly construed, and not limited to *felo de se.* In other cases, the condition was that the policy, though void in the event of suicide, in other respects should operate to entitle the holder to recover to the extent of an assignment or *bona fide* interest. Such cases were *Dufaur* v. *Professional Life Assurance Co.* (14) and *Rowett, Leakey & Co., Ltd.* v. *Scottish Provident Institution* (15), in which latter case the interests of onerous holders were protected. There are in the books several such cases, but we do not think it necessary to discuss them further. No such question falls to be decided here as was necessary to be considered in them. We do not think they afford us any guidance.

Authorities were cited from the Supreme Court of the United States. Decisions of that court are always considered with great respect in the courts of this country, and it has often been said that it is desirable to have uniformity in the law of contracts as far as possible in our two countries. The difficulty in the present connection is that these questions of public policy depend on the state law which governs the contract, and that the law may differ in different states. In *Ritter* v. *Mutual Life Insurance Co.* (16), it was held by the Supreme Court that, where an assured, while sane, had committed suicide, the policies on his life were not enforceable. The first ground on which the judgment was put was that such a death was not within the policy, which contained no express condition relevant to suicide. Harlan, J., said, at p. 151:

> But is it not an implied condition of such a policy that the assured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than wilful, deliberate self-destruction? Looking at the nature and object of life insurance, can it be supposed to be within the contemplation of either party to the contract that the company shall be liable upon its promise to pay, where the assured, in sound mind, by destroying his own life, intentionally precipitates the event upon the happening of which such liability was to arise?

It may be that these observations were directed to the case where the policy was silent on this matter. The second ground of the judgment was that to allow recovery would be against public policy. Harlan, J., said, at p. 154:

> There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment. If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators or assigns—expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted. Is the case any different in principle if such a policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his wilful, deliberate act when in sound mind?

The answer given by HARLAN, J., after an elaborate citation of authorities, was that such a risk could not legally be covered by the policies. The court did not, it seems, consider the further question whether a court should entertain an action in which the plaintiff or his representative was seeking to recover the fruits of a crime.

Whitfield v. *Aetna Life Insurance Co.* (17), decided in 1907, throws no light on the general question, and turns, it seems, on the effect of the state law. It decided that, where the statutes of the state in which the policy was effected provided that suicide, unless contemplated when the policy was applied for, should be no defence, the policy must be enforced in a Federal court, notwithstanding that it contained express terms limiting the recovery, in the case of suicide, to one-tenth of the sum insured. It does not appear that the assured took his life while of sane mind.

In *Northwestern Mutual Life Insurance Co.* v. *McCue* (18), decided in 1912, the assured had been executed for murder. It was held that, by the law of Virginia, which was the relevant state law for the policy in question, death by the hand of the law was not covered by the policy, which was silent in regard to suicide. The court held that it was immaterial to consider or ascertain what was the law of Wisconsin, where the insurance company had its head office.

In 1920, in the case of *Northwestern Mutual Life Insurance Co.* v. *Johnson* (19), and another case which was reported at the same time, the Supreme Court again considered this type of question. The court construed policies which contained clauses somewhat similar to condition 4 in the policies here in question as implying that suicide of the assured, whether sane or insane, after a specified time, should not be a defence. The headnote goes on thus to express the effect of the decision :

> The validity of such agreements to pay life insurance, even when death is due to suicide, if it occur after the lapse of a certain time, depends upon the state policy. Where it does not appear in what state the contracts in question were made, the court upheld them, which, *semble*, is in accord with the rule generally prevailing.

In *Johnson's* case (19), it did not appear that Johnson was insane when he killed himself. In the second case, nothing is said on the question as to whether the assured was sane or insane. In the judgment delivered by that great judge, HOLMES, J., *Whitfield's* case (17) was cited as an authority that public policy with regard to such contracts was a matter for the states to decide. *Ritter's* case (16) was not disapproved. It was, on the contrary, said, at p. 101, that :

> all the circumstances gave moral support to the construction of the policy adopted by the court in accordance with the view that has prevailed in some jurisdictions as to the general rule.

McCue's case (18) was not disapproved. The court seems to discuss public policy merely from the standpoint that :

> the mere evocation of a possible motive for self-slaughter is at least not more objectionable than the creation of a possible motive for murder.

That is, where a policy on a man's life is assigned to a third party. The court did not consider what the position would be if the assured or assignee of the policy murdered the life insured. We find it difficult to conceive that any court would, in that event, enforce payment for the benefit of the murderer ; but we do not think that the court was A considering any such case. The discussion seems to have been limited to the question whether the clause in reference to suicide, whether the man was sane or insane, rendered the policy void. Whatever the position may be in the United States, where each state, by legislative or judicial action of its own, can, it seems, determine the legality of a policy which, B expressly or by implication, provides for payment of the policy moneys in whole or in part in the case of suicide, sane or insane, we cannot, we think, consistently with the law of England, as we understand it, hold that the respondent can successfully maintain her claim.

Opinions may differ as to whether the suicide of a man while sane C should be deemed to be a crime ; but it is so regarded by our law. The old inquisition in the case of self-murder was *felonice et voluntarie seipsum interfecit et murderavit :* HALE'S PLEAS OF THE CROWN, chap. 31, p. 411. It may be that both ecclesiastical and civil penalties have been mitigated or abolished, but the criminal law still remains. Only the D legislature in this country can change the law in this matter, if it should so will. While the law remains unchanged, the court must, we think, apply the general principle that it will not allow a criminal or his representative to reap, by the judgment of the court, the fruits of his crime. We have quoted the above authorities in support of that principle which E is of general import. The principle has been applied not only in the authorities quoted above, but also in many decisions dealing with varied states of fact and applications of the same or similar principle. These are all illustrations of the maxim *ex turpi causa non oritur actio.* The maxim itself, notwithstanding the dignity of a learned language, is, F like most maxims, lacking in precise definition. In these days, there are many statutory offences which are the subject of the criminal law, and in that sense are crimes, but which would, it seems, afford no moral justification for a court to apply the maxim. There are, likewise, some crimes of inadvertence which, it is true, involve *mens rea* in the legal G sense, but are not deliberate, or, as people would say, intentional. Thus, in *Tinline* v. *White Cross Insurance* (20) and *James* v. *British General Insurance Co.* (21), both cases of motor car manslaughter, the judges held that policies against third-party liability were enforceable. In these cases, something may turn upon the special legislation on the matter. The H cases have been questioned in *Haseldine* v. *Hosken* (22), but need not further be considered here.

The principle that a court will not generally enforce transactions tainted with fraudulent or immoral purpose or objects has often been recognised, and was recently expounded in a decision of the Court of Appeal in *Alexander* v. *Rayson* (23). A recent Act was necessary to change the law that there could be no contribution between tortfeasors. It is enough to say that we know of no case where a crime, such as our A law holds *felo de se* to be (that is, a deliberate felony akin to murder), has been allowed to support an action by the criminal or his representative to recover the fruits of the crime. We think that what GREER, L.J., said in *Haseldine* v. *Hosken* (22), at p. 837, applies without qualification to a suicide such as that in question :

> B In this country, whatever may be the case in other countries, no person is allowed to insure himself against the commission of a crime.

The overriding duty, or inherent power, of the court to refuse its aid to enforce a promise to pay, in such circumstances, excludes its general duty to enforce performance of contracts.

C There may seem a hardship in holding that the appellant company is in law not compellable to pay, in the facts of this case, but we find it impossible to hold otherwise consistently with our law, as we understand it. We accordingly, with all deference, feel constrained to allow the appeal from what SWIFT, J., has decided.

D *Appeal allowed.*

Solicitors : *Sutton, Ommanney & Oliver* (for the appellant company) ; *Soames, Edwards & Jones* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

E

PROVIDENT ACCIDENT & WHITE CROSS INSURANCE CO., LTD. *v.* DAHNE AND WHITE.

[KING'S BENCH DIVISION (du Parcq, J.), **March 23, 1937.**]

F *Building Contract—Guarantee of due performance by contractor of bond in favour of rural district council—Bond given in favour of county council—Knowledge of guarantors—Estoppel.*

On June 6, 1930, in consideration of the issue by the plaintiff company of a bond on behalf of F. "in favour of the Gower R.D.C.," in connection with a contract for road improvement, the defendants undertook to indemnify the plaintiff company against all losses incurred G in consequence of having issued the bond. On July 4, 1930, the plaintiff company and F. bound themselves by a bond issued in favour of the Glamorgan C.C. which had by virtue of the Local Government Act, 1929, s. 30, become the competent road authority on Apr. 1, 1930. The plaintiff company became liable to perform its obligations under the bond, and it thereupon sought to be indemnified by the defendants. H The defendants did not know, when they gave their undertaking that the Glamorgan C.C. had become the competent road authority :—

HELD : (i) the maxim *ignorantia legis neminem excusat* was not applicable.

(ii) the words in the undertaking "in favour of the Gower R.D.C." were not mere surplusage and immaterial, and it could not be inferred that the defendants meant "the competent road authority."

(iii) there was no evidence that the defendants misled the plaintiff company by their conduct, and the defendants were not estopped from saying that they had never agreed to indemnify the plaintiff company.

[**EDITORIAL NOTE.** The undertaking in this case was to indemnify the road authority against failure of a contractor to carry out his contract. It was argued that it was immaterial that the road authority was stated to be the rural council whereas in fact it was the county council, but evidence being given that the guarantors would not have entered into such a document where the county council were concerned, the undertaking was held not to be binding.

As to Guarantee for due Performance by Contractor, see HALSBURY, Hailsham Edn., Vol. 3, pp. 518-520, paras. 588, 589; and for Cases, see DIGEST, Vol. 7, pp. 427-430, Nos. 376-384.

Cases referred to:

(1) *The Moorcock* (1889), 14 P.D. 64; 12 Digest 611, *5048*; 58 L.J.P. 73; 60 L.T. 654.

(2) *R.* v. *Tewkesbury Corpn.* (1868), L.R. 3 Q.B. 629; 20 Digest 132, *1056*; 37 L.J. Q.B. 288; 18 L.T. 851.

(3) *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1873), L.R. 6 H.L. 352; 21 Digest 309, *1130*; 43 L.J. Ch. 269.

(4) *Jorden* v. *Money* (1854), 5 H.L. Cas. 185; 21 Digest 292, *1041*; 23 L.J. Ch. 865; 24 L.T.O.S. 160.

Action upon an undertaking in writing to indemnify. The facts are set out in the judgment.

Trevor H. Hunter, K.C., and *Morris Morgan* for the plaintiff company.

Phineas Quass and *Edmund Davies* for the defendants.

du Parcq., J.: On June 6, 1930, the defendants, Mr. Dahne, a solicitor of the Supreme Court, and Mr. White, a licensed victualler, addressed to the plaintiff company the following written undertaking:

> In consideration of your issuing a bond for £2,250 on behalf of George Nelson Farley of "Oakdene," Pontardulais, in favour of the Gower Rural District Council in connection with a contract for road improvement on the Penclawdd-Llanrhidian Road, foreshore section, Penclawdd, we agree to indemnify you jointly and severally to the extent of £2,250 against all losses in consequence of having issued such bond including all costs, charges and expenses that you may incur or be put to in inquiring into and settling any claim or claims made upon you under or by virtue of such bond. And we further agree that in default of payment by us within 14 days after notice by you to us by post requiring payment you shall be at liberty to recover such monies as a liquidated amount due from us to you.

On July 4, 1930, the plaintiff company, together with Mr. Farley, bound themselves by a bond which answered the description contained in the defendants' written undertaking in every respect but one. It was not issued in favour of the Gower Rural District Council. It was to the Glamorgan County Council and not to the Gower Rural District Council that Mr. Farley and the plaintiff company bound themselves. Subsequently the plaintiffs became liable to perform their obligations under this bond. The Glamorgan County Council obtained a judgment against them in Nov., 1935, under which they were compelled to pay to the county council the sum of £1,443 8*s.* 1*d.* They now claim to be indemnified against this loss by the defendants, who answer them by saying that they never promised or agreed to indemnify them in respect of a bond in favour of the Glamorgan County Council.

Faced with an obvious difficulty, the plaintiffs put their case at the trial in three ways. First, they alleged that the defendants knew before the bond was issued that what Farley wanted was a bond which would satisfy the competent road authority, and knew also that from Apr. 1, 1930, onwards the competent road authority was the Glamorgan County Council and not the Gower Rural District Council. They contended that, even if the defendants had not actual knowledge of this fact, they must be taken to know it, because they would have known it if they had not been unacquainted with the Local Government Act, 1929, s. 30, and everybody is presumed to know the law. When, therefore, the defendants spoke of the Gower Rural District Council it was to be inferred (so ran the argument) that they meant no more than " the competent road authority," and words ought to be implied in the undertaking which would bring the bond into harmony with it. Secondly, if indeed this is to be regarded as a separate point, Mr. Trevor Hunter, for the plaintiffs, suggested that the words " in favour of the Gower Rural District Council " were mere surplusage, or immaterial, and that the undertaking might in the circumstances be construed as if these words had been omitted. Lastly, the plaintiffs relied upon an estoppel, which is pleaded in the reply in these words :

> By reason of the matters set out in paras. 4 and 5 of the statement of claim [which are in substance the allegations to which I have already referred] and the conduct of the defendants in giving the plaintiffs the said undertaking and thereafter maintaining silence and permitting the plaintiffs to execute the said bond in favour of the Glamorgan County Council the defendants are estopped from denying that the said bond was executed in pursuance of the defendants' said undertaking and in consideration of the said indemnity.

I may add that Mr. Trevor Hunter disclaimed reliance upon any equitable doctrine. He was content to rely upon the common law, citing in support of his argument a passage from p. 51 of Salmond and Winfields Principles of the Law of Contracts. No other authority was cited on either side, except, as was to be expected, *The Moorcock* (1). I suggested at one stage of the argument that the words which are so troublesome to the plaintiffs in this case might perhaps come within the definition of a *falsa demonstratio*, but Mr. Trevor Hunter seemed disinclined to pursue this line of argument, and, on reflection, I have no doubt that he was right. Having heard the evidence of Mr. Dahne and Mr. White, I see no sufficient reason to disbelieve either of them when he says that he did not know when he signed the undertaking, or until long after the execution of the bond, that the road authority with which Mr. Farley was contracting in respect of the Penclawdd-Llanrhidian Road was the Glamorgan County Council.

Until Apr. 1, 1930, the appointed day under the Local Government Act, 1929, the Gower Rural District Council had been the competent road authority. Mr. Farley had sent in a tender to the rural district council in March, and the name of the rural district council originally appeared throughout the document which contained the form and conditions of tender and the form and conditions of contract. Messrs. Morgan Davies & Partners were named as the engineers, and as such they wrote to Mr. Farley on May 16, 1930, to ask for the name of an assurance company who would be willing to be bound with him. This request took Mr. Farley to the defendant, Mr. Dahne, whose firm (Dahne & Thomas) acted as his solicitors and also, as it happened, as agents for the plaintiff company. Naturally enough, the plaintiff company was approached. It was unwilling to enter into a bond without an indemnity from some responsible persons, and at some date between May 29 and June 6 Mr. Dahne told the plaintiffs' inspector that he and Mr. White would " be agreeable to give a counter-indemnity." There is no evidence that either of the defendants had any but a friendly interest in Mr. Farley's business, or that it was of importance to them that Mr. Farley should get the contract. I do not find it very surprising that Mr. Farley, who may have thought the substitution of the county council for the rural district council as immaterial, as the plaintiffs now suggest that it was, omitted (as apparently he did) to mention it to Mr. Dahne. Mr. White was not concerned to inquire closely into the details of the transaction. He told me, indeed, that he did not understand that he was undertaking any liability to the plaintiff company. " I thought," he said in the witness box, " that the insurance company was covering us." Both Mr. Dahne and Mr. White said further that they would not have agreed to give an indemnity in respect of a contract with the Glamorgan County Council. Neither of them was asked, either in examination-in-chief or in cross-examination, his reasons for this discrimination in favour of the Gower Rural District Council. It is not for me to speculate as to the causes of this reticence on the part of counsel. My view of this piece of evidence is that, though somewhat surprising, it may be true.

I may now deal conveniently with the plaintiffs' contentions which I have already summarised. As to the first, inasmuch as I have found that neither of the defendants in fact had the knowledge imputed to him, it remains to consider whether the legal presumption relied on by the plaintiffs will supply the lack of actual knowledge. In my opinion it will not. It is not strictly accurate to say that everybody is presumed to know the law. The maxim is, as was said, for example, by Lush, J., in *R. v. Tewkesbury Corpn.* (2), at p. 639, " *ignorantia legis neminem excusat.*" If the defendants had agreed to indemnify the plaintiffs in consideration of their issuing a bond in favour of " the competent road authority," I have no doubt that they would have been precluded by the application of this principle from asserting that they had not studied the Local Government Act, 1929, and were not aware that the county council had become the road authority. It is another thing to say that they are to be precluded from asserting that they meant what they said, because if they had known the provisions of a statute, they might reasonably have been expected to say something else. The second contention cannot well be considered apart from the first. If the words in question are mere surplusage, then such a promise as the plaintiffs require may readily be implied. I cannot take the view, however, that they are surplusage, or immaterial. It is at least conceivable that a man might be willing to be bondsman, or to indemnify a bondsman, where such obligations as Farley's contract imposed upon him were to be incurred in favour of council A., and be unwilling to undertake the like liabilities where the obligations were to council B. I am not prepared to treat it as axiomatic, as a matter of fact or of law, that every road authority is equal to every other road authority for this purpose. To put the matter shortly, it seems to me to be hopeless to argue in a case like the present that where the due performance of the contract by one contracting party is to be guaranteed, the identity of the other contracting party is immaterial. It may be most material, and for that reason I think that the defendants may be speaking the truth when they say (though their reasons are not vouchsafed to me) that they would not have been willing to give a similar undertaking with the name of the Glamorgan County Council in place of that of the Gower Rural District Council.

It is unnecessary to deal fully with the terms of the contract in order to establish the proposition that much might depend, from the point of view of a guarantor, upon the possible idiosyncrasies of the council. It is enough, I think, to point out that the bond itself provides for the possibility of "forgiveness or forbearance" on the part of the council. I cannot suppose that all councils are equally forgiving and forbearing. Taking the view of the law and the facts which I have stated, I find it impossible to hold that any such term as the plaintiffs suggest can be implied in the undertaking.

As to the estoppel pleaded, it may be enough to say that it is not proved that the defendants, or either of them, misled the plaintiffs by their conduct. The plaintiffs knew the facts. They knew that the road authority and the other party to Farley's contract was the Glamorgan County Council. They knew that the defendants' undertaking in terms referred to the Gower Rural District Council. There is nothing to show that the defendants saw the bond until long after it had been executed. Even if they had, and if their silence had amounted to a representation, it would have been a representation that they intended to indemnify the plaintiffs notwithstanding a discrepancy between the undertaking and the bond, and such a representation of intention cannot found an estoppel: see the opinion of LORD SELBORNE, L.C., in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (3), citing a passage from the opinion of LORD CRANWORTH, L.C., in *Jorden* v. *Money* (4). A

For these reasons the action fails and must be dismissed, with costs.

Solicitors: *Blyth, Dutton, Hartley & Blyth* (for the plaintiff company); *Davies, Arnold & Co.*, agents for *G. Tracy Phillips*, Ammanford (for the defendants).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*] B

VICTOR WESTON (FABRICS), LTD. *v.* MORGENSTERNS (a Firm).

C

[KING'S BENCH DIVISION (Finlay, J.), **March 9, 1937.**]

Bankruptcy—Deed of arrangement—Assent—Dealings with trustee—Estoppel—Action for debt.

The defendants executed a deed of arrangement for the benefit of their creditors. The trustee under the deed sent a circular letter to all the defendants' creditors announcing the deed and undertaking to pay for goods ordered for current purposes. A statement of account was also asked for. The plaintiffs, who were creditors, duly sent their account and from time to time supplied to the trustee, and received payment for, further goods. In an action for the balance of the price of goods sold to the defendants before the deed of arrangement:— D

HELD: (i) the circular letter was not a trick to obtain the plaintiffs' assent to the deed of arrangement. E

(ii) the plaintiffs by their conduct were bound by the deed of arrangement, and were estopped not only from relying upon the deed as an act of bankruptcy, but also from bringing the action.

[**EDITORIAL NOTE.** This case deals with the effect of assent by conduct so far as it prevents the assentee bringing an action against the debtor. Previous cases have been concerned with the estoppel of the creditor from bankruptcy proceedings founded upon the deed as an act of bankruptcy, and while the position in regard to an action has been discussed, it has not been previously decided. F

AS TO EFFECT OF ASSENT TO A DEED OF ARRANGEMENT, see HALSBURY, Hailsham Edn., Vol. 2, pp. 443-445, paras. 606-608; and FOR CASES, see DIGEST, Vol. 5, pp. 1135-1138, Nos. 9221-9245, and see Vol. 4, pp. 127-130, Nos. 1161-1189.] G

Cases referred to:

(1) *Re Crow, Ex p. Collier* (1907), 97 L.T. 140; 4 Digest 129, *1183*.

(2) *Re Stray, Ex p. Stray* (1867), 2 Ch. App. 374; 4 Digest 128, *1178*; 36 L.J. Bcy. 7; 16 L.T. 250. H

(3) *Re Brindley, Ex p. Taylor, Sons & Co.*, [1906] 1 K.B. 377; 4 Digest 129, *1182*; 75 L.J. K.B. 46.

(4) *Re Mills, Ex p. Mills*, [1906] 1 K.B. 389; 4 Digest 127, *1167*; 94 L.T. 41.

(5) *Re Sunderland*, [1911] 2 K.B. 658; 4 Digest 128, *1179*; 105 L.T. 233.

(6) *Re Michael, Ex p. Michael* (1891), 8 Morr. 305; 4 Digest 130, *1189*.

ACTION for £128 12*s.* 6*d.*, the balance of the price of goods sold and delivered by the plaintiff company to the defendants between Aug. 20, 1936, and Nov. 16, 1936. The balance claimed was admitted to be due, but the defendants pleaded that the plaintiffs had assented to or aquiesced in a deed of arrangement executed by the defendants on Dec. 21, 1936, by dealing with the trustee under the deed after its execution, and on that point leave was given to defend.

On Dec. 21, 1936, after part of the amount claimed had fallen due, the defendants executed a deed of arrangement for the benefit of their creditors. On the same date a circular letter, written by the trustee under the deed, was sent to all the defendants' creditors, including the plaintiff company, announcing that a deed of arrangement had been made "for the protection of the estate and to ensure the continuity of the business," and adding that any orders for goods required for current purposes would be countersigned by the trustee who would accept responsibility for payment if so signed and not otherwise. A statement of account was also asked for. As a result of this letter the plaintiff company sold goods to the trustee and was paid in due course.

Greer Jackson, for the plaintiff company: Trading with the trustee admittedly prevents the plaintiff company from relying on the deed as an act of bankruptcy: *Re Brindley* (3). But this acquiescence is not fatal to an action for the debt: *Re Mills* (4), *Re Stray* (2). The defendants must prove an assent: *Re Michael* (6). Here there was no assent. Assent must be in writing: Deeds of Arrangement Act, 1914, s. 3 (3). The circular letter was a trick to obtain assent.

Gerald Gardiner, for the defendants: Assent need not be in writing: sect. 3 (3) is explained by a reference to sect. 3 (1). Trading constitutes assent: *Re Michael* (6). What defeats a bankruptcy petition also defeats an action for debt; if not under the statute, then on the basis of estoppel. The circular letter implied no promise.

FINLAY, J.: This action was brought in respect of an account showing a balance due of £128 12*s.* 6*d.* There was no dispute with regard to that matter, but a defence was raised and leave was given to defend upon it. The defence arises in this way. It appears that the defendants herein executed a deed of arrangement in favour of their creditors. That deed was registered and received the necessary statutory assents. The point which arises is whether on the facts the plaintiffs here were so bound by that deed as to be precluded from bringing this action outside the deed.

On Dec. 21, 1936, a notice was sent by the trustee to the plaintiff company. Pursuant to that notice the plaintiff company sent in to him a statement of its account. The trustee proceeded to carry on the business, and substantial orders for goods were dispatched in his name to the plaintiff company. Those goods were delivered and payments were made for them by the trustee to the plaintiff company. The defence is that the plaintiff company by its conduct has acquiesced in and assented to the deed and is bound by it.

The plaintiff company did serve a bankruptcy petition basing it upon the execution of the deed of arrangement, but the bankruptcy petition was abandoned and it is agreed that the plaintiff company could not treat the deed of arrangement as being an act of bankruptcy for the purpose of founding the petition upon it.

The defendants raise the obvious point that on the facts the plaintiff company is precluded by its conduct and estopped from suing outside the deed. The plaintiff company made three answers, two of which I think can be disposed of very summarily. A point was raised on the Deeds of Arrangement Act, 1914, s. 3 (3) as to the assent not being in writing. It seems to me that there was nothing in that point at all. If the Act is looked at, it is apparent that it has reference only to assents for the purpose of that section ; nor do I see any ground for saying that the letter dated Dec. 18, no doubt sent on Dec. 21, was in any way a trick. In *Re Crow* (1), Bigham, J., in the divisional court intimated the view that, in the circumstances of that case, a letter under which orders were procured might be a trick. Each case, of course, in a matter of that sort, must be judged on its own facts, and here I see no ground at all for the contention that the plaintiff company was in any way tricked into taking orders. The matter seems to have been altogether formally and accurately put to the plaintiff company, and there is nothing in the point. That brings me to the main point in this case.

It is clear, as I have already said, that the plaintiff company is precluded, as indeed is admitted, from founding on the deed an act of bankruptcy, and the point is whether it is so bound by it as to be unable to bring this action. My attention has been called to *Re Stray* (2), where the law is laid down by Lord Cairns, L.J. ; then there is *Re Brindley* (3), where the matter is fully discussed in a judgment of Vaughan Williams, L.J., and *Re Mills* (4), where the distinction is pointed out, based upon the passage from Lord Cairns, L.J., where it is said that a creditor may be precluded by his conduct from alleging that such a deed is an act of bankruptcy and still not be bound by the deed. The matter is further discussed in a later case, *Re Sunderland* (5), which went to the Court of Appeal.

Now the question here is this, has the plaintiff company, on the facts, by its conduct estopped itself from denying the title of the trustee ? I have arrived at the conclusion that it has. I think that the facts here show that the plaintiff company, acting with knowledge, recognised the trustee. Not only did it send him in its account, but it received orders from him and took payments from him. Its conduct can be based only, it seems to me, on the recognition of the deed and of the title of the trustee, that title being derived from the deed and the deed alone. It seems to me that the principle that one cannot both approbate and reprobate applies here. It is clear that the plaintiff company, by accepting orders from the trustee and by receiving payments from the trustee, derived a profit from the trustee, and I think it would be a remarkable result if, having done that, and in the absence of any trick or anything of that sort, it was then entitled to turn round and say that it refused to be bound by the deed, that it refused to recognise the trustee, and that it preferred to go outside the deed and to bring its own action. As a result of my survey of the authorities, appreciating the distinction between being precluded from relying on the deed as a matter of bankruptcy, and from being precluded from suing outside the deed by reason of the fact that one is actually bound by the deed, I arrive at the conclusion on the facts of this case that the plaintiff company is bound by the deed.

Judgment for the defendants.

Solicitors: *Henry Hilbery & Son* (for the plaintiff company); *Wigram & Co.*, agents for *Laurence Marks*, Manchester (for the defendants).

[*Reported by* GERALD ABRAHAMS, ESQ., *Barrister-at-Law.*]

BOWLES *v.* BOWLES.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **March 1, 1937.**]

Divorce—Variation of settlement—Petition by guilty wife—Consents of persons interested—Interests of unborn persons.

By a post-nuptial settlement a fund, which was all brought in by the wife or her father, was to be held upon trust for the wife for life, and subject thereto for the husband for life, but only if there should be issue of the marriage living at the death of the wife, and if there should be no issue of the marriage upon certain trusts in favour of the wife's two sisters and their children. The settlement further gave to the wife after the death of the husband a power of appointment in favour of any after-taken husband and the children of such marriage. The marriage was dissolved on the husband's petition on the ground of the wife's adultery, and the wife married again. There were no children of the first marriage and the first husband took no interest in the settled fund. The wife sought to have the settlement varied with the object of making provision out of the funds for any children of her second marriage, notwithstanding that her first husband was still living. The wife consented to the Registrar's report that the settlement should be varied as if the first husband were now dead and had died in the lifetime of the wife with all necessary rectifications and amendments to give the wife power to provide under the settlement for any children of the second marriage. The wife's sisters, who were both unmarried, consented:—

HELD: the Registrar's report ought to be confirmed.

[**EDITORIAL NOTE.** It has been considered to be an open question whether the guilty party could petition for the variation of a settlement. The point was left open in *Wootton-Isaacson* v. *Wootton-Isaacson* (1), and *Suart* v. *Suart* (*otherwise Hodgson*) (2), where the course was also allowed, was a nullity petition. With the present decision it may be fairly taken that there is no objection to such a petition where the innocent party or children of the first marriage are not prejudiced in any way.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 10. p. 802, para. 1278, and pp. 804, 805, para. 1281; and for Cases, see DIGEST, Vol. 27, p. 530, Nos. 5742, 5743.]

Cases referred to:

(1) *Wootton-Isaacson* v. *Wootton-Isaacson*, [1902] P. 146; 27 Digest 530, *5742*; 71 L.J. P. 80; 87 L.T. 147.

(2) *Suart* v. *Suart* (*otherwise Hodgson*), [1910] P. 246; 27 Digest 530, *5743*; 79 L.J. P. 86.

Motion on behalf of a wife respondent to confirm the Registrar's report on her petition to vary a post-nuptial settlement.

The parties were married on June 12, 1919, and there were no children of the marriage. On Dec. 2, 1919, a post-nuptial settlement was executed between the parties, which was confirmed by the wife in 1923 on her attaining the age of 21 years. The settlement funds consisted of securities of the value of about £4,850 settled by the wife's father, and further securities of the value of about £7,650 subsequently brought into settlement by the wife under her covenant to settle after-acquired property. The trusts of the settlement were to pay the income to the wife for her life without power of anticipation and subject thereto to the husband for his life and until he should marry again, but only if there should be issue of the marriage living at the death of the wife, and if there should be no issue of the marriage upon trust for such of the sisters of the wife, namely, Evelyn Natalie Alice Walker and Helen Maud Walker as should be living at the death of the survivor of the wife and the husband and the child or children attaining the age of 21 years or daughters marrying of such of the sisters as should then be dead, in equal shares *per stirpes*, and if both of them should be dead without leaving children surviving, in trust for such persons as the wife should by deed or will appoint and in default of appointment in trust for the wife absolutely. The settlement further provided, *inter alia*, that the wife might at any time after the death of the husband appoint by deed or will one moiety or less part of the capital of the funds for the benefit of any after-taken husband and the children of such marriage, but so that any such after-taken husband should not take any interest exceeding a life interest. On Nov. 2, 1931, the marriage was dissolved by decree absolute on the petition of the husband on the ground of the wife's adultery. In the events which happened the husband took no interest in the settled funds. On Sept. 24, 1936, the wife was married to John Norman Blackwell. On Dec. 2, 1936, the wife, after leave obtained from the President to do so out of time, filed her petition for variation of the settlement, with the object of making provision out of the trust funds for any children by her second marriage, A in which she prayed, *inter alia*, that the settlement might be varied by extinguishing the rights, powers and interests of the husband therein, as if he were dead and had died in her lifetime and might be read in all respects as if he were dead and had died in her lifetime (save and except as to the power of appointment in favour of an after-taken B husband). The wife consented to a report of the Registrar to the effect that the settlement should be varied as if the first husband were now dead and had died in the lifetime of the wife, with all necessary rectifications and amendments, to give the wife power to provide under the settlement for any children of her second marriage. The two sisters of C the wife, who were unmarried, consented and they and the trustees were represented before the Registrar. The first husband did not appear.

F. L. C. Hodson, for the wife: There is nothing in the Judicature Act, 1925, s. 192 (which re-enacted the powers of the court contained in the Matrimonial Causes Act, 1859, s. 5, and the Matrimonial D Causes Act, 1878, s. 3) to prevent the guilty party from petitioning for variation. Sir Gorrell Barnes, J. (as he then was), in *Wootton-Isaacson* v. *Wootton-Isaacson* (1), expressly left open the point of jurisdiction in regard to such a petition, and Sir Samuel Evans, P., in *Suart* v. *Suart* (2), made an order for variation of settlement on the E respondent's petition in a nullity suit, after having stated that the application to vary might have been made by either of the parties.

Bucknill, J., made an order confirming the Registrar's report and directed that the costs of the application should come out of the settled funds.

F Solicitors: *Seton, Emmett & Co.* (for the wife).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

R. *v.* CORNWALL COUNTY VALUATION COMMITTEE AND OTHERS, *Ex parte* FALMOUTH BOROUGH COUNCIL.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Scott, L.JJ.), **March 16, 17, 1937.**] A

Rates—Assessment—Uniformity—County valuation committee—Right to proceed by instalments.

A county valuation committee, finding that to a considerable extent prevailing assessments in the county were too low, proceeded to promote uniformity of assessment. The committee decided that it would be best to proceed by instalments and to re-value the county, area by B
area, over a number of years. Certain proposals were accordingly made in respect of one borough, and, *inter alia,* the assessment of a certain hereditament was increased. It was admitted that according to the proper statutory definition of "gross value" the figure to which the assessment was increased was correct. It was objected that, because the application of the principle or basis whereby that particular assessment was corrected and increased was not simultaneously made applicable C
to each and every part of the county with the result that there would be a greater burden on the borough in question in its contribution to the county rates compared with other areas where the assessments had not been corrected, the assessment was bad :—

HELD : the county valuation committee was entitled to proceed by instalments to promote uniformity of assessment.

Decision of Divisional Court ([1936] 3 All E.R. 1012) *affirmed.* D

[EDITORIAL NOTE. The county valuation committees have been constituted by statute for the purpose of securing uniformity of valuation throughout the county, so that each part of the county contributes its fair share to the county expenses, according to the value of the property in its area. In the present case the committee proceeded upon this task by re-valuation in instalments, taking one part of the E
county at a time. At the same time they were imposing a new standard of valuation upon the county generally, and not equalising the assessments upon an existing standard. Clearly until the process was completed there would be greater inequality, but it is held that the county valuation committee were entitled to proceed on these lines. The court expressly reserved the question whether a writ of prohibition or of *certiorari* is a competent procedure in the case of such a body as the county F
valuation committee.

AS TO COUNTY VALUATION COMMITTEES, see HALSBURY Supp., Rates and Rating, paras. 86, 87 ; and FOR CASES, see DIGEST Supp., Rates and Rating, Nos. 1146a—1170a.]

Cases referred to :

(1) *Stirk & Sons, Ltd.* v. *Halifax Assessment Committee,* [1922] 1 K.B. 264 ; 38 Digest 581, *1157* ; 91 L.J. K.B. 258 ; 126 L.T. 338. G

(2) *Double* v. *Southampton Assessment Committee,* [1922] 2 K.B. 213 ; 38 Digest 579, *1145* ; 91 L.J. K.B. 803 ; 126 L.T. 796.

(3) *Ladies' Hosiery & Underwear, Ltd.* v. *West Middlesex Assessment Committee,* [1932] 2 K.B. 679 ; Digest Supp. ; 101 L.J. K.B. 632 ; 147 L.T. 390.

(4) *Lilley & Skinner, Ltd.* v. *Essex County Valuation Committee* (1935), 153 L.T. 64 ; Digest Supp. H

APPEAL by the Falmouth Borough Council from a judgment delivered by the King's Bench Divisional Court (LORD HEWART, L.C.J., SWIFT and MACNAGHTEN, JJ.), on Dec. 8, 1936, and reported in [1936] 3 All E.R. 1012. The facts are set out in the judgment of LORD WRIGHT, M.R., and the report of the hearing before the divisional court.

A. S. Comyns Carr, K.C., and *J. Scott Henderson* for the appellants.

A *F. J. Tucker, K.C.*, and *G. D. Squibb* for the respondents.

Comyns Carr, K.C.: For one rating period, at least, inequality is created by the action of the respondents. Equality is the essence of the law of rating.

Scott Henderson: The complaint of these appellants is precisely the B same as that of the successful appellants in *Double* v. *Southampton Assessment Committee* (2).

Tucker, K.C.: The appellants should not have proceeded against such a body as the respondents by way of prohibition.

Comyns Carr, K.C., in reply.

C

LORD WRIGHT, M.R.: This is an appeal from a decision of the divisional court, which has discharged two orders *nisi* which came before it. The circumstances in which the dispute arose are these. The county valuation committee of Cornwall had for some time been con-D sidering the circumstance that there was some want of uniformity, or inequality, in the system of valuation adopted by the different rating authorities in Cornwall. It appeared that the valuation committee for the county of Cornwall had examined lists deposited by 10 rating authorities, and had found these areas were under-assessed. One of these E areas was Falmouth. The committee decided at that time, which was in July, 1933, when the draft valuation list was under consideration, to draw the attention of the assessment committees to all cases of under-assessment. Then the same question arose somewhat later, and the county valuer submitted to the assessment committee a statement show-F ing the lack of uniformity of assessments within and between the rating areas. The same matter was referred to somewhat later. In Jan., 1935, the same question was pursued, and it is stated in the minutes of the valuation committee that the county valuer had submitted a list showing particulars of under-assessments in 10 rating areas, which G included Falmouth, where valuations appeared to be much too low, and, after consideration, it was resolved at that date that there should be four additional assistants engaged in the valuation department, and that financial provision should be made for going into the question of these valuations by the rating authority. A start was made in these H ten areas where there was a number of assessments requiring review, and a start was to be made with Falmouth. That matter was proceeded with. In Oct., 1935, the county valuer reported to the sub-committee of the valuation committee that he had valued about 3,200 hereditaments in Falmouth, and the remaining 1,300 would be completed in about six weeks. Some of these revised valuations had come before the assessment committee on the proposals of the county valuation committee, based upon these valuations. The rule *nisi* was asked for and granted, in view of these circumstances, and the rule *nisi* asked for was in these terms. I take the rule *nisi* requiring cause to be shown : A

> why a writ of prohibition should not be awarded to prohibit the said county valuation committee from proceeding with and the said assessment committee [which was also added] from hearing or determining any proposal by the said county valuation committee for increases in assessments of any dwelling-houses or shops in the borough of Falmouth until the said county valuation committee lodges and proceeds with similar proposals taking effect in the same half year in relation to B all similar hereditaments in the county of Cornwall which in the opinion of the said county valuation committee are under-assessed.

The grounds stated are that :

> (i) the said county valuation committee in proposing such increases in a part only of the county of Cornwall is contravening its statutory duty to promote uniformity in the principles and practice of valuation and is taking steps calculated to produce C the opposite effect ; (ii) the said assessment committee if it gives any effect to the said proposals of the said county valuation committee will be imposing an unfair and unequal burden upon ratepayers in the borough of Falmouth in respect of county expenses.

The rule *nisi* dealing with the matter of *certiorari* has reference to a particular decision of the assessment committee, made, it is said, on the D proposal of the valuation committee, to increase the assessment of a certain hereditament from £28 to £48 gross value, and the grounds are somewhat similar. The question raised, therefore, is this. It is said that, if the valuations which have been put forward, proposed by the valuation committee, in respect of hereditaments in Falmouth are acted E upon, and the valuations of the particular hereditaments are increased by the assessment committee, the total amount of rates chargeable to ratepayers in Falmouth will be very seriously increased. It is said that that involves an inequality or a want of uniformity affecting the ratepayers in Falmouth, as compared with the ratepayers in other rating F areas in Cornwall, and that the valuation committee, in taking the course which it has taken, is acting *ultra vires*, because it is acting contrary to its statutory duty to establish uniformity as between all the ratepayers in all the different rating areas in Cornwall. It is said that, if the valuations of Falmouth are put up in accordance with the revised G valuation, the valutions will be higher than the existing valuations in other rating areas in Cornwall, which are admittedly too low—at least, that is the basis upon which this appeal has proceeded—and that will contravene the principle of uniformity. The valuation committee has, therefore, no power and no jurisdiction to make the proposals for these H increased valuations which it is putting forward, and equally the assessment committee ought to have no power, and the county valuation committee and the assessment committee should be prohibited from acting upon these improper, illegitimate and invalid proposals. The case of *certiorari* is somewhat more limited, but it depends on the same principle. It is said that the particular decision in question was arrived at on a proposal made by the county valuation committee, which was *ultra vires*, and must be disregarded. There is no suggestion here that the particular valuations taken in themselves are improper or excessive, or such as ought not to be accepted, and the case proceeds on that basis.

At the outset, it may be observed that these propositions are somewhat difficult to follow. I do not stop to consider—the point has not been argued—whether prohibition or *certiorari* is on any view a competent procedure in the case of such a body as the county valuation committee. I do not either dwell upon the very curious form of the rule *nisi* in respect of the writ of prohibition which is such that, if the rule *nisi* were made absolute, it would prevent the assessment committee from proceeding to deal with assessments until the valuation committee had proceeded with similar proposals for the same half-year :

> in relation to all similar hereditaments in the county of Cornwall which in the opinion of the said county valuation committee are under-assessed.

The reference to the opinion of the county valuation committee is very noticeable, but, putting aside these minor points, the essential feature to be observed is that the county valuation committee is not in any sense a judicial body ; it is simply and solely an administrative body, which has certain specific duties imposed upon it, duties which work in with the general system of rating and valuation under the Act of 1925. The judicial body is the assessment committee. The assessment committee has judicial duties in connection with the final settlement of the valuation list, which is prepared by different rating authorities, which is subject to objections, and which may be subject to investigation and decision on the part of the assessment committee. The functions of the valuation committee are much more limited. To see what they are it is necessary to look at the Rating and Valuation Act, 1925, s. 18 (1), which provides for the establishment in each county of a committee of the county council called the county valuation committee, consisting of members of the council, appointed by the county, and a representative of the assessment committee for each assessment area, nominated by the assessment committee. The duties of this body are stated to be :

> to take such steps as the committee think fit for promoting uniformity in the principles and practice of valuation—

that is one thing, and then it goes on—

> and assisting rating authorities and assessment committees in the performance of their functions—

that is to say, assisting them in the preparation and settlement of the valuation list, and, I suppose, the fixing of the rate. Then it goes on :

> for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties,

> to hold conferences with persons representing assessment committees (including assessment committees for county boroughs), and to bring to the notice of any rating authorities or assessment committees any conclusions arrived at or recommendations made by the committee or at any such conference.

So far, there is this general power, or general duty, in the committee to take such steps as the committee thinks fit for the purpose of promoting A uniformity and assisting rating authorities and assessment committees. So far, it appears that its functions are advisory, but it is to act for these purposes, taking a wider view, and looking beyond the ambit of any particular rating authority, or indeed its own county. Then there are certain more particular powers and duties vested in it. In sect. 18 B (3), it is provided:

> A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee or other county valuation committee, appear as a party to any objection or appeal under this part of this Act.

Then, in sect. 26, which belongs to the portion of the Act dealing with C the preparation of valuation lists, it is provided:

> (1) Any person (including the county valuation committee and any local authority) aggrieved by the incorrectness or unfairness of any matter in the draft list, or by the insertion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may in accordance with the provisions of this D part of this Act lodge an objection with the assessment committee.

That provision is dealing with the preparation of the list for each quinquennial period. Then sect. 37 deals with the revision of current lists, and it is that which is peculiarly apposite here, because these present questions have arisen with reference to a revision. Sect. 37 says: E

> (1) Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter, or by the valuation as a single hereditament of a building or a portion of a building occupied in parts, or otherwise with respect to the list, may make in manner provided by this section a proposal for the amendment of the list.

F

The mechanism is set out, and then, eventually, the proposal, if objected to, is to be heard and determined by the assessment committee as if it were an objection to the draft list. Then there is a provision in sect. 37 (10) which provides that any amendment made is to date back to the time when the proposal which led to the amendment was served on the G rating authority. I will refer to two more sections only. Sect. 38 gives rating authorities, assessment committees and county valuation committees power to employ, amongst other persons, a competent person to give advice or assistance in connection with the valuation of hereditaments, and sect. 55 provides that rating authorities, assessment com- H mittees and county valuation committees may appoint:

> for the purposes of this Act such rating officers, valuation officers and other officers as they think fit.

It was under sect. 55, no doubt, that the valuation committee in the present case appointed its valuer, and additional valuers to which I have referred.

In those circumstances, it seems to me that what the valuation committee has been doing in this case is simply, according to the best of its
A judgment, to fulfil the duties under the various sections which I have stated. There is no suggestion that it is not acting *bona fide*, and there is no suggestion even that any of the actual valuations which it has made so far, or which have been proposed to the assessment committee, or which have been settled by the assessment committee, are in them-
B selves wrong. The whole gravamen of the complaint on the part of the Falmouth council here is that nothing can be done in these matters, unless what is done is done simultaneously over the whole county of Cornwall. It is said, still assuming the proposals put forward are unexceptionable and are made in good faith, that the valuation committee
C cannot deal with Falmouth by itself, and it cannot be dealt with at all until the whole of Cornwall is dealt with. The whole gravamen, as I understand it, of this complaint is put on the time factor ; it is said that there must be a want of uniformity and a want of fairness if, as a result of proposals made, as they have been made, and are being made,
D by the valuation committee, Falmouth is revalued, however correctly and properly, so that the new valuation comes into effect before the new valuation which is contemplated comes into effect in the remaining areas of Cornwall. Though there is certain force in the complaint that one part cannot fairly be revalued so as to put up the values until all the
E parts are treated alike, and though it may be true that that procedure may involve for a time some want of uniformity and some want of fairness as between the different areas of the county, still, in my judgment, that does not justify the application which has been made here. I think the course which has been taken by the county valuation com-
F mittee is honestly directed to the fulfilment of the functions set out in the different sections which I have read, and every step is in accordance with the requirements of the statute. That being so, the actual mode of procedure must, I think, at least in all the respects which are relevant in this case, be left to the discretion of the county valuation committee
G as an administrative body. It is not deciding judicially as to what the valuations should be ; it is merely taking the appropriate steps to obtain, as expeditiously as it can, the revaluation, in the interests of uniformity, of the various hereditaments over the whole area of Cornwall. It has taken certain measures, which I have referred to, with the object
H of lodging the different proposals which flow from the valuations as and when they are effected, and it is, I think, entirely for it to decide what is the most convenient, and what is the most appropriate, method of achieving that result. I do not think that this court has any right at all to interfere, by these prerogative writs, with the discretion of the

valuation committee in carrying out its statutory duties. There may, perhaps, be cases in which something has been done which is *ultra vires*, which is beyond the jurisdiction, and which is contrary to the terms of the Act, but I do not find in this case anything of that character, and, putting aside all questions as to the propriety of this proceeding, and A merely as a proceeding, I think, on the merits, the order of the divisional court discharging the rules *nisi* was right, and should be affirmed.

The case of the *certiorari* is, I think, simpler than the case of the prohibition. The effect of the *certiorari*, if made absolute, would simply be to discharge the valuation which in itself was quite unexceptionable, B and to discharge it because there are other valuations in other parts of Cornwall which are not correct, whereas this valuation is correct, and to do so, as I have already said, on the ground that it was based on a proposal made by the county valuation committee which was unlawful and *ultra vires* and, therefore could not form the basis of a valid decision C by the assessment committee. That is one step further removed from the case of the prohibition, and the same consequences, I think, follow. I agree in all respects with the very clear and complete judgment of Lord Hewart, L.C.J., in this case, and indeed I might have been content to accept his judgment. D

I ought perhaps to refer to certain authorities which have been cited, but I am bound to say they do not seem to me to bear at all on the questions to be decided here; they deal with other matters, to my mind quite distinct matters, and not with the actions of an administrative body, but with the decisions of judicial bodies, namely, of assessment E committees. Such a case is *Stirk & Sons, Ltd.* v. *Halifax Assessment Committee* (1), where the rate was objected to on the ground that it did not involve a particular valuation of the various hereditaments, but merely applied a sort of general increase without any regard to the merits of the particular cases, and it was said that such a procedure F could not be justified upon any ground of discretion. As Branson, J., said, at p. 274:

> It has been urged upon us that the assessment committee has a free and unfettered discretion under the statute to make its list according to the best of its ability. I think that is true, but the committee has fallen into the error which has been made by other people who have a general discretion; instead of exercising G its discretion, as it should do, in relation to particular hereditaments, it has fettered that discretion by making a general rule, and has sought to apply to a number of hereditaments, which must be subject to all sorts of varying considerations, the one inflexible rule that the value is to be deemed to have risen by 25 per cent.

That case does not, I think, throw any light on the present case. Then *Double* v. *Southampton Assessment Committee* (2) was very strongly relied H upon. There, there was undoubtedly a case of inequality, due to what I may call the time factor. It related to a valuation, within a particular parish, of the different licensed houses. Certain of these licensed houses were revalued, but the process of revaluation stopped, for various reasons, and the poor rate of the parish was made on the basis of the amount on which certain premises had been revalued and other premises had not been revalued. It was a case of a supplemental list, and the result was that, in regard to that particular rate, the occupiers of the licensed houses which had been revalued—the revaluation having been by way of increase—had to pay more by way of rates than the occupiers of the other houses, to which the process of revaluation had not been reached, and it was held there that it was unequal and unfair, and that the assessment committee had no power to discriminate between properties of the same class. To my mind, that is no authority for such a proceeding as the present. The question there arose in the ordinary course by one occupier objecting to the rate and appealing from the assessment committee to quarter sessions to state a case. The decision was that the rate was unequal, and could not be enforced, and should be reduced. That is no authority for such a proceeding as is brought here against the defendants, because it is on them that the burden of the charge is placed, which is not a judicial authority but merely an administrative body carrying out its duties in the way I have indicated.

One of the other cases which were cited was *Ladies' Hosiery & Underwear, Ltd.* v. *West Middlesex Assessment Committee* (3), which certainly does not help in its general effect the appellants here, nor, as I think, do any of the passages relied upon aid the appellants' argument. The appeal there was against a particular assessment on particular premises. The complaint by the occupier was, that he had been assessed at a higher rate than other premises of the same class. It was not suggested that he had been over-assessed, or that the assessment was incorrect, and the sole basis was that there was an unfairness in the respect which I have stated. The Court of Appeal held that all that was irrelevant. The only question in that proceeding was whether or not the assessment was in accordance with the statute. There were other proceedings possibly open: there were proceedings open, no doubt, for the correcting, by appropriate steps, of the assessment of the hereditaments which were said to be incorrectly assessed, and it was in that connection that Scrutton, L.J., said, at p. 690:

> Evidence, however, as to the application of different principles of assessment, as between comparable classes, or different parts of the same classes, may, of course, be of importance on the question whether the valuation list is fair and uniform.

That is a long way from justifying the proposition that this court has any right to interfere in such circumstances as the present with the discretion of the county valuation committee. The later decision of *Lilley & Skinner, Ltd.* v. *Essex County Valuation Committee* (4) is substantially to the same effect. I would notice there only that the assessment committee, in revaluing the premises and settling the assessment, had proceeded on a proposal of the Essex county valuation committee to amend the county valuation list. I do not discover that it was said anywhere in that case that the proposal was a nullity, or something which the assessment committee was not entitled to proceed upon.

I think the appeal should be dismissed with costs.

Romer, L.J.: I agree so thoroughly with the judgment which has just been delivered, and with the judgment of Lord Hewart, L.C.J., in the divisional court, that I have very little to add. In the few observations I have to make, I would like, in the first place, to look at the matter from the point of view of the assessment committee. Supposing that every dwelling-house in the Falmouth area was undervalued with the exception of one, no one, I suppose, could doubt that the owner of the one would be a party aggrieved within the meaning of sect. 37, and could apply to the assessment committee to have the valuations of the other dwelling-houses in the area raised to the proper level. I can find nothing in the Act which even remotely suggests that in such a case the assessment committee would be under any obligation to decline to deal with the matter unless and until the party aggrieved had taken the necessary steps in every other area in the county to see that there was uniformity of valuation throughout the whole of the county of Cornwall. Of course, if the person alleging himself to be aggrieved turns out to be a person who had not the necessary power or the status to make a proposal under sect. 37, any alteration of the list made, or proposed to be made, by the assessment committee would be subject to proceedings either in *certiorari* or in prohibition respectively. If the party alleging himself to be aggrieved was the county valuation committee, whether proceedings could be taken in such a case against that committee by way of *certiorari* or prohibition I express no opinion at all. That being so, it seems plain that the only question in the present case is this: has the county valuation committee power and status to make these proposals which it has made to the assessment committee? It is said, by Mr. Comyns Carr, that it has not, and for this reason, that its duty, or one of its duties, at any rate, is to secure uniformity of valuation throughout the county, and that the steps that it is now taking, so far from securing uniformity, will result for some considerable time, it may be five or six years, in a complete lack of uniformity throughout the county. It is, however, to be observed that, by sect. 18, the legislature has said that, for the purpose of exercising the powers given to it by the section, every county valuation committee shall take such steps as the committee thinks fit for promoting uniformity. It cannot be denied, and indeed it is not denied, that, in the present case, the valuation committee is proceeding *bona fide* in its desire to secure uniformity of valuation throughout the county of Cornwall, but it has decided upon steps which do not commend themselves to the Falmouth Borough Council and its advisers. There is no doubt that the late Sir Herbert Trustram Eve was a very great authority, none greater, I dare say, on such questions as the valuation of properties for rating purposes, and, if his advice had been taken and followed, then the county valuation committee would not have proceeded on the present lines, but it has *bona fide* come to the conclusion that, for the purpose of securing ultimate uniformity of valuation throughout the county, these are the best and most practical steps it can take, even though it does result, and possibly must result, for some years, in there being a lack of uniformity. That being so, seeing that the county valuation committee is the body which is to determine what steps are to be taken for the purpose of securing uniformity, and seeing that it has acted *bona fide* in reaching the decision that it has reached, it is impossible, I think, for this court to interfere, even if the court came to the conclusion—I will not say that I have come to that conclusion—that the steps advocated by Sir Herbert Trustram Eve would have been the better or more practical to take, in the circumstances.

I agree that this appeal fails, and must be dismissed.

Scott, L.J.: I agree. I express no opinion on the question as to whether the writ of prohibition lies against the county valuation committee at all, and further whether that writ, or the writ of *certiorari*, lies against the assessment committee, in the circumstances such as we have heard. It seems to me, on the merits of the case, the appellants have not taken sufficient account of the direct statutory duty, imposed by sect. 22 and other effective sections, of making a valuation list that is correct, or correcting a valuation list, under sect. 37 of the Act, which is incorrect. The duty of making a valuation in accordance with the standard of valuation prescribed by the Act is a positive duty. In my view, the argument for the appellants here assumes that there is an over-riding positive duty modifying the first positive duty laid upon the county valuation committee, and also on the assessment committee, to see that no correction of an existing list is made unless there is uniformity established throughout the whole county. I see no ground for taking that view. I therefore agree entirely with the judgments which have been delivered.

Appeals dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co.* (for the appellants); *Speechly, Mumford & Craig*, agents for *County Solicitor*, Truro (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Re COUSEN'S WILL TRUSTS, WRIGHT *v.* KILLICK.

[Chancery Division (Farwell J.), **March 1, 1937.**]

Wills—Lapse—Substituted gifts—Legacy to personal representatives of deceased legatee.

J. C., who died in 1919, by his will left one half of his residuary estate to the children (who should be living at his death) of S. M. C., with a direction that should any such child predecease the testator leaving issue living at the testator's death, such child's share should be held in trust for the personal representatives of such child as part of his personal estate. S. M. C. predeceased the testator and no child of S. M. C. survived the testator. A son died intestate and a bachelor, and a daughter married and left all her property to her husband absolutely. The latter also predeceased the testator. The question was raised whether in these events the gift lapsed by reason of the latter's death in the testator's lifetime or whether it was to be held in trust for the persons who at the date of the testator's death were beneficially entitled to the estate of the daughter of S. M. C.:—

Held: the gift was a part of the testator's estate given to the personal representatives of the daughter of S. M. C. to be held upon the same trusts as her personal property and the gift, therefore, was to such daughter's husband, and lapsed.

[**EDITORIAL NOTE.** Cases dealing with legacies to the personal representatives of a deceased legatee have always been considered not to be easily reconcilable and the present case deals with the decision in *Re Bosanquet* (3), which, it was argued, departed from the decision of the House of Lords in *Lord Advocate* v. *Bogie* (2). The two cases are here examined in detail and in the present case *Re Bosanquet* (3) is applied. It would appear that his Lordship found no difficulty in reconciling that case with the opinions given in the House of Lords, and took the view that it followed the higher court.

As to Legacies to Personal Representatives of Deceased Legatees, see HALSBURY, 1st Edn., Vol. 28, Wills, p. 609, para. 1194; and for Cases, see DIGEST, Vol. 44, pp. 501, 502, Nos. 3208-3217.]

Cases referred to:

(1) *Long* v. *Watkinson, Long* v. *Long* (1852), 17 Beav. 471; 23 Digest 470, *5387*; 21 L.J. Ch. 844; 19 L.T. O.S. 309.

(2) *Lord Advocate* v. *Bogie*, [1894] A.C. 83; 21 Digest 59, *386*; 63 L.J.P.C. 85; 70 L.T. 533.

(3) *Re Bosanquet, Unwin* v. *Petre* (1915), 113 L.T. 152; 23 Digest 419, *4903*; 85 L.J. Ch. 14.

(4) *Re Greenwood, Greenwood* v. *Sutcliffe*, [1912] 1 Ch. 392; 44 Digest 502, *3215*; 81 L.J. Ch. 298; 106 L.T. 424.

(5) *Re Valdez's Trusts* (1888), 40 Ch. D. 159; 44 Digest 493, *3131*; 58 L.J. Ch. 861; 60 L.T. 42.

Adjourned Summons for the determination (among other questions, which are not reported) of the question who, in the events which had happened, was beneficially entitled to a half-share of the residuary estate of James Cousen, who died on May 20, 1919. By his will, dated July 10, 1907, James Cousen left one half of his residuary estate to all the children of Samuel Mann Cousen who should be living at the testator's decease, and directed that if any child of Samuel Mann Cousen should have died in his lifetime leaving issue living at his death, the share of residue which such child would have taken if he or she had survived the testator should be held in trust for his or her personal representatives as part of his or her personal estate. No child of Samuel Mann Cousen survived the testator, but his daughter Catherine Sarah Cousen, who became the wife of William Alcock, and who died intestate in 1884, left a daughter, Jane Alcock, who married Samuel Poyntz Wright on Jan. 18, 1894, and a son who died in 1893, intestate and a bachelor. William Alcock by his will dated June 16, 1897, devised and bequeathed the residue of his estate to Jane Wright for life and subject thereto to Samuel Poyntz Wright until the eldest child of the marriage should attain 21 and thereafter, in the events which happened, to the only child of the marriage, who died on Oct. 8, 1921, a bachelor and intestate. Letters of administration to his estate were granted to Samuel Poyntz Wright, to whom Jane Wright, by her will, dated Sept. 21, 1935, left all her property absolutely. Jane Wright died on Nov. 10, 1935.

J. M. Gover, K.C., and *A. H. Droop* for the plaintiff, Samuel Poyntz Wright.

C. E. Harman, K.C., and *Wilfrid Hunt* for the first three defendants, the personal representatives of James Cousen.

Fergus Morton, K.C., and *G. P. Slade* for the fourth defendants, interested in the residuary estate of James Cousen.

D. M. McQueen for the fifth defendant, one of the trustees of the will of William Alcock.

Gover, K.C.: The effect of the will of James Cousen was to vest the fund at his death in the person or persons who were the personal representatives of Mrs. Alcock, who took it as if it had been part of her estate. But, as they were not intended to take it beneficially, it is necessary to find out for whom they were to hold it in trust. I say that they were intended to hold it in trust for the persons who, at James Cousen's death, would have been beneficially entitled to Mrs. Alcock's estate: see *Long* v. *Watkinson* (1) and *Lord Advocate* v. *Bogie* (2). *Re Bosanquet, Unwin* v. *Petre* (3) is a contrary decision, and as to that case I say (i) that the legatee who was excluded was a pecuniary, and not, as here, a residuary, legatee; (ii) that the judgment of SARGANT, J., is contrary to the principles enunciated by LORD HERSCHELL, L.C., and by LORD WATSON in *Lord Advocate* v. *Bogie* (2). To apply *Bosanquet's* case (3) to this case will involve reading into William Alcock's will the exact limitations in James Cousen's will, which is what LORD HERSCHELL said was not to be done.

Droop: On the footing that *Re Bosanquet, Unwin* v. *Petre* (3) was correctly decided, I say that the proper course here is to make Mrs. Alcock's intestacy speak from the death of James Cousen, as in *Re Bosanquet, Unwin* v. *Petre* (3) SARGANT, J., made the donee's will speak, as regards the interest derived from the donor, not from the death of the donee, but from the death of the donor. This alternative view may be right in principle, since we are dealing here with an interest which had no existence until the death of James Cousen, and the question may be at what date that interest is to be treated as part of Mrs. Alcock's A estate, which cannot be before it came into existence. That date being the death of James Cousen, the fund will go on this footing also to Jane Wright, as the next of kin of Mrs. Alcock. There is nothing in the authorities which have been cited which is in conflict with this view.

Fergus Morton, K.C.: It is to my interest to resist any suggestion of B a resulting trust. I support *Gover's* argument in so far as it relates to *Re Bosanquet, Unwin* v. *Petre* (3), which, I say, cannot be reconciled with the reasoning of the House of Lords in *Lord Advocate* v. *Bogie* (2). But I say that *Droop's* argument is not consistent with the whole of the judgment of LORD HERSCHELL, L.C., in that case. C

Harman, K.C.: The doctrine of lapse applies to all testamentary dispositions, including disposition by reference to other documents. As this property passes under the will of James Cousen and under that of no one else, anyone who is dead at the time of his death cannot take, and there must be a resulting trust. A gift of this sort is not merely a D form of trust by reference, which is what LORD WATSON meant in *Lord Advocate* v. *Bogie* (2), at p. 95. To the question whether this property became part of Mrs. Alcock's estate for all purposes, the answer can only be in the negative, according to *Re Bosanquet, Unwin* v. *Petre* (3). The cases under the Wills Act, 1837, s. 33, show the difference between a E statutory prolongation of the life of a son who predeceases a testator, with the result that anything which passes to the son becomes part of his estate for all purposes, and an act of the parties of the kind here in question. SARGANT, J., in *Re Bosanquet, Unwin* v. *Petre* (3), was exactly following *Long* v. *Watkinson* (1). See also *Re Valdez's Trusts* (5), F and *Re Greenwood, Greenwood* v. *Sutcliffe* (4), in which PARKER, J., on p. 396, makes an observation exactly in point in this case.

As to *Droop's* argument that Mrs. Alcock's death must be brought down to a date after the testator's death, and that it will then be found that Mrs. Alcock's next of kin was her daughter Jane Wright, the G answer to that is that the direction in the testator's will was that the half-share of residue was to go the same way as the personal estate of Mrs. Alcock. *Droop's* argument would make it go exactly the opposite way. It would defeat the words of the will to introduce any such theory. Besides which, that would be to make the fund a part of the estate of H Mrs. Alcock, which is what the cases say it is not. The true view is that, in point of fact, the will of James Cousen failing to dispose ultimately of this property, it remains a part of his estate, to be dealt with as such by his personal representatives.

Hunt: The provision in the will of James Cousen amounts to a legacy to Catherine Mann Cousen, if she survived him. If she did not, the language of the will is merely machinery to find out who is the specific legatee. As she died before the testator, the reference to her personal representative taking the fund as part of her personal estate ceases to have any significance, and it is necessary to find out, without reference to it, who is entitled to the fund. As there is no provision against the doctrine of lapse in respect of the substituted legacy, it must apply.

Gover, K.C., in reply.

FARWELL, J.: The question I now have to determine is one, I think, of very considerable difficulty. It arises in this way. By his will, dated July 10, 1907, James Cousen made the following dispositions: He gave certain specific articles to his wife, Sarah Jane Cousen, and then he gave the whole of his real and personal estate to his wife upon trust, putting it quite shortly, after payment of his debts, for herself his said wife during her life. Then the will proceeds:

> And after the death of the said Sarah Jane Cousen the residuary trust funds shall be in trust as to and concerning one half thereof for all the children of my late uncle Samuel Mann Cousen who shall be living at my decease in equal shares and as to and concerning the other half thereof for all the children of my late aunt Mary Atkinson who shall be living at my decease in equal shares provided always and I declare that if any child of my late uncle Samuel Mann Cousen or of my late aunt Mary Atkinson shall have died in my lifetime (whether before or after the date of this my will) leaving issue living at my death the share in the residuary trust funds which such child would have taken if he or she had survived me shall be held in trust for his or her personal representatives as part of his or her personal estate.

The rest of the will is not material to anything I have to determine.

The testator died on May 20, 1919. He was survived by his widow, who died on Sept. 6, 1930. Thereupon, on her death, it became necessary to ascertain, if possible, who were the persons to take under the gift over in the testator's will, and an order was made by this court directing an inquiry as to the children of the uncle, Samuel Mann Cousen, and of the aunt, Mary Atkinson, and on Mar. 19, 1935, the master duly made his certificate in answer to that inquiry. By that certificate it was held as follows:

> 1. No child of Samuel Mann Cousen and Mary Atkinson respectively, the uncle and aunt of the above-named testator named in his will, was living at the death of the testator. . . .
>
> 2. The following children of the said Samuel Mann Cousen and Mary Atkinson respectively died in the lifetime of the testator leaving issue living at the death of the testator, that is to say: (*a*) Catherine Sarah Cousen, a child of the said Samuel Mann Cousen. Her personal representative is the defendant Stephen Poyntz Wright. [the plaintiff in these proceedings]; (*b*) James Hawkridge Atkinson, a child of the said Mary Atkinson. His personal representative is the defendant, Thomas James Hawkridge Atkinson.

I am not concerned with Thomas James Hawkridge Atkinson as far as this question is concerned.

So the result of that inquiry was that, had Catherine Sarah Cousen, who afterwards married and became the wife of William Alcock, survived the testator, she would have been entitled to one half of his residuary estate. But she did not survive him, and so the question arises, who is now entitled to that one half of the estate which she would have A taken had she survived?

Catherine Alcock died in Feb., 1884, and she left her husband her surviving. Her husband, William Alcock, died in 1901, so that he also predeceased the testator. Now, it is quite plain that, if there had been no provision such as there is here, in the event of one of these persons B predeceasing the testator, of a trust following for the personal representative of that person, there must have been a lapse, so far as that share was concerned, and it would not have been disposed of. But the testator makes provision to prevent that event happening by providing that, if such a person as may be in question dies in the lifetime of the C testator, the share which he or she would have taken if he or she had survived should be held in trust for his or her personal representatives as part of his or her personal estate. The effect of such a provision, in my judgment, has been clearly established by two authorities, at least, to which I have been referred. One of them, which was a decision of Sir John D Romilly, M.R., is the case of *Long* v. *Watkinson* (1), the headnote of which is as follows:

> Where a bequest is made by A. to the executors of B., such executors hold it in trust, and to be administered as part of B.'s assets. The persons who take it beneficially take as *cestuis que trust* and not as *personæ designatæ*, and it may belong either to the creditors, or the pecuniary or residuary legatee or next of kin of B., E according to the circumstances.

Romilly, M.R., in his judgment, says this at pp. 473, 474:

> The question then remains, on what trusts does the executrix of Mrs. Fowler hold this property? I think she holds it to be administered by her according to the trusts of her office, that is, I consider it as forming a part of the property which came F to her hands as the executrix of Mrs. Fowler, and that it is to be administered by her as if it formed part of the property of Mrs. Fowler. It is the same as if the testator had said, "let the residue of my estate be administered in the same manner and upon the same trusts, as if it formed a part of my sister's estate." The result is, that, in my opinion, the contest, whether the residuary legatee or the next of kin take the property, is, in many cases, a contest arising from a misapprehension of the character in which the executor or executrix takes the property. The executor or executrix, who takes the property, does so as a trustee, and the person who takes the G property beneficially takes it as a *cestui que trust*, and not as a *persona designata*. It is, in my opinion, inaccurate to lay down as a rule, that, in such cases, the fund belongs either to the residuary legatee or to the next of kin; it belongs to the persons who are interested in the estate of the person to whose executor it is given. This disposition therefore will, in some cases, give the fund to the creditors, in others to the pecuniary legatees, in others to the residuary legatees, and in others to the next of kin.

H

The other decision, which is really to the same effect, is a case in the House of Lords, *Lord Advocate* v. *Bogie* (2). It is not really necessary for me to read very much of the facts of that case, but I think I must refer to two passages in the speeches of Lord Herschell, L.C., and of

LORD WATSON. In that case the facts were these. The action was raised by the Lord Advocate, representing the Crown, against William Bogie and others, executors of Robert Methven's will, the respondents, claiming certain duties, including legacy duty, upon a third share (about £5,000) A of residue of the estate of a lady called Miss Scott. The material words of her will were:

> With regard to the free residue of my whole moveable means and estate of every description [after payment of debts and legacies] I leave and bequeath the same to Robert Methven, Robert Russell, and James Russell equally between and amongst them, share and share alike, for their own use and behoof, and failing all or any of B them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees.

Robert Methven predeceased Miss Scott. He died on Apr. 3, 1887, and Miss Scott died in 1888. Robert Methven left a will and codicil, appointing the respondents as his executors, and providing that the residue of his estate was to be divided among certain charities after the death C of his brother, which took place on July 24, 1890. The question which was raised was whether the duty had to be paid on the estate of Robert Methven.

Now, what LORD HERSCHELL, L.C., said in the passage to which I D wish to refer, which is on pp. 91, 92, is this:

> The will of Miss Scott, as I have said, must be taken as speaking from the time of her death; and the case appears to me to be precisely the same as if she in her lifetime had given the money to the executors of Methven to be used by them as executors in the same way as the other money which came to them as executors; I cannot think that there is any difference because she made this disposition by will, and in her will had made Robert Methven himself a beneficiary in case he had survived E her. One must look at the state of things at the time from which the will speaks.
>
> Now, I think that the effect of her disposition was so to vest this money in the persons who were to administer Robert Methven's estate, that they would have to administer it precisely as if it were part of Robert Methven's estate. I will go so far as to assume that, so far as it was possible for her to do so, she made it a part of his personal estate. But admitting all that, it does not follow that the legal effect of what she did was to make it for the purposes of this statute that which it really was not, a part of "the personal estate of the deceased," which *prima facie* F means the personal estate which has been his. For many purposes it would no doubt be regarded in precisely the same way. The learned Lord Advocate said that the question was whether it was impossible for her to make it so. It seems to me, however, that the question rather is whether what she has done necessarily has the effect of making it a part of the personal estate of the deceased within the meaning of the statute. If it has, of course the duty follows; but I cannot think that this is the result. It appears to me that the effect cannot be said to be more than this; G it is to be held by the same persons and administered in the same way and dealt with altogether as if it were part of the personal estate; but I do not think that makes it, or could make it, part of the personal estate within the meaning of this statute.

Then LORD WATSON, in a very short passage, says this at p. 95, which I think sums up the whole matter in a few words:

> H I do not think it is necessary to speculate how far she could have accomplished the object of making the Crown entitled to these duties by indicating that her bequest was to be in the same position under these statutes as if it had in point of fact belonged to the nephew who predeceased her. I am satisfied that no such thing was either done or attempted here. Miss Scott created, according to my view, a new trust in the persons of Methven's executors, the purpose of the trust being, not that the fund which she committed to them should become part and parcel of the deceased's estate, but that it was to be administered by the trustees as a separate

estate, in the same manner and subject to the same conditions as if it had originally been the property of Methven himself.

As I understand it, the effect of these opinions in the House of Lords, and of the decision, is that, when the testator in this case gave the share of residue in the events which have happened, or attempted to give it, A
to Catherine Sarah Alcock, or, if she did not survive him, to her legal personal representatives, it was as if he had said that, in the event of Catherine Sarah Alcock predeceasing him, then her share of the residue was to be held by her legal personal representatives, on the same trusts as those on which they held her personal estate, but not so as to B
make it part of her estate, but simply as if the words were written out in the testator's will, and that the property so being held as part of the testator's estate was to be distributed by reference to the dispositions in Mrs. Alcock's will. That, in my judgment, is the effect of this decision. In no sense does this share of residue, which Mrs. Alcock would have taken C
if she had survived the testator, become part of her estate under this provision in James Cousen's will. It is part of the testator's estate, which is given to Mrs. Alcock's personal representatives, to be held by them upon the same trusts as Mrs. Alcock's property was held, with the result, as it appeared in the House of Lords, that there would be no D
further duty to be paid, other than the duty on the legacies going under Miss Scott's will to the persons in question.

Now, it is not suggested, and it could not be suggested, having regard to the authorities, that the legal personal representatives of Mrs. Alcock took beneficially. Quite clearly they did not. They took as trustees to E
hold this share of residue upon trust for the persons entitled. So far, I think, there is no difficulty. But then there comes this difficulty. Mrs. Alcock, as I have said, predeceased the testator, James Cousen. On Mrs. Alcock's death, the person who became her legal personal representative, and the person who became beneficially entitled to the F
whole of her estate, was her husband, William Alcock. William Alcock did not survive the testator, James Cousen. If, therefore, I am to read the gift in the will of the testator as if it were a gift to Mrs. Alcock "if she is surviving at my decease, or in the event of her death to William Alcock, her husband," he being her personal representative, as he died G
beneficially entitled to her estate, it must follow, in my judgment, that there would be a lapse, and that the portion of the estate of James Cousen now in question would be undisposed of. But it is suggested that that is not the true way to read this case, that the will of James Cousen can speak only from his death, that I have to look and see who, at his death, H
are the persons who are entitled to the estate or have become entitled to the estate of Mrs. Alcock, that, as her estate beneficially passed to her husband, William Alcock, it became part of his estate and that whoever is entitled under his will to his property is entitled to take this gift. That contention is not, I think, in accordance with the decision of

SARGANT, J., to which I have been referred, in *Re Bosanquet, Unwin* v. *Petre* (3). [His Lordship read the facts of this case and then continued.] SARGANT, J., in his judgment, says this at p. 153 :

> The material dates are as follows : Miss Dashwood's will was made on July 18,
> A 1901. Mrs. Bosanquet's will was made on Mar. 16, 1911. Miss Dashwood died on May 21, 1911. Mr. Claud Henry Manners, the legatee in reversion, died on July 6, 1913. Mrs. Bosanquet died on Feb. 9, 1914.
>
> The effect of Mrs. Bosanquet's will seems to me indistinguishable from that stated in *Long* v. *Watkinson* (1), and from that stated in *Lord Advocate* v. *Bogie* (2), at p. 95.

Then he read passages from the judgments of LORD HERSCHELL, L.C.,
B and of LORD WATSON, which I have already read, and continued :

> Under Mrs. Bosanquet's will, therefore, an additional fund was created for the purpose of being applied for the benefit of the various beneficiaries under Miss Dashwood's will, including Mr. Claud Henry Manners, as if that additional fund had formed part of the estate of Miss Dashwood. And if the gift by Mrs. Bosanquet had been by deed, the title of Mr. Manners would have been complete. But, unfortunately for him and his representatives, the instrument of gift was a will, and
> C the gift was accordingly subject to the incidents of a testamentary gift. It was obviously liable to be altered or revoked by any fresh testamentary disposition on the part of Mrs. Bosanquet, and I see no reason why it was not also liable to the risk of failure or lapse incident to such gift in the event of the death of the legatee between the date of the will and the death of the testatrix.

He held accordingly that the £5,000 went to the residuary legatee,
D because the gift, so far as it was a gift for the benefit of Claud Henry Manners, lapsed by reason of the fact that he had died prior to the death of Mrs. Bosanquet, although he had survived the original testatrix, Miss Dashwood. Of course, in that case, although Claud Henry Manners was excluded by the doctrine of lapse from taking any benefit under the
E will of Mrs. Bosanquet, there was nothing to prevent the benefit given by Mrs. Bosanquet's will falling into and forming part of the residuary estate of Miss Dashwood, and going, accordingly, to the person entitled to that residuary estate. But, as I understand that decision, what SARGANT, J., is saying is that you have to look at the gift as a gift given
F by the will of the second testatrix, not to the persons named in the first testatrix's will, but as beneficiaries under Mrs. Bosanquet's will, that only persons who survived her can take under Mrs. Bosanquet's will, and that a gift to anybody who died in her lifetime must lapse. Notwithstanding that a person dying in her lifetime could have taken
G under a gift in the first will of Miss Dashwood, he could not get any additional benefit which would have passed to him under the will of Mrs. Bosanquet, because he did not survive Mrs. Bosanquet. That, as I understand, is the effect of that decision.

Perhaps I ought to refer to one passage in the judgment of PARKER, J.,
H as he then was, in *Re Greenwood, Greenwood* v. *Sutcliffe* (4). I need not read the headnote or any part of the judgment, because the case is different from the one I am considering, but I want to refer to one passage, on p. 396, where the judge said this :

> In construing a gift of this nature it must be remembered that the general law

> does not allow a legatee who predeceases the testator to take any benefit under his will. In that event the gift is said to lapse, with the consequence that it falls into residue, or if it is itself a share of residue, goes to the testator's next of kin. It is not competent to a testator to exclude the application of this rule of law, but the consequences of a lapse can be avoided by the substitution of some other legatee to take the legacy if the event which occasions the lapse occurs.

Then he deals with other questions. A

The question here, in these circumstances, in my judgment, comes down really to a question of construction of this will. The testator has undoubtedly endeavoured, and has succeeded up to a point, in avoiding the rule of lapse, because he has made a provision for the person or persons who would take directly, in this case Mrs. Alcock, predeceasing B
him, and has made another provision, a substitutionary provision, providing for the benefit to go to that person's legal personal representative as part of her personal estate. The question is, how are these last words to be read? In my judgment, according to the authorities to which I have referred, the only way I am justified in reading them is in reading C
them as being a gift to Mrs. Alcock, or, in the events which have happened, to the person who became entitled, on Mrs. Alcock's death, to her estate. That, in this case, was her husband, William Alcock. William Alcock did not survive the testator, James Cousen. There is nothing in this will that I can see which provides against the lapse which must arise if, on D
the true construction of the will. the person who is substituted for Mrs. Alcock is her husband, William Alcock. If that is the true construction, then this part of the estate of James Cousen has not been disposed of.

I have carefully considered the other construction which has been suggested by Mr. Gover and by Mr. Fergus Morton, and also by Mr. E
Gover's junior, Mr. Droop, but, on the whole, I have come to the conclusion that that which I have already stated to be the true one is the one which ought to be put upon this will. It seems to me that that is in accordance with the decision of SARGANT, J., and I think, in the circumstances, I ought to follow it, but I am fortified in the view I take F
by thinking his view is in accordance with the view which I hold. I accordingly declare that the disposition of half of the residuary estate of James Cousen in favour of Catherine Sarah Alcock's legal personal representatives failed, and that the beneficial interest therein resulted to the testator's estate, and belongs to his personal representatives, in G
trust as to any realty for his heir at law, and as to any personalty for those interested as on his intestacy. Costs of all parties as between solicitor and client as to half out of the said half share of the said residuary estate, and as to half out of the estate of William Alcock.

Solicitors: *Maude & Tunnicliffe*, agents for *J. C. Dacre*, Otley (for H
the plaintiff); *Kingsford, Dorman & Co.*, agents for *Vint, Hill & Killick*, Bradford (for the first three defendants); *Batchelor, Pirkis & Fry*, agents for *Mumfords & Gordons*, Bradford (for the other defendants).

[*Reported by* C. M. YOUNG, *Barrister-at-Law.*]

LAKE VIEW & STAR, LTD. *v.* COMINELLI.

[Privy Council (Lord Blanesburgh, Lord Atkin, Lord Maugham, Lord Roche, Sir Sidney Rowlatt), **January 25, 26, February 26, 1937.]**

Privy Council—Australia—Mines—Gold mine—Tributer's agreement—Payment regulated by statute—Agreement for payment at less than statutory minimum — Illegality — Retrospective effect — Mining Acts (Western Australia) 1904-23, *ss.* 152, 156.

The appellants were the lessees of a gold mine in Western Australia. The respondents were tributers of the mine under tribute agreements made with the appellants on May 15, 1930, and approved and registered by the warden. The respondents instituted proceedings in the warden's court in 1933, claiming in substance an account of all sums due to them from the appellants under the tribute agreement. The appellants, in their defence, contended that by an agreement of Mar. 18, 1932, the parties had agreed that the appellants should pay to the respondents for the gold delivered by them to the appellants certain sums other than those stipulated for by the tribute agreements, and on making such payments should be released and discharged from their liability to make the payments agreed to be made in the tribute agreements, that they had made such payments and that the sums were received in full settlement of all claims. The respondents in reply maintained that the agreement of Mar. 18, 1932, was illegal and void as being contrary to the Mining Acts, 1904-23, s. 152 :—

Held : the Mining Act was intended to protect tributers in respect of their own contracts, and to interfere with their liberty of contract in their own interests, and its terms were plainly obligatory. The agreement was invalid, both as to past and future payments.

Decision of the High Court of Australia (51 C.L.R. 553) *affirmed.*

[EDITORIAL NOTE. A compromise of an existing dispute honestly made will be supported by the courts, but a contract contrary to a statutory enactment cannot be supported as it is illegal and void. This is the more so where the statute is passed for the protection of a certain class of persons who, it is thought, might be imposed upon by others.

As to Contracts Prohibited by Statute, see HALSBURY, Hailsham Edn., Vol. 7, pp. 164-170, paras. 235-241 ; and for Cases, see DIGEST, Vol. 12, pp. 269-272, Nos. 2200-2222.]

Cases referred to :

(1) *Great Boulder Proprietary Gold Mines, Ltd.* v. *Scriven* (1932), Unreported.

(2) *Netherseal Colliery Co.* v. *Bourne* (1889), 14 App. Cas. 228 ; 34 Digest 730, *1107* ; 59 L.J.Q.B. 66 ; 61 L.T. 125.

(3) *Brace* v. *Abercarn Colliery Co., Huggins* v. *London & South Wales Colliery Co.,* [1891] 2 Q.B. 699 ; 34 Digest 731, *1108* ; 60 L.J.Q.B. 706 ; 65 L.T. 694.

(4) *Griffiths* v. *Dudley (Earl)* (1882), 9 Q.B.D. 357 ; 34 Digest 237, *2022* ; 51 L.J.Q.B. 543 ; 47 L.T. 10.

(5) *Baddeley* v. *Granville (Earl)* (1887), 19 Q.B.D. 423 ; 34 Digest 233, *1977* ; 56 L.J.Q.B. 501 ; 57 L.T. 268.

(6) *Haydock* v. *Goodier,* [1921] 2 K.B. 384 ; 34 Digest 439, *3587* ; 90 L.J.K.B. 425 ; 125 L.T. 71.

(7) *Russell* v. *Rudd,* [1923] A.C. 309 ; 34 Digest 440, *3588* ; 92 L.J.K.B. 429 ; 129 L.T. 193.

(8) *Salford Union* v. *Dewhurst,* [1926] A.C. 619 ; 37 Digest 215, *105* ; 95 L.J.Ch. 457 ; 135 L.T. 514.

(9) *Re Burdett, Ex p. Byrne* (1888), 20 Q.B.D. 310; 7 Digest 56, *301*; 57 L.J.Q.B. 263; 58 L.T. 708.

(10) *Stanton* v. *Brown*, [1900] 1 Q.B. 671; 12 Digest 269, *2203*; 69 L.J.Q.B. 301.

(11) *Printing & Numerical Registering Co.* v. *Sampson* (1875), L.R. 19 Eq. 462; 12 Digest 244, *1992*; 44 L.J.Ch. 705; 32 L.T. 354.

(12) *Anctil* v. *Manufacturers' Life Insurance Co.*, [1899] A.C. 604; 29 Digest A
350, *2835*; 68 L.J.C.P. 123; 81 L.T. 279.

APPEAL, by special leave, from a judgment of the High Court of Australia (RICH, DIXON, and MCTIERNAN, JJ.), dated Sept. 12, 1934, reversing a judgment of the Supreme Court of Western Australia B
(NORTHMORE, C.J.), dated Mar. 19, 1934, and restoring a judgment of the Warden's Court at Kalgoorlie (MCGINN, Warden), dated Dec. 1, 1933. The facts of the case are set out in the judgment of their Lordships, delivered by LORD ATKIN.

Sir William Jowitt, K.C., *H. St. John Field, K.C.*, and *Denis Chetwood* C
for the appellant company.

Fergus D. Morton, K.C., and *Harold L. Murphy, K.C.*, for the respondents.

Jowitt, K.C.: The agreement of Mar. 18, 1932, was not a tribute agreement, and was not an agreement to which sect. 152 applied. It D
was a valid compromise of existing disputes which were liable to be affected by the ultimate decision of litigation then pending. The compromise was followed by payment and acceptance of payment upon the footing of the compromise. *Great Boulder Proprietary Gold Mines, Ltd.* v. *Scriven* (1) was decided upon different facts and different documents, and E
had no reference to any such compromise as was the subject matter of the present litigation. *Scriven's* case (1) was decided upon the express footing that it applied only to alleged premiums received at a time when England was still upon the gold standard, and once England had departed from the gold standard there was no world market price which could F
be used as a standard in considering the question whether any price received for gold included a premium or not. [Counsel referred to *Griffiths* v. *Dudley* (*Earl*) (4), *Baddeley* v. *Granville* (*Earl*) (5), *Netherseal Colliery Co.* v. *Bourne* (2), *Brace* v. *Abercarn Colliery Co.* (3), *Haydock* v. *Goodier* (6), *Russell* v. *Rudd* (7), *Salford Union* v. *Dewhurst* (8), *Re* G
Burdett, Ex p. Byrne (9), *Stanton* v. *Brown* (10).]

St. John Field, K.C., following on the same side, referred to *Printing and Numerical Registering Co.* v. *Sampson* (11), *Anctil* v. *Manufacturers' Life Insurance Co.* (12).

[After an adjournment their Lordships intimated that they desired to H
hear the respondents on the question of the premium only.]

Morton, K.C.: The *ratio decidendi* in *Scriven's* case (1) applies to all sums received by the appellants in excess of £4 4*s*. 11½*d*. per ounce fine gold or £3 17*s*. 10½*d*. per ounce standard gold by reason of Great Britain having gone off the gold standard. It is not open to the appellants to contend the contrary.

LORD ATKIN: This is an appeal from a judgment of the High Court of Australia, which reversed a judgment of the Supreme Court of Western Australia and restored a judgment of the Warden's Court at Kalgoorlie in favour of the plaintiffs, the present respondents. The appellant company is the lessee of a gold mine in the East Coolgardie goldfield, and the respondent Cominelli, and one Martino Bonazzi, of whose estate his widow Maria Bonazzi is the administrator, at all material times were tributers of the mine, on the terms of tribute agreements made with the appellant company on May 15, 1930, and duly approved and registered by the Warden. On Oct. 19, 1933, the two tributers commenced the present action in the Warden's Court, claiming in substance an account of all sums due to the plaintiffs from the defendant company under the tribute agreements. The defence was that, by an agreement of Mar. 18, 1932, the parties had agreed that the defendant company should pay to the plaintiffs, for the gold delivered by them to the defendant company, certain sums other than those stipulated for by the tribute agreements, and, on making such payments, should be released and discharged from its liability to make the payments agreed to be made in the tribute agreements; that it duly made the said payments, and that the sums were received in full settlement of all claims. The reply was that the agreement of Mar. 18, 1932, was illegal and void, as being contrary to the provisions of the Mining Acts, 1904-25, sect. 152. The Warden held that the agreement was void. On appeal to the Supreme Court, NORTHMORE, C.J., held that it was not, and, on the plaintiffs' appeal to the High Court, that court affirmed the decision of the Warden. No account has yet been taken, and the only point to be decided in this appeal is whether the defence based on the later agreement is good.

The case, up to a point, is, in material respects, similar to that of *Great Boulder Proprietary Gold Mines, Ltd.* v. *Scriven* (1), decided by the Judicial Committee on Nov. 22, 1932, on appeal from the Supreme Court of Western Australia, and their Lordships find it unnecessary to explain the position of tributers further than was done by the judgment of the Board in that case, delivered by LORD MACMILLAN. The tribute agreement in that case, as in the present, was subject to the provisions of the Mining Act, 1904, as amended in 1919, 1920, 1921, and 1923, which, by sect. 152, provides that, in all contracts between a tributer and the owner of a treatment plant (whether the lessee of the mine under tribute or not) relating to the treatment of gold ore, the following provisions shall apply:

(*a*) it shall be obligatory on the part of the owner of such plant [to account for all ores received on the basis of not less than 90 per cent. extraction of the assayed value of the ore];

(*b*) the owner of the treatment plant shall also account for and pay to the tributer not less than 50 per cent. of any premium received by such owner on the sale of the gold obtained from the ore treated.

By sect. 156, any person who contravenes any of the provisions of A the Act for which no other penalty is expressly provided shall be guilty of an offence, and, on conviction, shall be liable to a fine not exceeding £50. In the *Scriven* case (1), the tribute agreement contained an express stipulation as to the payment of 50 per cent. of any premium received. In the present case, there is no express stipulation, but the matter is B controlled by the statutory provision. In both cases the lessees of the mine were the owners of the treatment plant in which the gold was extracted. In the *Scriven* case (1), the question arose as to the meaning of the word premium. At that time, there was a fixed London price for gold, £4 4*s.* 11½*d.* per fine ounce, and the question was whether, C when the lessees of the mine received in Australian currency, by reason of the difference in exchange, more than £4 4*s.* 11½*d.* Australian, they received a premium, though the gold in London in fact realised only the fixed price. The contention of the lessees was that there was no excess over the fixed price, which must be considered the "par," and therefore D there was no premium. The Supreme Court rejected this view, as did this Board, and it was held that what the lessees received in Australian currency in excess of £4 4*s.* 11½*d.* Australian per fine ounce was "premium." In the *Scriven* case (1) the judgment of the Supreme Court was given in Aug., 1931, a month before England went off the E gold standard in Sept., 1931. The judgment of the Privy Council, though given in Nov., 1932, had reference only to dates while England was on the gold standard, and the effect of any change in respect of the matter under discussion was not discussed. In the present case, after the decision of the Supreme Court had been given in the *Scriven* case (1), F and while the case was under appeal to the Privy Council, on Mar. 18, 1932, the agreement pleaded in the defence was made. It is unnecessary to discuss the circumstances in which the parties came together, for, on the hearing of the appeal, no attack was made on the validity of the contract, apart from the statute. The agreement recited the tribute G agreement, and that the tributers had sold and delivered, and would sell and deliver, ore to the company, that the value of gold had increased, and that the company had received, and would receive, the benefit of such increased value, and that the company would receive a bounty under the provisions of the Gold Bounty Act, 1930-31. It then recited H that the tributer claimed to be entitled to receive 50 per cent. of the premium on all gold sold by the company, as well as the said bounty, and that the company had been, and would be, paid by its bankers a sum equal to the bank's prevailing selling rate of exchange (London and Australia) on the value of all gold computed at the rate of £4 4*s.* 11½*d.* per fine ounce. It then proceeds :

> And whereas disputes and differences have arisen between the company and the tributer as to the meaning of " premium " and concerning the amount which the tributer is entitled to receive from the company in respect of premium and bounty on the gold aforesaid.
>
> And whereas litigation is impending or has been threatened by the tributer against the company concerning the said disputes and differences.
>
> And whereas the company and the tributer have mutually agreed to settle and compromise the said disputes and differences upon the terms hereinafter expressed now this agreement witnesseth as follows :
>
> 1. In consideration of the premises and of the covenants and promises by the company hereinafter expressed the tributer agrees to accept from the company in full satisfaction of any claims which he may or shall have or may have had against the company for premium and bounty in respect of all such gold as aforesaid :
>
> (*a*) 50 per cent. of any bounty hereafter received by the company in respect of such gold under the provisions of the Gold Bounty Act, 1930-31 or any amendment thereof.
>
> (*b*) 20 per cent. of the amount actually received or to be received by the company in Australia as and by way of exchange as aforesaid on the value computed at £4 4*s.* 11½*d.* per ounce of fine gold of all such gold heretofore or hereafter exported and sold by the company as aforesaid.
>
> (*c*) 50 per cent. of the difference between (i) the value of all such gold computed at the said price of £4 4*s.* 11½*d.* per fine ounce in Australian money, and (ii) the value of all such gold computed at the price actually received by the company for the same in England as though such price were Australian money.

According to the appellants' contentions, here was a *bona fide* compromise of a genuine dispute, and the mutual covenants, and also the payments, made under the agreement, operated as a discharge of the liabilities under the tribute agreement made for good consideration. And, at any rate, it was said that, even if sect. 152 of the Mining Act operated to invalidate the provision of only 20 per cent. on the exchange benefit, the agreement would be good as to the past, and as to past transactions the payments actually made would afford a good discharge. It will be sufficient to say that, in their Lordships' view, the payments cannot operate so as to lead to an inference of a contract to discharge supplemental to or independent of the original contract of Mar. 18, 1932. They are payments under that contract, and nothing else ; and, if that contract is invalid, the payments in pursuance of it will have no independent efficacy. As to the agreement of compromise itself, it appears to their Lordships to be made illegal by sect. 152. The Mining Act, 1904, as amended, certainly in this provision, and apparently in others, e.g., sect. 146, is an Act intended to protect the class of tributers in respect of their own contracts. It is intended to interfere with their liberty of contract in their own interests. Its terms are plainly obligatory : " In all contracts the following provisions shall apply." The owner of a plant, therefore, may not account for and pay to the tributer less than 50 per cent. of any premium. To suggest that a tributer may renounce the right to 50 per cent. is to defeat the very terms of the Act, for there would then be a tribute agreement to which the statutory provision did not apply. It cannot be doubted that the provision contained in cl. 1 (*b*) is contrary to the terms of sect. 152 (6) when one has the guidance of the decision in the *Scriven* case (1) as to the meaning of premium. For, instead of paying not less than 50 per cent. of any premium received, the owner is to pay only 20 per cent.

These provisions appear to fall precisely within the principles enunciated in the House of Lords in *Netherseal Colliery Co.* v. *Bourne* (2), which served to protect miners in respect of contracts made contrary to the terms of the Coal Mines Regulation Acts, principles followed in the decision of *Brace* v. *Abercarn Colliery Co.* (3). And, as the agreement is invalid as to the future, so is it in respect of the past. The stipulation that, for ore already delivered, the company shall pay less than 50 per cent. of the premium, equally offends against the Act. As this agreement is drawn, it seems impossible to distinguish between the past and the future. The effect is that, in respect of past as well as of future deliveries, the tributers agree to accept less than 50 per cent. But, if the sum had been a lump sum, arrived at on the same basis, the same result would have followed. Moreover, the parties cannot support a plain violation of such an Act by failing to agree on its meaning, and calling an agreed variation a compromise. They misunderstand it at their peril. It is plain, therefore, that this stipulation as to 20 per cent. of the difference in exchange is in violation of the statute, and is illegal and void. It forms part of the consideration for the release which appears to depend upon the covenants on either side. The release is therefore invalid, and the defence fails. Their Lordships have not thought it necessary or desirable to consider the exact meaning of " premium " in the statute, as it is clear that, in respect of the exchange over £4 4*s*. 11½*d*., the exact point decided in *Scriven's* case (1), there is a breach of the statute. The judgment of the High Court contains this passage :

> For these reasons the judgment of the Supreme Court ought to be reversed and the order of the Warden restored. That order does not declare that the amounts obtained by the respondent company in respect of the gold in excess of £3 17*s*. 10½*d*. per ounce of standard gold are premiums. Although we do not doubt that that was the Warden's opinion, yet we agree with the contention of the respondent that, under the order made, it remains open to the respondent company to contend on the taking of accounts that some or all of this excess does not constitute a premium, notwithstanding the decision of the Privy Council in *Scriven's* case (1). We do not desire to encourage this contention, but as counsel for the respondent company submitted that the question did not arise upon this appeal, which concerned only the order made by the Warden, and that we ought not to decide the question so as to conclude the parties, and, as he did not argue it fully before us, we refrain from expressing any final opinion upon it.

Their Lordships concur in what was there said, and with equal lack of encouragement. Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellants must pay the costs of the appeal.

Solicitors : *Birkbeck, Julius, Edwards & Co.* (for the appellant company) ; *Gregory, Rowcliffe & Co.* (for the respondents).

[*Reported by* T. A. Dillon, Esq., *Barrister-at-Law.*]

TATA HYDRO-ELECTRIC AGENCIES, LTD. (BOMBAY) *v.* INCOME TAX COMMISSIONER, BOMBAY PRESIDENCY AND ADEN.

[PRIVY COUNCIL (Lord Russell of Killowen, Lord Macmillan, Sir John Wallis), **January 26, 28, March 12, 1937.**]

Privy Council—India—Income tax—Business—Expenditure—Annual payment made as part of consideration of purchase of business—Distinguished from one for the purpose of producing profits.

The appellant company carried on business as managing agent of various electric supply companies, including the Tata Power Co., Ltd., having by an assignment, dated Nov. 21, 1929, succeeded to this agency formerly held by Tata Sons, Ltd., subject to certain obligations. The remuneration of the appellant company consisted of a commission of 10 per cent. on the annual net profits of the Tata Power Co., Ltd. In 1926, the Tata Power Co., Ltd., being in need of financial assistance, obtained, through Tata Sons, Ltd., a loan from F. E. Dinshaw, Ltd., and Richard Tilden Smith, one of the conditions of which was that, in addition to the interest payable by the company, each of the lenders should receive from Tata Sons, Ltd., 12½ per cent. of the commission earned by Tata Sons, Ltd., under its agency with the Tata Power Co., Ltd., i.e., 25 per cent. in all. After the acquisition of the agency business by the appellant company, the Tata Power Co., Ltd., in fulfilment of its obligations under its agreement with Tata Sons, Ltd., entered into a new agency agreement with the appellant company, in terms identical with those of its previous agreement with Tata Sons, Ltd., and the appellant company entered into agreements with F. E. Dinshaw, Ltd., and the administrator of the estate of Richard Tilden Smith in terms identical with those of the previous agreements between Tata Sons, Ltd., and these parties. In assessing the appellant company to income tax, the authorities refused to allow a deduction in respect of the 25 per cent. commission in computing the taxable income of the company :—

HELD : the obligation to pay this commission was part of the transaction whereby the appellant company acquired the agency business from Tata Sons, Ltd., and the payments were made in fulfilment of the terms of that purchase. The deduction ought not, therefore, to be allowed.

Per Cur. If the purchaser of a business undertakes to the vendor as one of the terms of the purchase that he will pay a sum annually to a third party irrespective of whether the business yields any profits or not, it would be difficult to say that the annual payments were made solely for the purpose of earning the profits of the business.

Addie (Robert) & Sons' Collieries, Ltd. v. *Inland Revenue Comrs.* (4) *applied.*

[EDITORIAL NOTE. It is difficult to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits. The present case appears to lay down as a proposition of some generality that an annual payment undertaken as part of the consideration on the acquisition of a business is a payment in respect of the right to carry on the business and thus have an opportunity to earn profits. It is not a payment for the purpose of producing profits in the conduct of the business. This principle does not apply where the undertaking is to pay a current expense of the business, e.g., the rents of current leases, the determining factor being : is it expenditure laid out as part of the process of profit earning ?

As to Trade Expenses, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras, 309-320; and for Cases, see DIGEST, Vol. 28, pp. 42-45, 50, 51, Nos. 215-226, 255-260.]

Cases referred to:

(1) *Pondicherry Ry. Co., Ltd.* v. *Income Tax Comrs.* (1931), 58 L.R. Ind. App. 239; Digest Supp. A

(2) *Bharat Insurance Co.* v. *Income Tax Comrs.* (1933), 61 L.R. Ind. App. 41.

(3) *Macdonald (C.) & Co.* v. *Income Tax Comrs.* (1934), 37 Bom. L.R. 126; 7 I.T.C. 466.

(4) *Addie (Robert) & Sons' Collieries, Ltd.* v. *Inland Revenue Comrs.*, [1924] S.C. 231; 8 Tax Cas. 671; Digest Supp.

B

Appeal from a judgment of the High Court of Judicature at Bombay (Sir John Beaumont, C.J., Rangnekar, J.), dated Mar. 27, 1935, delivered on a reference of questions of law made to the High Court under the Indian Income Tax Act, 1922, s. 66, by the Commissioner of Income Tax, Bombay Presidency and Aden, whereby the questions raised C in the reference were answered by the court adversely to the appellant company.

Raymond Needham, K.C., *Reginald P. Hills*, and *Ralph Parikh* for the appellant company.

Hubert Hull for the respondent.

D

Lord Macmillan: The appellant company is a private limited company which carries on the business of managing agent of the Tata Power Co., Ltd., and of certain other hydro-electric companies in India. It acquired this agency business from its predecessor, Tata Sons, Ltd., under an assignment dated Nov. 21, 1929, whereby Tata Sons, Ltd., E transferred to the appellant company its whole rights and interest as agent of the hydro-electric companies under its subsisting agreements with these companies, but subject, as to its rights and interest under its agreement with the Tata Power Co., Ltd., to its obligations under two agreements with F. E. Dinshaw, Ltd., and Richard Tilden Smith, F respectively. The assignment was declared to be to the intent that the appellant company should thenceforth be and act as the agent of the hydro-electric companies, and be entitled to all benefits and advantages contained in and conferred by the agreements between Tata Sons, Ltd., and these companies, and should perform and be bound by all the G obligations and duties thereby imposed, and further that the appellant company should receive all commissions and other remuneration to which Tata Sons, Ltd., was entitled thereunder. The appellant company for its part covenanted to carry out and perform the terms and conditions of the agreements with F. E. Dinshaw, Ltd., and Richard Tilden Smith, H and to indemnify Tata Sons, Ltd., against any consequences of the non-observance thereof. The appellant company further undertook, if so required, to enter into separate agreements in its own name with F. E. Dinshaw, Ltd., and Richard Tilden Smith, in the same terms.

Under the agency agreement between Tata Sons, Ltd., and the Tata Power Co., Ltd., which was dated Sept. 24, 1919, and the benefit of which the appellant company thus acquired, the remuneration of Tata Sons, Ltd., for its services, consisted of a commission of 10 per cent. A on the annual net profits of the Tata Power Co., Ltd., with a minimum of Rs. 50,000 whether that company should make any profits or not, and it was also entitled to have its expenses reimbursed. In return for this remuneration, Tata Sons, Ltd., undertook to use its best endeavours to promote the interests of the Tata Power Co., Ltd. The B agreement was declared to be assignable, and the Tata Power Co., Ltd., undertook to recognise any assignees as its agents, and, if required, to enter into an identical agency agreement with such assignees. It was also declared to be lawful for Tata Sons, Ltd., to assign the whole or any part of its earnings under the agreement.

C It appears that, in 1926, the Tata Power Co., Ltd., was urgently in need of financial assistance, to the extent of over a crore of rupees. Tata Sons, Ltd., its then managing agent, which, as the Commissioner of Income Tax puts it in his statement of facts, "had to find the money," approached F. E. Dinshaw, Ltd., and Richard Tilden Smith, who agreed D to provide the necessary funds. One of the conditions on which they agreed to do so was that, in addition to the interest payable by the Tata Power Co., Ltd., for the loan, they should each receive from Tata Sons, Ltd., two annas in the rupee, or 12½ per cent. of the commission earned by Tata Sons, Ltd., under its agency agreement with the Tata E Power Co., Ltd. Two agreements embodying this obligation were entered into between Tata Sons, Ltd., and F. E. Dinshaw, Ltd., and Richard Tilden Smith, respectively, dated Oct. 15 and Oct. 19, 1926, being the agreements referred to in the assignment by Tata Sons, Ltd., of its agency business to the appellant company. It will be observed that, F as the remuneration of Tata Sons, Ltd., depended, subject to a minimum, on the prosperity of the Tata Power Co., Ltd., it had an interest in assisting the Tata Power Co., Ltd., to obtain the financial accommodation required for the conduct of its business.

After the acquisition of the agency business by the appellant company, G the Tata Power Co., Ltd., in fulfilment of its obligation under its agreement with Tata Sons, Ltd., entered into a new agency agreement with the appellant company, dated Dec. 17, 1929, in terms identical with those of its previous agreement with Tata Sons, Ltd., and the appellant company also entered into agreements with F. E. Dinshaw, Ltd., and the H administrator of the estate of Richard Tilden Smith (who had meantime died), dated Feb. 23 and May 19, 1932, respectively, in terms identical with those of the previous agreements between Tata Sons, Ltd., and these parties.

By this series of transactions, complete novation was effected, with the result that the appellant company came in room and place of Tata Sons, Ltd., in all respects, both as regards the right to receive from the Tata Power Co., Ltd., the stipulated agency remuneration, and as regards the obligation to pay out of that remuneration 12½ per cent. to F. E. Dinshaw, Ltd., and 12½ per cent. to Richard Tilden Smith's administrator. A

In the year 1932, the appellant company duly earned and received payment from the Tata Power Co. of its commission of 10 per cent. on the net profits of that company, and duly paid over to F. E. Dinshaw, Ltd., and to Richard Tilden Smith's administrator, 12½ per cent. thereof each, or 25 per cent. in all. B

The assessment of the appellant company's income for tax purposes for the fiscal year to Mar. 31, 1934, which is in question in the present appeal, is based on its income, profits, and gains for the year 1932, and the question is whether, in the computation for tax purposes of its income profits and gains for that year, it is entitled to deduct a sum representing C the 25 per cent. of the commission earned and received from the Tata Power Co., Ltd., which it paid over to F. E. Dinshaw, Ltd., and Richard Tilden Smith's administrator, under the agreements above-mentioned. The gross commission received by the appellant company was Rs. 5,17,288, and the one-fourth thereof which it claimed to deduct was Rs. 1,29,322. D

Under sect. 10 (2) of the Indian Income Tax Act, the profits or gains of any business carried on by the assessee are to be computed after making allowance for :

> (IX) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. E

The income tax officer refused to allow the appellant company to deduct the sum in question in the computation of the profits or gains of its business, and the assistant commissioner took the same view. The appellant company then requested the respondent to refer to the High Court the legal question of the admissibility of the deduction. The F respondent, in doing so, expressed, as required by the Act, his own opinion, which was also to the effect that the deduction was inadmissible. He founded his opinion on *Pondicherry Ry. Co., Ltd.* v. *Income Tax Comrs.* (1), which he submitted was on all fours with the present case, and he also referred to *Bharat Insurance Co.* v. *Income Tax Comr.* (2), in G which the *Pondicherry* case (1) was followed.

The questions of law, as formulated by the Commissioner of Income Tax, were as follows :

> (1) Whether, in the circumstances of the case, and in view of the provisions of sects. 4 (1) and 10 of the Act, the assessee company has been correctly assessed H on the total amount of Rs. 5,17,288 received by it as profits and gains of the business carried on by it as the managing agent of the Tata Power Co., Ltd.
>
> (2) Whether, under the provisions of sect. 10 of the Act, or under any other provision thereof, the assessee company is entitled to have a deduction from the said profits and gains amounting to Rs. 5,17,288 to the extent of Rs. 1,29,322 paid by it to certain parties under the agreements [the agreements between the appellant

company and F. E. Dinshaw, Ltd., and Richard Tilden Smith's administrator, respectively], on the ground that this latter amount was nothing but expenditure incurred solely for the purpose of earning the said profits or gains or on any other ground.

In the High Court, the appellant company was also unsuccessful. A BEAUMONT, C.J., in his judgment, held that the whole 10 per cent. commission received by the appellant company from the Tata Power Co., Ltd., was properly included without deduction in the assessment of the profits or gains of the appellant company's business, in conformity with the decision in the case of *C. Macdonald & Co.* v. *Income Tax* B *Comrs.* (3), within which BEAUMONT, C.J., said that the present case exactly fell. He further expressed the opinion that the question whether the expenditure in question was incurred solely for the purpose of earning the profits or gains of its business was a question of fact, and that, as there was no finding of fact on which the court could hold that the C deduction claimed was one falling within the statute, the question must be answered in the negative. By their order of Mar. 27, 1935, the High Court accordingly answered the first of the questions stated by the commissioner in the affirmative and the second in the negative.

In the case of *C. Macdonald & Co.* (3), to which BEAUMONT, C.J., refers, D the assessees carried on the business of managing agents of another company from which they received a commission for their services. This commission the assessees were bound under an agreement to share with certain third parties, and they claimed that the shares of their commission which they paid over to these third parties should be excluded or deducted E in the computation of the profits or gains of their agency business. The court held that the case was governed by the decision in the *Pondicherry* case (1), and that the whole commission received by the assessees must be included, without deduction, in the computation of their income for tax purposes.

F Before their Lordships, counsel for the Crown did not seek to support the judgment of the High Court in the present case on the ground that it was ruled by the decision in the *Pondicherry* case (1), and, in their Lordships' view, he was well advised in recognising the clear distinction between that case and the present case. In the *Pondicherry* case (1), the G assessees were under obligation to make over a share of their profits to the French government. Profits had first to be earned and ascertained, before any sharing took place. Here, the obligation of the appellant company to pay a quarter of the commission which it receives from the Tata Power Co., Ltd., to F. E. Dinshaw, Ltd., and Richard Tilden Smith's H administrator, is quite independent of whether the appellant company makes any profit or not. Indeed, if, on its year's operations as a whole, it were to make a loss, and incur no liability to income tax, it would nevertheless have to pay away a quarter of the commission in question to the parties named. The commission in truth is not profit or gain;

it is only an item or factor in the computation of the appellant company's
profits or gains. Their Lordships regard this as a fundamental distinction.
In the case of *C. Macdonald & Co.* (3), it would rather appear that the
commission which was received by the assessees, and which they were
bound to share with certain other parties, was the sole source of income A
of the assessees, but, be this as it may, the decision in that case cannot
be supported by the authority of the *Pondicherry* case (1), on whatever
other ground it may be justified.

It was not questioned by counsel for the Crown that, if the present
question had arisen with Tata Sons, Ltd., that company would, under B
sect. 10 (2) (ix), have been entitled, on the facts stated, to deduct its payments to F.E.Dinshaw,Ltd.,and Richard Tilden Smith, as being expenditure incurred solely for the purpose of earning its profits or gains. But
he submitted that, after the acquisition of the agency business by the
present appellant company, the payments assumed a different character. C
The appellant company, he said, did not take any part in obtaining the
loans, nor did it incur the liabilities in question in the course of rendering
any services to its principals. The obligation to make the payments in
question was taken over by it as part of the transaction whereby it
acquired the agency business from Tata Sons, Ltd., and the payments D
were therefore made, not for the purpose of earning profits in the
conduct of the agency business, but in fulfilment of the terms on which it
purchased the business.

Their Lordships recognise, and the decided cases show, how difficult
it is to discriminate between expenditure which is, and expenditure E
which is not, incurred solely for the purpose of earning profits or gains.
In the present case, their Lordships have reached the conclusion that the
payments in question were not expenditure so incurred by the appellant
company. They were certainly not made in the process of earning its
profits; they were not payments to creditors for goods supplied or services F
rendered to the appellant company in its business; they did not arise
out of any transactions in the conduct of its business. That the company
had to make those payments no doubt affected the ultimate yield in
money to it from its business, but that is not the statutory criterion.
The company must have taken this liability into account when it agreed G
to take over the business. In short, the obligation to make these payments
was undertaken by the appellant company in consideration of its acquisition of the right and opportunity to earn profits, that is, of the right to
conduct the business, and not for the purpose of producing profits in the
conduct of the business. If the purchaser of a business undertakes to the H
vendor, as one of the terms of the purchase, that he will pay a sum annually
to a third party, irrespective of whether the business yields any profits
or not, it would be difficult to say that the annual payments were made
solely for the purpose of earning the profits of the business. It would

seem to make no difference that the annual sum should be made payable out of a particular receipt of the business, irrespective of the earning of any profit from the business as a whole. The case of a transferee of a business undertaking liability, for example, for the rents under current leases of the premises in which the business was carried on by the transferor, and is to be carried on by the transferee, is quite a different case, for the rents paid are clearly an outlay necessary for the earning of profit. In the case of *Robert Addie & Sons' Collieries, Ltd.* v. *Inland Revenue Comrs.* (4), LORD CLYDE, dealing with corresponding words in the British Income Tax Act, says, at p. 235 :

> What is " money wholly and exclusively laid out for the purposes of the trade " is a question which must be determined upon the principles of ordinary commercial trading. It is necessary, accordingly, to attend to the true nature of the expenditure, and to ask oneself the question, Is it a part of the company's working expenses ; is it expenditure laid out as part of the process of profit earning ?

Adopting this test, their Lordships are of opinion that the deduction claimed by the appellant company is inadmissible, as not being expenditure incurred solely for the purpose of earning the profits or gains of the business carried on by the appellant company. They thus reach the same result as the judges of the High Court, but on different grounds, and in conclusion they would add only that, with all respect, they do not share the view expressed by the learned chief justice that the question whether the payments in question were admissible deductions, under sect. 10 (2) (ix), was not open to argument in the High Court, on the facts as found.

Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed, and the order of the High Court of Mar. 27, 1935, be affirmed. The respondent will have his costs of the appeal.

Appeal dismissed.

Solicitors : *Stanley Johnson & Allen* (for the appellant company) ; *The Solicitor, India Office* (for the respondent).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

ROBINSON BROTHERS (BREWERS), LTD. *v.* HOUGHTON AND CHESTER-LE-STREET ASSESSMENT COMMITTEE.

[Court of Appeal (Greer, Slesser and Scott, L.JJ.), **January 20, 21, 22, 25, March 23, 1937.]**

Rates—Assessment—Licensed property—" Tied house."

A firm of brewers, following the usual custom at the present time instead of letting a public house to a tenant, put a manager in charge of it. The house was in effect a tied house, and it was admitted that brewers were prepared to pay a higher rent for houses in which a manager could be placed in this way. The rating authority assessed the house at a higher figure on these grounds. On appeal to quarter sessions, and thence to the divisional court, it was held that the principle' enunciated in *Bradford-on-Avon Assessment Committee* v. *White* (1) applied as well to a house in which a manager was placed as to a house sub-let, and that, in estimating the gross value, regard ought not to be had to the special price which brewers might give, except so far as such special price might raise the market value generally. The assessment committee appealed to the Court of Appeal :—

Held : (i) all considerations tending to affect the value of a hereditament must be taken into account, and the public house should have been assessed at a figure taking into account the higher rent brewers were prepared to pay in such a case.

(ii) although the decision in *Bradford-on-Avon Assessment Committee* v. *White* (1) had stood for 39 years and had been often acted upon, the court was entitled to overrule it, and should do so if convinced, as it was, that that decision was wrong in law.

Decision of the Divisional Court ([1936] 1 All E.R. 751) *reversed.*
Bradford-on-Avon Assessment Committee v. *White* (1) *overruled.*

[EDITORIAL NOTE. For many years when brewers purchased a public house and desired to attach a " tie " thereto, they let the premises to a tenant, introducing the " tie " into the lease. Of recent years, brewers have preferred to effect the same purpose by placing a manager in the house rather than by letting or sub-letting it. In either case, the brewers would be willing to give a higher price for premises to which a tie could be attached, and it is now decided that such higher price must be taken by the assessment committee as the basis of the valuation for rating purposes. In coming to this decision, the Court of Appeal overruled the case of *Bradford-on-Avon Assessment Committee* v. *White* (1), although it had stood as an authority since 1898, and had since that time been continuously acted upon by rating authorities, and, it was said, had been taken as the law in the framing of subsequent legislation. The judgments, therefore, consider at length, not only the principles of valuation in such cases, but also the principle of *stare decisis, i.e.*, that decisions which have been acted upon in practice should be allowed to stand. This principle is, however, held not to apply to the present case, as the Court of Appeal was unanimously of opinion that the earlier case was wrongly decided.

As to the Rating of Licensed Premises ; see HALSBURY, 1st Edn., Vol. 24, Rates, p. 41, para. 73 ; and for Cases, see DIGEST, Vol. 38, pp. 566, 567, Nos. 1047-1055.]

Cases referred to :

(1) *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q.B. 630 ; 38 Digest 567, *1052* ; 67 L.J. Q.B. 643 ; 78 L.T. 758.

(2) *Westminster City Council* v. *Southern Ry. Co.*, [1936] A.C. 511; [1936] 2 All E.R. 322; Digest Supp.; 105 L.J. K.B. 537; 155 L.T. 33.

(3) *West Ham Union* v. *Edmonton Union*, [1908] A.C. 1; Digest Supp.; 77 L.J. K.B. 85; 98 L.T. 1.

(4) *Hamilton* v. *Baker, The Sara* (1889), 14 App. Cas. 209; 30 Digest 186, *533*; 58 L.J.P. 57; 61 L.T. 26.

(5) *Inland Revenue Comrs.* v. *Truman, Hanbury, Buxton & Co., Ltd.*, [1912] 3 K.B. 377; [1913] A.C. 650; 39 Digest 236, *112*; 82 L.J. K.B. 1042; 109 L.T 337.

(6) *Inland Revenue Comrs.* v. *Crossman, Inland Revenue Comrs.* v. *Mann*, [1937] A.C. 26; [1936] 1 All E.R. 762; Digest Supp.; 105 L.J. K.B. 450; 154 L.T. 570.

(7) *Sunderland Overseers* v. *Sunderland Union* (1865), 18 C.B.N.S. 531; 38 Digest 566, *1048*; 34 L.J. M.C. 121; 13 L.T. 239.

(8) *Townley Mill Co.* (1919), *Ltd.* v. *Oldham Assessment Committee*, [1937] 1 All E.R. 11; Digest Supp.; 106 L.J. K.B. 140; 156 L.T. 81.

(9) *R.* v. *Coventry Canal Navigation Co.* (1859), 1 E. & E. 572; 38 Digest 559, *978*; 28 L.J. M.C. 102; 32 L.T. O.S. 293.

(10) *R.* v. *London & South Western Ry. Co.* (1842), 1 Q.B. 558; 38 Digest 540, *848*; 11 L.J. M.C. 93.

(11) *R.* v. *Grand Junction Ry. Co.* (1844), 4 Q.B. 18; 38 Digest 539, *839*; 13 L.J. M.C. 94; 3 L.T. O.S. *123*.

(12) *Consett Iron Co., Ltd.* v. *Durham County Assessment Committee for No. 5 or North Western Area* (1929), 46 T.L.R. 53; [1931] A.C. 396; Digest Supp.; 100 L.J. K.B. 242; 144 L.T. 649.

(13) *Great Eastern Ry. Co.* v. *Haughley* (1866), L.R. 1 Q.B. 666; 38 Digest 521, *705*; 35 L.J. M.C. 229; 14 L.T. 548.

(14) *R.* v. *South Staffordshire Waterworks Co.* (1885), 16 Q.B.D. 359; 38 Digest 551, *920*; 55 L.J. M.C. 88; 54 L.T. 782.

(15) *R.* v. *West Middlesex Waterworks Co.* (1859), 28 L.J. M.C. 135; 38 Digest 450, *171*; 32 L.T.O.S. 388.

(16) *Mersey Docks* v. *Liverpool Overseers* (1873), L.R. 9 Q.B. 84; 38 Digest 563, *1016*; 43 L.J. M.C. 33; 29 L.T. 454.

(17) *R.* v. *Southampton Dock Co.* (1851), 14 Q.B. 587; 38 Digest 527, *741*; 20 L.J. M.C. 155; 16 L.T.O.S. 460.

(18) *R.* v. *London & North Western Ry. Co.* (1874), L.R. 9 Q.B. 134; 38 Digest 543, *878*; 29 L.T. 910.

(19) *R.* v. *London School Board* (1886), 17 Q.B.D. 738; 38 Digest 522, *713*; 55 L.J. M.C. 169; 55 L.T. 384; Ryde, Rat. App. (1886-90) 235.

(20) *London County Council* v. *Erith Parish* (*Churchwardens, etc.*) *& Dartford Union Assessment Committee*, [1893] A.C. 562; 38 Digest 429, *42*; 63 L.J. M.C. 9; 69 L.T. 725.

(21) *Cartwright* v. *Sculcoates Union*, [1899] 1 Q.B. 667; [1900] A.C. 150; 38 Digest 564, *1025*; 69 L.J. Q.B. 403; 82 L.T. 157.

(22) *Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee*, [1901] A.C. 175; 38 Digest 526, *735*; 70 L.J. K.B. 584; 84 L.T. 542.

(23) *Dodds* v. *South Shields Poor Law Union Assessment Committee*, [1895] 2 Q.B. 133; 38 Digest 565, *1041*; 64 L.J. Q.B. 508; 72 L.T. 645.

(24) *Poplar Metropolitan Borough Assessment Committee* v. *Roberts*, [1922] 2 A.C. 93; 38 Digest 520, *698*; 91 L.J. K.B. 449; 127 L.T. 99.

(25) *Whelan* v. *Alfred Leney & Co., Ltd., Loughnan* v. *Marston's Dolphin Brewery, Ltd.*, [1934] 2 K.B. 511; [1936] A.C. 393; [1936] 1 All E.R. 468; Digest Supp.; 105 L.J. K.B. 197; 154 L.T. 537.

(26) *Inland Revenue Comrs.* v. *Clay, Inland Revenue Comrs.* v. *Buchanan,* [1914] 3 K.B. 466; 39 Digest 226, *63*; 83 L.J. K.B. 1425; 111 L.T. 484.

(27) *Ricketts* v. *Colquhoun,* [1926] A.C. 1; 28 Digest 88, *519*; 95 L.J. K.B. 82; 134 L.T. 106.

Appeal from a decision of the Divisional Court dated Apr. 1, 1936, and reported in [1936] 1 All E.R. 751. The facts in the case are fully set out in the judgments.

A. S. Comyns Carr, K.C., and *F. Grant* for the appellant committee.

A. M. Latter, K.C., and *Michael E. Rowe* for the respondent company.

Comyns Carr, K.C.: In this case the court is being asked to explain or overrule the case of *Bradford-on-Avon Assessment Committee* v. *White* (1). There the two judges gave judgment on quite different grounds, and the decision has often been criticised. It is no argument that, because a case is old, it should not be overruled: *Westminster City Council* v. *Southern Railway Co.* (2); *West Ham Union* v. *Edmonton Union* (3). The motive affecting a potential tenant is immaterial: *R.* v. *London School Board* (19), approved of in *London County Council* v. *Erith Parish (Churchwardens, etc.) and Dartford Union Assessment Committee* (20). The principles on which the value is to be determined were laid down in *R.* v. *London & North Western Railway Co.* (18). Here, even if profits are made elsewhere, *e.g.* at the brewery, they may be taken into account. The rent paid by a tenant need not be the criterion of rateable value: *Mersey Docks & Harbour Board* v. *Birkenhead Assessment Committee* (22).

Latter, K.C.: One must look at the premises to see what they are worth in the market. It is a question of what is reasonably to be expected. That does not depend upon purely personal considerations; that is a question personal to each brewer. It is not right to say that the top price that could be obtained is the right assessment. There is no distinction in principle between the judgments of Channell, J., and Ridley, J., in the *Bradford-on-Avon* case (1). The judgment of Channell, J., was approved in *Inland Revenue Comrs.* v. *Truman, Hanbury, Buxton & Co.* (5), and *Whelan* v. *Alfred Leney & Co., Ltd.* (25). The *Bradford-on-Avon* case (1) has been approved whenever it has been before the courts, including the House of Lords: *Inland Revenue Commissioners* v. *Crossman* (6). It is submitted that that decision binds this court. It is admitted that the competition by the brewers will affect the market price, but the top price that will be paid by a brewer is not the true price to be considered, as that is merely a personal consideration. [Counsel referred to *Dodds* v. *South Shields Poor Law Union Assessment Committee* (23), *Cartwright* v. *Sculcoates Union* (21), *Consett Iron Co., Ltd.* v. *Durham County Assessment Committee* (12), *Westminster City Council* v. *Southern Railway Co.* (2), and *Townley Mill Co.* (1919), *Ltd.* v. *Oldham Assessment Committee* (8).] It is wrong to treat brewers as a class. Motive is not immaterial if it induces a person to bid more than the market value. [Counsel referred to *R.* v. *London School Board* (19) and *R.* v. *London & North Western Railway Co.* (18).] It is immaterial where the profits are made ; if goods are sold elsewhere, that does not diminish the rateable value. But you cannot bring profits earned in parish A. into parish B. : *Sunderland Overseers* v. *Sunderland Union* (7). Profits earned at the brewery cannot be taxed on the rateable value of a public house ; they are quite separate properties, and the profits must not be rated twice. That is what is sought to be done here. The whole output is taken into account in the rating of the brewery.

Grant, in reply : It is said that you must exclude the higher rents that would be paid by brewers except in so far as they would increase the rent that would be paid by a non-brewing tenant. CHANNELL, J., in the *Bradford-on-Avon* case (1), said that you must take no account of the higher rents that brewers would pay, but that you must find the market value. He has, however, wrongly defined the market value.

Comyns Carr, K.C. : *Inland Revenue Comrs.* v. *Truman, Hanbury, Buxton & Co.* (5), *Inland Revenue Commissioners* v. *Crossman* (6), were all based on the Finance Act, 1894, s. 7 (5), and they held that the market value excluded no one, and therefore rejected, by implication or in terms, the definition of CHANNELL, J., of market value. In *Whelan* v. *Alfred Leney & Co., Ltd.* (25), the *Bradford-on-Avon* case (1) was not contended to be wrong.

Rowe, replying on the law : In *Ricketts* v. *Colquhoun* (27) it was said that it is undesirable to overrule an old decision on which subsequent legislation may have been based. That applies here. The law in tax cases ought not to be unsettled.

GREER, L.J. : This appeal raises a question as to the true meaning and effect of the Parochial Assessments Act, 1836, s. 1, and its application to the facts stated in the case. The appeal is concerned with the rateable value of a fully licensed public house which, as stated in para. 2 of the case, had been at all material times occupied by the appellant company and managed by a manager in the employment of the company. All the draught beer sold, and some of the bottled beer sold, in the said hereditament had at all material times been beer brewed by the company or by its associated company, and considerable quantities of bottled beer brewed by Messrs. Bass and by Messrs. Worthington were also sold. The case also stated that a brewer taking a tenancy of the said hereditament would be able thereby to secure the use of the premises for the sale of beer from his own brewery, and thus to secure a larger output and a profit thereon over and above the retail profit which a tenant other than a brewer might reasonably expect to make. There were several brewers who, if the said hereditament had been vacant and to let, might reasonably have been expected to compete with each other for a tenancy of the said hereditament. The case also stated that, if regard be had to the competition between brewers and to the rent which a competing brewer, who desired the premises for the reasons mentioned in sub-para. (*c*) thereof, might be willing to give, the rent at which the said hereditament might reasonably have been expected to A let from year to year would be sufficiently high to support a gross value of £112. Neither the rent at which the hereditament might reasonably have been expected to let from year to year to a free tenant who was not a brewer nor the rent at which the hereditament might reasonably have been expected to let from year to year to a tied tenant of a brewer would B be sufficiently high to support a gross value of this figure. Quarter sessions, notwithstanding the opinions expressed in the case, came to the conclusion that they were bound to follow the decision of the Divisional Court in *Bradford-on-Avon Assessment Committee* v. *White* (1), and they accordingly allowed the appeal, and fixed the gross value of the said C hereditament at £95. If they had considered that they were not bound by the decision of the Divisional Court in *Bradford-on-Avon Assessment Committee* v. *White* (1) they would have fixed the gross value of the said hereditament at £112. The assessment committee appealed from the decision of the quarter sessions to the Divisional Court, who dismissed D the appeal, on the grounds that they were bound by the decision in *Bradford-on-Avon Assessment Committee* v. *White* (1) and that they agreed with that decision.

In my judgment, the decision in *Bradford-on-Avon Assessment Committee* v. *White* (1) was plainly wrong, and we are therefore entitled, E according to the views expressed by the House of Lords in *Westminster City Council* v. *Southern Ry. Co.* (2), to overrule it, notwithstanding the fact that annual values and rateable values have been fixed for a long time on the assumption that the decision was right. It is difficult to understand the logic of the two judgments. It is quite clear that there are F many cases where, if a hereditament were in the market, its annual value would necessarily be decided by the offer that could reasonably be expected from a special class of tenants who would desire to occupy the premises for the purpose of carrying on a successful business. Houses in Harley Street fetch a higher rent by reason of the fact that, if they were G in the market, physicians and surgeons who desired to have the higher standing of an address in Harley Street would compete with one another, and the tenancy would go to the highest bidder in this class. If a valuer were asked to value a house in Harley Street, he would obviously have to take into consideration the price that could reasonably be expected H to be given in the market in which the principal offerers were medical men, who, for reasons of their own, were prepared to give a larger rent than any other class of tenant. It is pointed out by Channell, J., in his judgment in the *Bradford-on-Avon* case (1), that the value of any property for the purposes of rating is to be determined by the "higgling" of the market. If it is to be so determined, it seems to me quite illogical to say that you are entitled to consider that some of the individuals so higgling in the market would give a higher price than anyone else and at A the same time dismiss from your consideration what would be the highest rental established in the market. You are surely not entitled to say that the brewers should be allowed to go into the market and there compete with one another, and at the same time to exclude the price that they would be willing to pay as the result of such competition, and B confine the value of the public house to the point at which the ordinary tenant would refuse to go further in the competition. The value of any property may reasonably be expected to depend on the rent that would be produced by allowing all the contestants to bid against one another in the market. You cannot find the value due to the higgling of the C market by excluding those who are nowadays the principal higglers, namely, the brewers.

It was argued by the respondent company that it is too late for the court to reverse the decision in the *Bradford-on-Avon* case (1), because it was decided in the year 1898, and year after year assessments have been D based on the assumption that the decision was right. *West Ham Union* v. *Edmonton Union* (3) and *Hamilton* v. *Baker, The Sara* (4) are cases in which previous decisions were held to be plainly wrong, and were overruled by the House of Lords after more years than have passed between the date of the decision in the *Bradford-on-Avon* case (1) and the present E date. See also the decision already cited in *Westminster City Council* v. *Southern Ry. Co.* (2). In that case, LORD WRIGHT, M.R., said, at p. 563:

> There is no rule which debars your Lordships from doing justice even at the cost of reversing an old authority, that is an authority of a court inferior to this House.

F

On p. 564, he cites as follows the principle stated by LORD LOREBURN, L.C., in the *West Ham* case (3), at pp. 4, 5:

> Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and especially where the subsequent course of judicial G decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House to overrule them, if it has not lost the right to do so by itself expressly affirming them.

The other Lords who took part in the decision do not expressly deal with this question, but their speeches necessarily involve the overruling of H the case referred to by LORD LOREBURN, L.C. In the present case, I am of opinion that practical injustice must follow if we act on the Divisional Court's decision in the *Bradford-on-Avon* case (1), inasmuch as brewers would be relieved from being rated on the true value of public houses carried on on their behalf, with the result that other hereditaments would suffer from over-rating. There has been no decision in the House of Lords where the question necessarily arose as to whether the decision in the *Bradford-on-Avon* case (1) was right, though there have been some *dicta* which assumed that it was right: see *per* HAMILTON, J., in *Inland Revenue Comrs.* v. *Truman, Hanbury, Buxton & Co.* (5), and *per* A LORD BLANESBURGH in *Inland Revenue Comrs.* v. *Crossman* (6), at p. 62.

There is one other case on which, I think, I ought to say something, that is the case of *Sunderland Overseers* v. *Sunderland Union* (7). That case was concerned with the estimated rental of a brewery. Anyone tendering a rent for the brewery would not be entitled to assume that B he would get, with the tenancy of the brewery, not only the brewery, but also a portion of the brewery's trade. The competing tenant is not supposed to be competing for any portion of the business of the brewery, but only for the brewery itself. A brewer who is willing to let his brewery may be quite unwilling to part with any portion of his trade or his con- C tracts with the tied houses. Having granted his brewery to a tenant from year to year, he could set up a brewery elsewhere, and keep the value of his personal agreements with the existing tenants of his houses. He is not to be assumed as putting his brewery in the market together with all his personal contracts with his tenants. What the hypothetical D tenant is offering for is a tenancy of the brewery, and not in any sense offering for the trade of the brewery. This case seems to me to have no bearing on the question we have to determine. As I have already said, in my judgment the decision in the *Bradford-on-Avon* case (1) was plainly wrong, and we are not bound by it and are entitled to overrule it. For E these reasons, in my judgment, the appeal should be allowed, and the gross value of the public house in question should be declared to be £112, and the rateable value should be declared to be that amount less the statutory deductions. I have not found it necessary to deal in detail with the various cases cited by Mr. Latter and his junior, but I have F had the advantage of reading the judgment of SCOTT, L.J., and I agree with what he says about those cases.

SLESSER, L.J., desires me to say that he has read the judgment which I have just delivered and the judgment of SCOTT, L.J., in this case, and that he agrees with them, and that the appeal should be allowed. G

SCOTT, L.J.: This appeal raises the question of what is the real effect of the provisions of the Rating and Valutation Act, 1925, in regard to ascertaining the gross value of any hereditament—in this case a fully licensed public house. The dispute turns, to a great extent, but not, in H my view, wholly, on the old statutory test of the hypothetical tenant, which now appears as a definition of gross value in sect. 68 in words which are nearly identical with those used from the 1836 Act onwards:

> the rent at which a hereditament might reasonably be expected to let from year to year,

The Divisional Court followed the decision of another Divisional Court given 39 years ago in the *Bradford-on-Avon* case (1), where the facts found by quarter sessions were somewhat similar. They said they felt bound by it, but they also said they agreed with the reasoning of the judges in the case, and reaffirmed the principles there laid down. To-day this court is taking the contrary view, and we are allowing the appeal because we disagree with the reasoning in that case and think that its so-called principles are erroneous. With such differences of judicial opinion, I confess to a feeling of diffidence, but I cannot say I entertain any doubt.

Although, if there was a clear *ratio decidendi* in the *Bradford-on-Avon* case (1), it was binding on the Divisional Court, the case is, of course, not binding on us ; but the respondent company contends that it has subsequently been clothed with binding authority by approval in the Court of Appeal, or even in the House of Lords, or, alternatively, by the length of time that it has stood unattacked. The argument of the appeal before us naturally, therefore, involved a double contest ; (i) as to whether the *Bradford-on-Avon* case (1) was wrongly decided, and, if so, what the right legal principles are, and (ii) whether, even if we were disposed to hold that the *Bradford-on-Avon* case (1) was wrongly decided, we are not precluded from giving effect to that view. In my opinion, the appellant committee ought to win both contests.

Logically, the second issue comes first, but I think it will help in the consideration of the cases where the *Bradford-on-Avon* case (1) has been discussed if I begin with the issue of principle. In my view, facts are found by quarter sessions which compel us to allow the appeal. It is, I think, impossible in law to do anything but enforce the decision which the sessions actually reached in their own minds, and would have applied, but for the question of law which the respondent company desired to argue on the strength of the *Bradford-on-Avon* decision (1). The special case, signed by JUDGE RICHARDSON, as chairman of quarter sessions, is very clearly stated. It finds facts quite definitely and unambiguously, not confusing evidence with findings upon the evidence, and not mixing up law and fact. It is so short that there is nothing to be gained by attempting to summarise it : but the dominant findings of fact are these. The respondent company was assessed in the current valuation list as occupier of the White Lion Hotel, a fully licensed public house in the Houghton-le-Spring urban rating area, at £112 gross and £90 rateable value. In accordance with the procedure of the Rating and Valuation Act, 1925, s. 37, it applied for a reduction ; but the assessment committee refused it. The company appealed to quarter sessions, under sect. 37 (8), on the ground that the assessment was "excessive having regard to the volume of trade." This reason should be borne in mind. The company was in occupation, through its manager, in accordance with the general practice of the assessment area. Para. 2 (*b*) of the case states:

> practically all the public houses in the area being owned by brewers and managed or sublet to tied tenants.

The obvious economic motive of the brewer is stated in para. 2 (*c*): increased output and increased profits. In para. 2 (*d*), the case records the practical certainty of competition amongst brewers, not only as purchasers, but even for a tenancy of the White Lion, if vacant. The first half of para. 2 (*e*) is the cardinal finding of fact in the whole special case:

> If regard be had to the competition between brewers and to the rent which a competing brewer, who desired the premises for the reasons mentioned in sub-para. (*c*) hereof, might be willing to give, the rent at which the said hereditament might reasonably have been expected to let from year to year would be sufficiently high to support a gross value of £112.

For reasons which I will develop presently, I think that this sentence is conclusive of the appeal, and entitles the appellant committee to our judgment. The sub-paragraph goes on to state two other findings of fact:

> Neither the rent at which the hereditament might reasonably have been expected to let from year to year to a free tenant who was not a brewer nor the rent at which the hereditament might reasonably have been expected to let from year to year to a tied tenant of a brewer would be sufficiently high to support a gross value of this figure.

These two facts are presumably stated merely for the purpose of clearing the ground; in view of the other facts found in the case, particularly in the first half of para. 2 (*e*), they have no relevance to the problem which we have to solve. Now comes the sub-paragraph on which the judgment below rested, para. 2 (*f*):

> If the competition of the brewers is taken into consideration, but the rents which they might reasonably be expected to give for the reasons mentioned in sub-para. (*c*) hereof are excluded from consideration except so far as the possibility of such rents being given raises the rent which might reasonably be expected to be given by a tenant not influenced by those reasons, the rent at which the said hereditament might reasonably have been expected to let from year to year would only be sufficiently high to support a gross value of £95.

This sub-paragraph is taken from the *Bradford-on-Avon* case (1). It was obviously inserted for the sole purpose of enabling the respondent company to argue that the facts fall within the decision in that case. I think it does successfully epitomise that case, but at the same time it brings out what, I think, was the fallacy of that decision. There is no doubt that the offers of non-brewer competitors for a vacant public house would tend to be pushed up by the prospect of brewer competition, but if it was the fact, as the sub-paragraph finds, that even one brewer would offer to pay a higher rent than any of the non-brewers desiring the tenancy, why is that fact not economic evidence of the existence of a higher real rental value than the non-brewers would pay for; and, if there were several brewers so desiring to compete, as the case finds, why is that not *a fortiori* evidence to that effect ?

In my view, it would be wholly wrong to " exclude the rents " mentioned in sub-para. (*c*) " from consideration," as to do so would be to exclude evidence which it was most material for the valuer to consider, and would be in effect to command him to shut his eyes to vital information bearing upon his estimate of real value. This is the cardinal, and, apart from the contention that the *Bradford-on-Avon* case (1) has been made binding on us by superior judicial authority, I believe the only question of law directly raised by the present appeal, although many collateral aspects indirectly bearing on it have been discussed, and call for consideration. The statutory test has been so much discussed in the courts, including the House of Lords, that it seems absurd to go back over the old ground, but, as I am differing from the court below, and am doing so because their decision seems to me to involve a departure from the one basic principle of that test, I feel bound to cite some of the leading judgments in which the meaning and applications of the test have been explained. It will be convenient to state the steps by which I reach my conclusion before quoting the authorities which I think support my view. The relevant steps (partly law, partly facts), as found in the special case, appear to be these : (i) the hereditament to be valued under sect. 22 of the Act is always the actual house or other property for the occupation of which the occupier is to be rated, and that hereditament is to be valued as it in fact is—*rebus sic stantibus* ; (ii) where the particular hereditament is let at what is plainly a rack rent, or where similar hereditaments in similar economic sites are so let, so that they are truly comparable, that evidence is the best evidence, and for that reason is alone admissible : indirect evidence is excluded, not because it is not logically relevant to the economic inquiry, but because it is not the best evidence ; (iii) where such direct evidence is not available, for example, if the rents of other premises are shown to be not truly comparable, resort must necessarily be had to indirect evidence from which it is possible to estimate the probable rent which the hypothetical tenant would pay ; (iv) this kind of estimating is a skilled business, and it is here especially that the role of the skilled valuer comes in. His employment is plainly contemplated by all the rating statutes of the last hundred years, and has always been the practice in all disputes upon *quantum* of assessment, but, above all, wherever resort to indirect sources for assessing value is necessary ; (v) in weighing up the evidence bearing upon value, it is the duty of the valuer to take into consideration every intrinsic quality and every intrinsic circumstance which tends to push the rental value either up or down, just because it is relevant to the valuation, and ought therefore to be cast into the scales of the balance before he looks to see the resultant figure on the dial at which the pointer finally rests ; (vi) a skilled valuer is a professional man, and must be left free to inform his mind of all relevant facts. It is only where it can be shown that he has had regard to some fact which is legally irrelevant, or *vice versa*, that his valuation is open to legal attack ; (vii) when the assessing tribunal, whether assessment committee or quarter sessions, has to make its own valuation in a contested case about a gross assessment, the tribunal, not being itself professionally skilled in valuation, must necessarily act on evidence, including expert evidence, and that evidence must be relevant ; but, wherever the direct evidence test is not available, no fact which would, in all the actual circumstances of the case, tend to raise or lower the amount of rent likely to be given by probable competitors can be either irrelevant or inadmissible ; (viii) the rent to be ascertained is the figure at which the hypothetical landlord and tenant would, in the opinion of the valuer or the tribunal, come to terms as a result of bargaining for that hereditament, in the light of competition or its absence in both demand and supply, as a result of " the higgling of the market " (I call this the true rent because it corresponds to real value) ; (ix) this true rent is often called " market value," but I hesitate to use that expression, as it seems to me prone to mislead, for it gives rise to the notion of something absolute, something having an objective existence, independent of all the various particular sources of demand, which together constitute the totality of demand. The phrase " market value " is not used in the special case, but it was used in the judgment below of LORD HEWART, L.C.J. (in effect quoting the judgment of CHANNELL, J., in the *Bradford-on-Avon* case (1)), to describe the lower measure of value stated in para. 2 (*f*) of the present special case, and the higher figure there mentioned as attributable to the competition of brewers is spoken of as something over and above " market value." This, in my view, is an economic paradox. The only conceivable purpose for which the metaphor of " market value " can properly be used, in cases where there is in fact no market test of actual rents, is to describe the real value (expressed in terms of the statutory test) which sect. 22 requires the assessment committee to ascertain. If this be so, then to speak of a hereditament possessing both a market value of £X and a higher value of £X plus £Y, due to a special factor of demand, is a contradiction in terms. In my opinion, the higher value is, in that event, the market value, in the only sense in which that phrase can properly be used in such a case ; (x) the nature of the disagreement between me and the Divisional Court in the *Bradford-on-Avon* case (1), which I have just stated, is perhaps made clearer if discussed from the evidence side ; that is to say, by considering what evidence is admissible on such an inquiry. The objective being the real value of the actual hereditament, the inquiry is primarily economic, and not legal ; it is legal only in so far as logical relevance is the measure of legal admissibility. That the value is to be expressed in the terms of the statutory definition of gross value is "nothing to the matter," as LORD HOLT would have said. That definition does not prevent the objective being the real value; it merely states certain data in regard to the terms of A the hypothetical tenancy which are to be assumed in order to get a fixed instead of a variable figure. Some terms must be assumed by every valuer in any calculation: the statute merely chooses the terms, in order that all resultant figures may be strictly comparable; but the statutory definition contains no provision which prevents real value being B the one and only objective of the inquiry; (xi) on such an inquiry every factor, intrinsic or extrinsic, which tends to increase or decrease either demand or supply is economically relevant, and is therefore admissible evidence for the assessment committee, or its valuer, or the quarter sessions on appeal, to consider.

C The following considerations show that the demand of the brewers mentioned in para. 2 (*e*) of the case is logically a vital aspect of the economic demand upon which the real value of the house must rest: (*a*) the intrinsic characteristic of a licence possessed by the White Lion is relevant, just because beer cannot be sold in unlicensed premises, D and the licence gives the licensed house a monopoly value in respect of volume of trade, whilst the high probability of renewal of the licence carries a business assurance of the continuance of the trade; (*b*) other things being equal, the fewer licensed houses there are in the area, the greater will be the share of the trade enjoyed by any one, or the greater, E in other words, will be its monopoly value, and this extrinsic circumstance must tend to stimulate the economic desire of all brewers within business reach to possess any such house, if unoccupied, and therefore to increase demand for it, and push up its real value; (*c*) similarly, the more brewers there are within business reach who want to enjoy the profits of its F monopoly value, the greater will be the demand for the particular house of which the statutory hypothesis postulates vacant possession. The steps in the reasoning process, which I have just stated without any attempt at logical completeness, lead, in my opinion, inevitably to the conclusion that the sessions were right, as a question of rating law, G in taking into consideration the fact that "there were several brewers who might reasonably have been expected to compete with each other" for the White Lion, if vacant; or, putting, the same question in terms of the law of evidence, that that evidence was admissible on the issue of *quantum* of real value, just because it was economically relevant. Even H if it had been only one brewer who would have been ready to offer a rent of £112, the evidence would have been logically admissible, although a tribunal of fact dealing with so theoretical a demand might well insist on corroboration, or refuse to accept the evidence at its full face value.

Here the decision of fact reached by the sessions is open to no such criticism, for they have answered it in advance by two findings: (i) that there were in fact several such competing brewers; and (ii) that they have made all due allowance for the hypothetical character of the expert evidence given before them to that effect, for they say in effect that the figures proved were sufficiently above £112 to make that figure, in their opinion, a safe one. On these questions of pure fact, the findings of the sessions must be treated as really final.

The special case raises only one question of law, namely, whether there is any fact found in para. 2 (*f*) of the case which in law prevents effect being given to the sessions' finding in the first half of para. 2 (*e*). I have already stated my opinion that a negative answer must be given to that question, although I recognise that para. 2 (*f*) repeats with fidelity the reasoning, and almost the very words, of the judgment of CHANNELL, J., in the *Bradford-on-Avon* case (1).

The next step, therefore, is to justify my opinion by references to the Act and authorities, and then to explain where and why I disagree with the reasoning of the judges in that case. The relevant provisions of the Rating and Valuation Act, 1925:

> which embraces within its provisions the law as to rating and valuation which is to prevail when and where the Act applies—

(*per* LORD RUSSELL OF KILLOWEN in *Townley Mill Company* (1919), *Ltd.* v. *Oldham Assessment Committee* (8), at p. 13), are contained in the following sections: sect. 17 (1) and sect. 18 (2) (assessment committees and their duties); sect. 19 and sect. 22 (valuation lists); sect. 28 (1), (3), (5), sect. 31, sect. 37 (which, taken together, lay down the procedure for appeal to the assessment committee to amend the list); sect. 38 (power to any rating authority or assessment committee to employ valuers); and sect. 68 (definitions of "gross value" and "hereditaments"); and in the second schedule, part I (classification of hereditaments). Every hereditament has to be valued, and to appear with its appropriate particulars in the valuation list.

> 21 (1) Subject to the provisions of this Act, there shall be inserted in the valuation list such particulars with respect to every hereditament in the rating area and the value thereof as may be prescribed:

Sect. 22 (1), which deals with deductions from gross value for the purpose of fixing rateable value, refers to the descriptive lists in the second schedule. Whether a public house is a "house" within part I or "a building of similar character to a manufactory" may not be clear; but, at any rate, it has to appear in the valuation list somewhere (see sect. 20), and for the present purposes it does not matter what its proper classification is under the schedule. Sect. 22 (1) in effect directs every valuation committee to ascertain the gross value of every hereditament in its area; and the definition of "gross value" in sect. 68 is, for present purposes at any rate, identical with the statutory provisions which have been in force since 1836. The legal error, if any, in the judgment of the court below, was in the interpretation of this definition: it is therefore vital to keep the essential words of it in mind. This is what the statute says:

> "Gross value" means the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent; provided that, in estimating the annual rental value of a hereditament to a tenant, no account shall be taken of the value of any services which the landlord renders, or procures to be rendered, to the tenant (either alone or in common with other tenants of the landlord) other than the provision of, or repairs to, or maintenance of, the hereditament.

The task of the assessment committee in the present case was to ascertain:

> at what figure the hereditament in question [that is, the White Lion Hotel, Houghton-le-Spring] might reasonably be expected to let from year to year—

on the assumptions of the definition. Whilst the tenant is hypothetical, and the landlord who is to let to the tenant is necessarily also hypothetical, the hereditament is actual, namely, the hereditament described in the valuation list with all its actualities. Two consequences follow. All the intrinsic advantages and disadvantages must be considered and weighed. It is just that particular hereditament which is supposed to be in the market, with all its attractions for would-be tenants, to whatever kind of human emotion or interest or sense of duty they may appeal—economic, social, æsthetic, political (for example, in order to perform a statutory duty)—and also with all its imperfections and drawbacks, which may deter or reduce competition for it. That is why, in valuing a public house, you must take into account its licence, with the statutory implications of the licence, as, for instance, on the one hand, its monopoly value, and, on the other, the degree to which in that area the competition of other licensed houses may reduce the profit-making quality of that particular house, and so prejudice the demand for it. The second consequence is that the totality of opposing forces of demand and supply must be assessed and weighed in order to hit off the point at which the two opposing negotiators are to be deemed likely to strike their bargain. I think that this is exactly what the quarter sessions have done in para. 2 (*e*), but that the adoption by the Divisional Court of the alternative stated in para. 2 (*f*) disregards a most important part of the economic demand, and therefore involves an arbitrary and illogical exclusion of evidence directly relevant to the assessment of the real rental value, which is the objective of sect. 22 (1), and of the definition of gross value, which must be read into that subsection, and thus defeats the object of the Act. I can see no words in the definition which afford any ground for the exclusion of that evidence, and I believe that my view, based upon the reasoning to which I have already given expression, is supported by the long line of authorities on the equivalent provisions of the earlier Acts.

I begin with a reference to some of the early railway and canal cases, for four reasons: (i) they are typical profit-earning hereditaments endowed by statute with monopoly rights; (ii) no one could conceivably A take them on a tenancy except for the purpose of making profit out of the occupation; (iii) however difficult it is to estimate from probable profits the rent which the hypothetical tenant desiring those profits might reasonably be expected to pay, the task has to be performed by the tribunal of fact in every assessment of that type of hereditament; (iv) in the B case of such a statutory undertaking, it is obvious that the "year to year" tenancy must be interpreted with the implied addition that a prospect of continuance may be assumed. Compared with the practical difficulties of that type of case (against which Lord Campbell, C.J., protested in 1851, in the canal case of *R.* v. *Coventry Canal Navigation Co.* C (9), at p. 104), the assessment of a public house, where there is general competition amongst all the brewery companies of the district to get it, in order to run it with their own manager, and so increase their profits is mere child's play. In *R.* v. *London & South Western Railway Company* (10), and *R.* v. *Grand Junction Railway Co.* (11), the principles to be D applied in ascertaining the rental value of railways for the purpose of rating were laid down on lines which have ever since been followed. In Ryde on Rating, 6th Edn., there is a very clear statement of the law so established, and his citations there from the judgment of Lord Denman in the later of the two cases (at pp. 36-41) in my opinion show E that, wherever the rental value has to be ascertained by reference to the opportunity of profit afforded by the occupation of the hereditament, every source of profit, direct or indirect, must be taken into account, for the simple reason that it must affect the mind of the hypothetical applicant for a tenancy. F

These cases also dispose of the contention, which was suggested rather than argued before us for the respondent company, that the statute forbids any account being taken of a tenancy lasting more than a year, and that, therefore, although brewers might be ready enough to buy, the idea of their competing for a tenancy is in a practical sense G absurd. The answer is that the statute, properly construed, does not so limit the hypothetical tenant's prospects. The idea of a lease for years is excluded, but the prospect of the tenancy from year to year continuing must be assumed. This rule of law was explained and applied by Lord Hewart, L.C.J., in the recent case of *Consett Iron Co., Ltd.* v. H *Durham County Assessment Committee* (12): see also *Great Eastern Railway Company* v. *Haughley* (13), at pp. 679, 685; and *R.* v. *South Staffordshire Waterworks Company* (14), at p. 370. As the appeal turns on the exclusion of part of the evidence of demand for the house, it is worth observing that the economic relevance of demand and supply to the ascertainment of the real rent has been recognised from early days: see, for instance, *R.* v. *West Middlesex Waterworks Co.* (15), where WIGHTMAN, J., said, at p. 138:

> Value is derived entirely from the relation of demand to supply, and if a water company comes into competition with a mere agriculturist for land for waterworks, an addition is made to the value of such land by the additional competition. . . . Upon the common principles regulating value, it is enhanced in proportion to the scarcity of the thing in demand; so that, if a few levels only were suitable for the required transit, or a few sources of water alone were accessible, the price would be higher.

The chain of reasoning, to which I have just given expression, is, in my view, justified by the authorities, particularly that no element of demand should be ignored. I begin with the famous judgment of the Court of Queen's Bench, delivered by BLACKBURN, J., in *Mersey Docks* v. *Liverpool Overseers* (16). The question there was what rent would the hypothetical tenant give for the whole dock system vested in the Mersey Docks and Harbour Board by their Acts of 1857 and 1858. At pp. 96, 97, there is this passage:

> Where the hereditaments, or hereditaments of a similar kind, are in practice actually let at a rent, the amount of which is ascertained by what has been called "the higgling of the market," the application of this definition is easy and simple. Where the hereditaments are not in practice let the problem becomes more difficult. The facts and circumstances, which would be taken into consideration by those who in the case of a real tenancy do in the higgling of the market fix the rent, are to be taken into consideration, and on a view of all those the net annual value of the occupation is to be determined; and in many cases the amount that is made by the trade carried on by the occupier's occupation, less an allowance for the profits which the tenant might elsewhere make by his trade, is an important element in the evidence of the annual value. In such a case as *R.* v. *Southampton Dock Co.* (17), they were properly allowed; but it is not always so. If the hereditaments are such as to afford peculiar facilities for carrying on any kind of business, that facility does, beyond all question, enhance the value of the occupation; but, though the profits which may be reasonably expected to arise from such a business no doubt form an element in estimating the enhanced value of the occupation of the premises, the actual profits made do not form any element, except in so far as they afford evidence of what might be reasonably expected to be made from the occupation of premises affording facility for carrying on such a business. For instance, to explain our meaning, there can be no doubt that the annual rent of a shop in Cheapside is higher than the annual rent of a similar shop in a back street; and that the reason why tenants give a higher rent is because of the superior facility for carrying on business there. But the rent and the rateable value of the shop are quite independent of the amount of the shopkeeper's actual gains. The rateable value is the same whether the tenant is a flourishing trader or is carrying on business at a loss. So, no doubt, in fixing the rent of chambers in one of the Inns of Court, the facility for carrying on the legal profession in them is an element, and an important one, but the actual income of the tenant is not. The chambers command no more rent when let to the Attorney-General than they would do if let to a young barrister just called who does not as yet pay his expenses.

I believe that that passage, often cited in subsequent cases, contains nearly all the law necessary for the solution of the problem which we are called on to solve in the present case. Two features are particularly worth noting; the only reference to the "market" is in the phrase "higgling of the market," which the learned judge there uses in regard to the way in which the figure of an actual rent gets fixed by negotiation

in the light of the active demand in and the available supply to a market. He nowhere says of the statute that it makes the existence of an actual market a condition to be satisfied before the assessment committee can legitimately reach the conclusion that the hereditament has an annual value or that its value is £X. He recognises that, as in the case then A
before the court, there may often be no market value, or that such value can only be ascertained within approximate limits. Three principles are implicit in the judgment : (i) the real value of the hereditament must be ascertained so far as an estimate can ascertain it ; (ii) that value will, like all other values, depend on and be fixed by the economic B
forces of demand and supply in every case where the hereditament is of a kind to admit of those forces operating ; and (iii) every imaginable motive affecting human nature which makes people want a thing, whether a commodity or a hereditament, creates demand and thus affects value. Finally, and this is equally important, in enunciating these basic princi- C
ples of rating valuation he brings out clearly the distinction between material facts and the evidence by which they are to be established. This distinction is of absolutely first-rate importance in rating cases about valuation, for much confusion is apt to arise through ignoring it. I think this happened in the *Bradford-on-Avon* case (1). D

In *R.* v. *London and North Western Railway Company* (18), the same judge follows the same logical path. The question was whether a small length of railway, which brought the company little direct income within the rating area but a large income elsewhere, should be assessed without taking into consideration this element of value to the occupying E
company. It was argued for the company that the assessment committee ought as a matter of law to disregard the fact, economically relevant, that the apparently unprofitable length of line was indirectly highly profitable, in that it brought grist to the company's mill elsewhere, and also the further fact there found that two other companies F
would have gladly acquired it in order each to get the benefit of the indirect profits so resulting. The rating authority contended that such indirect profit was an admissible piece of evidence showing that the real value was higher than the apparent value, as measured by the ordinary rule of thumb test applicable to the rating of railways. On p. 142, in G
the course of the argument, BLACKBURN, J., said :

> The question seems to be, if it happens that certain persons (a limited number of persons, but more than one) are desirous to have the line, because, on becoming occupiers of it, they can get a profit elsewhere, and are willing to give a high rent for it, are we not, in estimating the rateable value, to take that into account ?

That the objective of rating assessment under the statute is the ascertain- H
ment of the real value of the hereditament (expressed, of course, in terms of the hypothetical tenancy), and not that of any arbitrary figure of value higher or lower than the real value, seems to me to be implicitly recognised in all the cases where a public authority is in occupation for

the purpose of performing a public duty, and where, therefore, no question of profit or of a demand based on the desire for profit enters in. Thus in *R.* v. *London School Board* (19), there was no element of profit, but none the less there was real demand and real value, because there was at least one person who wanted the hereditament, and would therefore be a willing applicant for a tenancy, namely, the occupying school board itself. In the report of the case in RYDE'S RATING APPEALS, 1886-1890, at p. 240, FRY, L.J., is recorded as saying:

> The Act of Parliament does not deal with the object, or motive, of the tenant; it only asks whether there is a reasonable expectation of finding a tenant, who will take the premises from any motive.

Precisely the same legal question was considered by the House of Lords in *London County Council* v. *Erith Parish (Churchwardens, etc.) & Dartford Union Assessment Committee* (20). LORD HERSCHELL, L.C., at pp. 590, 591, expressly approved of the decision in *R.* v. *London School Board* (19), and, at p. 593, speaking of the non-profit making hereditament, said:

> In all cases of the description of which I am speaking, the whole of the circumstances and conditions under which the owner has become the occupier must be taken into consideration, and no higher rent must be fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises.

Again, the real value criterion. When considering profit-making hereditaments, he had, on the previous page, said:

> There is no doubt a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of gasworks, waterworks, and other industrial undertakings where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, the profits earned and the share of those profits attributable to any particular hereditament have to be taken into account.

In *Mersey Docks* v. *Liverpool Overseers* (16), the *London School Board* case (19), and the *London County Council* case (20), which I have just cited, the profit-making motive for demand was wholly absent; but in each case a motive for the actual tenant wanting to occupy the hereditament rated was afforded by the statutory duty that it was performing. In each of the three cases, the court or the House treated the inquiry ordained by the statute as a difficult one of fact, but saw no legal difficulty in carrying it out. Where better evidence is, in the circumstances of a particular hereditament, impossible, resort may be had to either capital value or cost of construction, either of which can, with appropriate corrections, be converted into approximately equivalent terms of annual value; and I think it follows from those three decisions that, in the present case, the tribunal of fact was guilty of no error of law in getting at the figure of annual value by estimating the brewers' potential demand as best it could. In the second case, the profit-making motive was present, as the occupier was a railway company; although no

profits resulted from the occupation of the assessed hereditament, which was worked at a loss, yet its possession led to the making of large profits in other rating areas. These indirect profits were two stages removed from the hypothetical rent to be ascertained, but the court treated those profits as constituting a conclusive motive for the actual occupier, and A
equally for each of the two competing railway companies wanting to occupy the unprofitable length of line in question ; in other words, they concluded that real value was established, and accordingly accepted the method of ascertaining annual value by inference from capital cost, which had been adopted by the assessment committee, as unobjectionable in B
law.

In *Cartwright* v. *Sculcoates Union* (21), the hereditament was a public house. The arbitrator to whom the assessment was referred found as a fact that it was impossible to value the house by a comparison with the rents of other more or less similar houses, and accordingly admitted C
evidence, not of actual takings, but of the volume of trade done, and received, from the expert witnesses for the rating authority, estimates of the value which they thought the house had in the light of that volume of trade. On that footing, he found that the assessment was justified. The Court of Appeal and the House of Lords confirmed the D
assessment. Throughout the judgments, the relevance of the prospect of profit was unquestioned, as a reason why there would be applicants anxious to become tenants. Lord Davey, at pp. 158, 159, quoted with complete approval the passage from the judgment of Blackburn, J., in the *Mersey Docks* case (16), with which I began my citations, and E
proceeded thus :

> I say, my Lords, in answer to a suggestion that was made from the bar, that in my opinion Lord Blackburn there was laying down a general principle applicable to all such cases, and not merely one that applied only to exceptional cases, where there is no market value or price or letting rent to which you can refer. And, my Lords, I venture to think that that is founded upon common sense. I repudiate F
> this distinction which has been made so much of between exceptional and ordinary cases. You have in each case to find out in the best way you can what is the rent which a tenant may reasonably be expected to give, and if the best way under the particular circumstances is to ascertain the use which a tenant might expect to be able to make of the premises, the facility afforded by the premises for the carrying on of a trade appears to me to be a primary and elementary consideration in the case. If you are to take into account the fact that the premises command a trade, G
> you must surely ask what trade. Is it a large trade, or is it a small trade ? And I do not know myself any better test of what trade they may be expected to command than the trade which they actually do command. It is not that you rate the profits, it is not that you rate the man's skill and judgment or discretion in the mode of carrying on the business, but you have to ascertain what sort of a trade the hypothetical tenant, as he is called, may reasonably expect to be able to carry on on those premises as an element in determining the rent he would be willing to offer. My Lords, I entirely agree in a passage in the Lord Chancellor's judgment, which I H
> will take the liberty of quoting and adopting as the expression of my own mind. His Lordship says : " It would be to my mind one of the most extraordinary things in the world if you could give expert evidence that such and such a house would be likely to command such and such a business, and yet not be able to verify that *a priori* opinion by proof of the fact that it did command such a business." A. L. Smith, L.J., says : You may call it goodwill or you may call it anything else you like

but it is legitimate evidence to show that it is a house capable of carrying on a good trade according to the matters which have to be taken into consideration by the hypothetical tenant; and he fortifies that evidence by saying it is carrying on a good trade because I see such and such things going on every day to my own knowledge. My Lords, that appears to me to sum up the whole of this case.

A It is particularly to be noted that the *Bradford-on-Avon* case (1), although decided only two years before, was not cited in the *Sculcoates* case (21), in the House of Lords, and, though cited in the court below, was not mentioned in the judgments. The principles laid down in the case of the Birkenhead lairages of the Mersey Docks & Harbour Board in *Mersey* B *Docks & Harbour Board* v. *Birkenhead Assessment Committee* (22), are directly germane to the present case. The EARL OF HALSBURY, L.C., there said, at pp. 179, 180:

> The thing that the legislature has called upon the overseers to do is to solve a simple question of fact, and although it may be by no means simple as regards the mode in which they are to arrive at it, the question of fact is simple enough C as stated. . . . That is the proposition which is put before the parish officers—that is the question which they have to answer; and they are to arrive at that value, so far as I know, unfettered by any statute as to the way in which they can do it. I am not aware of any rule of law or any statute which has limited them as to the mode in which they shall arrive at it. It is not a question of law at all—it is a question of fact. These questions have from time to time come before the courts and have been argued as questions of law; but that is where, D instead of doing what the statute has directed them to do, the overseers, or those who were acting on the part of the parish, have thought proper either to include something which by law ought not to be included, or to exclude something which ought to have been included. Of course in that sense, when you are dealing with a question of fact which has to be answered by any tribunal, it may be that a question may come up in the argument as a matter of law; but still one must bear in mind that the thing to be done is to answer a plain question of fact, namely, What is the rent which a tenant might reasonably be expected to give for the E premises, subject to the deductions mentioned in the statute, as a tenant from year to year?

On p. 182, The EARL OF HALSBURY, L.C., said:

> To go into the amounts of profits and losses as if you were finding out what a man's income is would be absolutely irrelevant; but for the purpose of ascertaining what a tenant would be likely to give, to suggest that that is something which in F point of law you have no right to inquire into would be equally absurd. All the circumstances of the particular occupation, the mode in which the trade is being carried on, and the circumstances affecting either the restriction or the amplitude of the trade, are all legitimate subjects of inquiry, and the only question of law is whether the particular tribunal has followed the line I have indicated or not.

The above passages, to my mind, are conclusive that the tribunal of G fact in the present case has done nothing wrong in saying, as it does, in para. 2 (*e*), that the competition of the brewers in its opinion justified the higher figure of value.

In my opinion, the cardinal fallacy in the adoption by the Divisional Court of the alternative stated in para. 2 (*f*), and in the judgment of H CHANNELL, J., in the *Bradford-on-Avon* case (1), which that sub-paragraph accurately expresses, is that it shuts out evidence which must, in the very nature of the problem, be vitally relevant. We all know how one financially strong buyer will put up the price of a security on the Stock Exchange and for the moment make a new market value. Demand must put up value, and cannot be irrelevant to valuation. I therefore wholly disagree with the conclusion of Ridley, J., in the *Bradford-on-Avon* case (1), at p. 635, that:

> the competition of brewers intending to use the premises as a tied house [ought to be excluded, because it] introduces . . . an element not referable to the rateable hereditament itself, but to some personal or temporary contract under which the business is to be carried on. A

Similarly, I disagree with the view of Channell, J., expressed on pp. 637, 638, in the same case, that, although the competition of brewers for the use of the house as a tied house was admissible up to a point, namely, to the extent to which it would make persons who were not brewers B increase their offers in " the market," yet, over and above that figure, it must be excluded. His ground was that this additional factor would introduce " reasons personal to the brewer " (p. 638). But why is that a ground for disregarding their competition? Every motive in human conduct is personal, and all demand is personal. I regard the whole C reasoning of the case, which is sufficiently reproduced in the headnote, as misconceived, and think the case was wrongly decided. In so far as it was based on the decision in *Dodds* v. *South Shields Poor Law Union Assessment Committee* (23), it is to be remembered that that case has been so criticised since as to have lost authority: see, for instance, the *Sculcoates* case (21), per Lord Davey and Lord Morris, at pp. 155-158. D

Reliance was also placed, in the *Bradford-on-Avon* case (1), on *Sunderland Overseers* v. *Sunderland Union* (7), decided in the Court of Common Pleas in 1865, as authority for the proposition that sums a tenant might pay: E

> not by reason of the value of the premises but for reasons personal to himself ought not to be taken into account.

I do not think that the *Sunderland* decision (7), is any authority for that proposition, as applied by the Divisional Court in the *Bradford-on-Avon* case (1), but, if it is, it was wrongly decided. In the *Sunderland* case (7), F the valuation under discussion was that of five breweries, which owned a large number of tied public houses, some of which were within the parish, some outside. The tied tenants had been assessed by the overseers as free tenants, and the breweries had been assessed without regard to the value to the brewers of the tie. The union assessment committee had G raised the assessment of the breweries, but left the assessments of the tied tenants unaltered. The overseers of the parish appealed to quarter sessions against the assessments of the breweries. It was found as a fact that, by means of the ties, the breweries secured a large trade, and were enabled to sell at higher prices. Erle, C.J., in his judgment, took H one brewery, and one public house tied to that brewery, as a test, and assumed that the gain to the brewery and the loss to the publican were equal. He also assumed that the aggregate of the two values continued the same after as before the tie. Both assumptions seem of doubtful economic validity. This latter aspect, apparently, was pressed by the court on counsel for the union and conceded by him. It thus appeared that the union had acted illogically in not reducing the assessments of the public houses when they raised the assessment of the brewers, A and the report, on p. 571, says this :

> Under these circumstances, the notion that the rateable value of the brewery could be increased by the gain from the tie, without lowering the rateable value of the public house to the same extent by reason of the loss from the tie, was so untenable that the counsel for the respondents did not offer to maintain it. By that admission, the question to be answered is narrowed to the point whether the whole rateable value of the public house shall be set down in the list for the B parish where it is situate, or partly therein and partly in the parish where the brewery is situate to which it is tied.

ERLE, C.J., on p. 576, said this :

> Here, the overseers have rated all the public houses, as well as the brewery, according to the principles of the Assessment Acts ; and, according to those principles, the publican would have to pay a rate both on the lower money payment C and higher beer charge which he pays to the brewer, his landlord, under the contract. There is no suggestion that any further value is created by this relation of landlord and tenant. If the suggestion was made, it certainly could not be ascertained without taking an account of the profits of the beer trade, involving an account of all losses by insolvency and otherwise ; and so it would be made apparent that it was an attempt to rate a profit of trade.

D With this judgment MONTAGUE SMITH, J., concurred.

BYLES, J., at pp. 577-578, started his dissentient judgment by accepting the premises of the other two, that :

> no question arises as to the aggregate rateable value of the whole brewery concern, including in that expression both the brewery, properly so called, and the restricted public houses. The question is, how that rateable value should be distributed between the brewery itself and those restricted houses.

E

In the result, he differed from his colleagues, because he thought that the value of the tie was taken from the public house and transferred to the brewery. It is clear that this decision is no authority for excluding evidence of an existing demand from several competing brewers, or for F saying that it is not material, from which valuers may reasonably infer that the house commands a rental of £X. It did not touch that question. Whether the view of the majority or that of BYLES, J., about the valuation of the brewery was right is, in my opinion, immaterial to the present appeal ; but, anyhow, all the cases which I have cited are subsequent G in date, and most of them of higher authority. It is unnecessary to analyse the judgment of LORD HEWART, L.C.J., in the present case, as it accepts the principles of the judgment of CHANNELL, J., in the *Bradford-on-Avon* case (1), as binding, and follows that decision. I need not say that I differ from that decision, after his endorsement of it, with H the greatest hesitation, but, having formed a definite opinion, I must express it.

I now deal with the second issue in the appeal, that arising out of the contention that we are bound by authority to follow the *Bradford-on-Avon* case (1), or, alternatively, that it has been so long treated as good law that we ought not to upset it: *stare decisis*. This alternative contention does not seem to me to have any weight in such a question as the present. In the *Bradford-on-Avon* case (1) there was evidence of a specific source of demand for the public house from the brewers for the purpose of putting in a tied tenant. That demand was found as a fact to be sufficient to increase the value by some 30 per cent. The court said that they must disregard it, because the profit which was the motive for the demand would be made out of a personal contract. That conclusion was, in my opinion, radically inconsistent with a long chain of authorities. What is the proposition which it is contended should be treated as sacrosanct? I think the contention is unsound, and that we should follow the principles laid down by Lord Wright, M.R., in *Westminster City Council* v. *Southern Railway Co.* (2), at pp. 563, 564, and the quotation from Lord Loreburn, L.C., on the latter page.

As regards the other argument, that the *Bradford-on-Avon* decision (1) has been approved by authority binding on us, I do not think it necessary to say much. The *Bradford-on-Avon* decision (1) was mentioned by Hamilton, J., in *Inland Revenue Comrs.* v *Truman, Hanbury, Buxton & Co.* (5) That case depended on other statutes, the most relevant being the Finance (1909-10) Act, 1910, s. 44 (2), as to the "annual licence value" of licensed premises. In the course of his judgment, Hamilton, J., summarised the argument of the petitioners (pp. 392-394), and in the course of it mentioned the *Bradford-on-Avon* case (1), which had been cited by counsel, but he did not in any way endorse it. That reference cannot give it authority. In the Court of Appeal it was never mentioned. It was cited by counsel in the case of *Poplar Metropolitan Borough Assessment Committee* v. *Roberts* (24), at p. 97, but for a wholly different purpose. In *Whelan* v. *Alfred Leney & Co., Ltd.* (25), the brewers held a number of tied houses. These they leased to another brewery company for a term of years for an inclusive rent of £20,000. The houses were assessed under Sched. A at an annual value of £5,500. The inland revenue claimed to be entitled to Sched. D tax on the difference. The House of Lords, affirming the Court of Appeal, decided in favour of the brewers. The *Bradford-on-Avon* case (1) was mentioned in the special case, but does not appear to have been referred to in argument. Lord Hanworth, M.R., however, during his judgment, at p. 522, quoted this passage from the judgment of Channell, J., at p. 639:

> I do not think, therefore, that it is right to say that the competition of brewers should be wholly excluded from consideration, but the special prices which they may give, owing to personal considerations, and not on account of the value of the premises, should be excluded except so far as the possibility of such special prices being obtained raises the market value generally.

Then he himself added:

> That means that the question should be considered whether the competition of

brewers had raised the market value of the public houses in the district. That is the right way in which this question of tie should be used.

I do not think LORD HANWORTH, M.R., had in mind the question before us to-day; nor was he expressing approval of the point in the decision A which now concerns us. His citation of the case does not therefore affect us. There is, however, a passage in the judgment of ROMER, L.J., at p. 534, which calls for consideration. He there says:

> It is perfectly true that the fact that the brewer is willing to give a very much higher rent for a public house because of his anticipation, if he becomes lessee, of making very large profits from the supply of beer to the house, ought not to be B taken into consideration in ascertaining the annual value for the purposes of Sched. A, but it by no means follows from that that the large rent which in the end he pays for the premises because of his anticipation of profits is not a rent in the true sense of the term.

ROMER, L.J., seems, in the first half of this sentence, to be touching on the *Bradford-on-Avon* case (1), although he does not mention it; but C the second half, I think, shows that his mind was not really on that case. The passage therefore does not affect our freedom to-day.

In my opinion, the respondent company's argument, that the *Bradford-on-Avon* case (1) has been made binding authority, therefore comes to nothing.

D There is only one other aspect I need mention. Counsel for the respondent company relied on certain cases decided under other statutes, such as *Inland Revenue Comrs.* v. *Truman, Hanbury, Buxton & Co., Ltd.* (5), decided under the Finance (1909-10) Act, 1910, ss. 43, 44; *Inland Revenue Comrs.* v. *Clay* (26), decided under sect. 25 (1) of the same Finance Act; E *Whelan* v. *Alfred Leney & Co., Ltd.* (25), to which I have already referred, in which the valuation of public houses for Sched. A income tax was discussed; and lastly, *Inland Revenue Comrs.* v. *Crossman* (6), a case upon the Finance Act, 1894, s. 7. The questions there raised are necessarily not the same question as that raised here; but, so far as they F have any bearing upon it, I am of opinion that they support the view expressed by me in this judgment, and I do not think it necessary or useful to discuss them in detail.

Appeal allowed with costs here and below, including the costs of the appeal to quarter sessions. Judgment of the court of quarter sessions set aside. G *Leave to appeal to House of Lords.*

Solicitors: *Richardson, Sadler & Co.*, agents for *Hannay & Hannay*, South Shields (for the appellant committee); *Godden, Holme & Ward* (for the respondent company).

H [*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Re SYSTON AND THURMASTON GAS, LIGHT AND COKE CO., LTD.

[Chancery Division (Simonds, J.), **March 18, 1937.**]

Companies—Statutory company—Winding up—Distribution of assets—Surplus assets—No provision in memorandum or articles—Original and additional share capital—Limited dividend—Distinction between classes of capital.

No provision was made in the memorandum or articles of a statutory company, which had a capital of £10,000, either for the distribution of surplus assets in the event of a winding up or for dividends, except that the directors could declare a dividend to the members in proportion to their shares. In 1902 an order, which was confirmed by statute, was made providing for an increase of the capital to £18,000 by an issue of additional shares. The order provided that the undertakers should not make a larger dividend payment than one of 10 per cent. on the original capital and one of 7 per cent. on the additional capital. There was no provision with regard to the distribution of surplus assets and there was nothing else to distinguish the two classes of capital. In 1936 the company's undertaking was sold and the company was wound up. A question arose as to the distribution of surplus assets in the hands of the liquidator after payment of the debts of the company and after paying to the shareholders the amount paid up on their shares. The surplus assets represented *inter alia* the proceeds of the carrying on of the undertaking since the last dividend was declared and paid :—

Held : (i) as no dividend had been declared by the directors before the winding up, the surplus assets could not be distributed partly as dividend and partly as capital.

(ii) the surplus assets should be distributed *pari passu* between the holders of both classes of share capital.

[**EDITORIAL NOTE.** The rule of equality in the distribution of surplus assets applies to statutory companies restricted as to the dividend they may pay upon their shares and having shares entitled to varying percentages as dividend.

As to Winding Up of Statutory Companies, see HALSBURY, Hailsham Edn., Vol. 5, p. 85, para. 159 ; and for Cases, see DIGEST, Vol. 10, pp. 1193, 1194, Nos. 8466-8483.]

Cases referred to :

(1) *Griffith* v. *Paget* (1877), 5 Ch. D. 894 ; 10 Digest 1030, *7140* ; 46 L.J. Ch. 493.

(2) *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.* (1889), 14 App. Cas. 525 ; 10 Digest 1003, *6965* ; 59 L.J. Ch. 122 ; 61 L.T. 621.

(3) *Re Crichton's Oil Co.*, [1902] 2 Ch. 86 ; 10 Digest 1006, *6980* ; 71 L.J. Ch. 531 ; 86 L.T. 787.

(4) *Bishop* v. *Smyrna & Cassaba Ry. Co.*, [1895] 2 Ch. 265 ; 10 Digest 1005, *6979* ; 64 L.J. Ch. 617 ; 72 L.T. 773.

(5) *Inland Revenue Comrs.* v. *Burrell*, [1924] 2 K.B. 52 ; 28 Digest 108, *665* ; 93 L.J. K.B. 709 ; 131 L.T. 727.

Summons to determine the rights of shareholders in a gas company, which had sold its undertaking and was being wound up, in respect of surplus assets in the liquidator's hands. The facts are set out in the judgment.

C. E. Loseby, for the liquidator, stated the facts.

Maurice Berkeley for the first defendant, a holder of shares of the original capital: The rights of holders of the additional share capital are governed by the gas order. There are indications in the order that the holders of the shares of the additional capital are to have rather less A rights than the holders of shares of the original capital. The surplus assets ought to be divided amongst the shareholders in like proportions. If this view is accepted by the court, no dividend need be paid. If the capital were held to be divisible between the shareholders equally, I should ask the court to say that a dividend ought to be paid out of the B surplus assets to the date of the winding up.

P. J. Sykes for the second defendant, a holder of shares of the additional capital: Where the right to a dividend depends upon the declaration of a dividend, it cannot be obtained in a winding up. There is nothing in this case which precludes the rule of equality of distribution. C There is no contrary indication to show that the capital should be distributed otherwise than equally. The order contains no express provision of any kind dealing with winding up, and the fact that it provides for a limited dividend's being paid on the additional capital cannot exclude the ordinary rule that the capital should be distributed equally D in a winding up. [Counsel referred to *Griffith* v. *Paget* (1), *Birch* v. *Cropper, Re Bridgewater Navigation Co., Ltd.* (2), *Re Crichton's Oil Co.* (3), *Bishop* v. *Smyrna & Cassaba Ry. Co.* (4), *Inland Revenue Comrs.* v. *Burrell* (5).]

E SIMONDS, J.: In this case, the liquidator seeks the opinion of the court in regard to surplus funds in his hands after payment of the debts of the company and after returning to the holders of the share capital the amount paid up on their shares. The company was formed in 1866 to carry on the business of a gas undertaking in the neighbourhood of F Syston and of Thurmaston, in the county of Leicester. The capital was originally £5,000, divided into 5,000 shares of £1 each. That capital was from time to time increased, until, in the year 1902, it had reached a total of £10,000, divided into shares of £1 each. No provision was made by the memorandum or articles with regard to the distribution of surplus G assets in the event of a winding up, nor was there any provision as to dividend, except that the directors could declare a dividend to the members in proportion to their shares. In 1902, an Act was passed, called the Gas and Water Orders Confirmation Act, 1902, by which, amongst other orders, an order was confirmed which empowered the H Syston and Thurmaston Gas, Light and Coke Co., Ltd., to issue additional capital beyond the original amount of £10,000, to an amount not exceeding £18,000, providing, therefore, for the issue of additional capital not exceeding £8,000 in all. The order said that, except as otherwise provided, the undertakers should not make a larger dividend payment than one of 10 per cent. on the original capital and one of 7 per cent. on so much of the additional capital as might be issued as ordinary capital. The order contained no provision with regard to the distribution of surplus assets. There was nothing in the order to distinguish the two classes of capital, except the provision as to the rates of dividends. A maximum dividend and a maximum price were usually provided in the case of gas undertakings. In 1936, the undertaking was sold to the Leicester corporation, and the purchase price, together with certain profits in the hands of the liquidator, representing the proceeds of the carrying on of the undertaking since the last dividend was declared and paid, amounted to the sum of approximately £9,000. The question for me to determine is whether that sum of £9,000, or some part of it, is applicable by way of dividend for the period of the company's trading in respect of which no dividend has been paid, and also, how the sum ought to be distributed amongst the holders of the capital. Since no dividend has been declared, that sum is not to be distributed partly as dividend and partly as capital. Neither the court nor the liquidator can assume the function of declaring a dividend after a company has gone into liquidation. On the point whether the sum available for distribution is to be distributed *pari passu* between the holders of the two classes of capital, it is clear that, as there is only a distinction in regard to dividend, and no further distinction imposed in the memorandum, or in the articles, or in the order sanctioning the issue of further capital, it is impossible to distribute the assets in any way other than *pari passu*. Accordingly, the liquidator will distribute the surplus in his hands *pari passu*, according to the amount paid up on the shares. They are all fully paid. The costs of all parties will come out of the assets, and there will also be a representation order.

Solicitors: *Field, Roscoe & Co.*, agents for *Freer & Co.*, Leicester (for all parties).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

APPENRODT *v.* CENTRAL MIDDLESEX ASSESSMENT COMMITTEE.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Scott, L.JJ.), **February 17, 18, March 23, 1937.**]

Rates and Rating—Licensed premises—Monopoly value—Capital Payment—Rent the hypothetical tenant would pay—Licensing (Consolidation) Act, 1910 (*c.* 24), *s.* 14 (2)—*Rating and Valuation Act,* 1925 (*c.* 90), *s.* 68.

In Apr., 1932, a new justices' on-licence was granted for 5¼ years upon condition that the licensee should pay a monopoly value of £3,000 by instalments of £600. He contended that these payments were one of his normal working expenses and should be taken into consideration in deciding the rent the hypothetical tenant would pay for the premises :—

HELD : such payments ought not to be so taken in consideration.

Per ROMER, L.J. : the instalments were an expense necessary for the accrual to the premises of the incorporeal condition of being licensed premises, and the expense of maintaining it in that condition is one of the expenses to be undertaken by the landlord within the meaning of the Rating and Valuation Act, 1925, s. 68.

Per SCOTT, L.J. : under the statutory provisions the hypothetical tenant had not got to face these payments at all. He is bargaining for a licensed hereditament possessing the monopoly value and that involves the assumption that a justices' and an excise licence have been obtained, and therefore the payment in respect of monopoly value paid. Such payment is not relevant as a factor tending to diminish the value of the premises to the hypothetical tenant.

Decision of the Divisional Court ([1936] 2 All E.R. 304) *affirmed.*

[**EDITORIAL NOTE.** The judgments of ROMER, L.J., and SCOTT, L.J., in this case arrive at the same result by rather different lines of reasoning. LORD WRIGHT, M.R., while agreeing with SCOTT, L.J., expressly says that he does not dissent from the view taken by ROMER, L.J. The result is that in fixing the rent the hypothetical tenant would pay in respect of licensed premises no account need be taken of the payment in respect of monopoly value. The reasons given by the Lords Justices are briefly summarised in the headnote.

AS TO RATING OF LICENSED PREMISES, see HALSBURY, 1st Edn., Vol. 24, Rates, pp. 41, 42, para. 73 ; and FOR CASES, see DIGEST, Vol. 38, pp. 564-567, Nos. 1024-1055.]

Cases referred to :

(1) *Waddle* v. *Sunderland Union,* [1908] 1 K.B. 642 ; 38 Digest 565, *1031* ; 77 L.J. K.B. 509 ; 98 L.T. 260.

(2) *R.* v. *Customs & Excise Comrs.*, [1913] 3 K.B. 483 ; [1914] 2 K.B. 390 ; 30 Digest 20, *128* ; 83 L.J. K.B. 555 ; 110 L.T. 527.

(3) *Inland Revenue Comrs.* v. *Truman, Hanbury, Buxton & Co., Ltd.*, [1913] A.C. 650 ; 39 Digest 236, *112* ; 82 L.J. K.B. 1042 ; 109 L.T. 337.

(4) *R.* v. *Shoreditch Assessment Committee, Ex p. Morgan,* [1910] 2 K.B. 859 ; 38 Digest 564, *1028* ; 80 L.J. K.B. 185 ; 103 L.T. 262.

(5) *Goodchild* v. *St. John, Hackney Trustees* (1858), E.B. & E. 1 ; 38 Digest 528, *742* ; *sub nom. R.* v. *Goodchild,* 27 L.J. M.C. 233 ; 31 L.T. O.S. 9.

(6) *R.* v. *Smith* (1885), 55 L.J. M.C. 49 ; 25 Digest 54, *479* ; 54 L.T. 431.

(7) *Ashby's Cobham Brewery Co., Petitioners, Re The Crown, Cobham, Ashby's Staines Brewery Co., Petitioners, Re The Hand & Spear, Woking,* [1906] 2 K.B. 754 ; 30 Digest 55, *421* ; 75 L.J. K.B. 983 ; 95 L.T. 260.

(8) *Parr* v. *Leigh Union* (1905), 1 Konst. Rat. App. 211; 38 Digest 566, *1044.*
(9) *Cartwright* v. *Sculcoates Union,* [1900] A.C. 150; 38 Digest 564, *1025*; 69 L.J. Q.B. 403; 82 L.T. 157.
(10) *R.* v. *Taylor, R.* v. *Amendt,* [1915] 2 K.B. 593; 30 Digest 35, *272*; 84 L.J. K.B. 1489; 113 L.T. 167.
(11) *Sunderland Overseers* v. *Sunderland Union* (1865), 18 C.B.N.S. 531; 38 Digest 566, *1048*; 34 L.J. M.C. 121; 13 L.T. 239.
(12) *R.* v. *Rhymney Ry. Co.* (1869), L.R. 4 Q.B. 276; 38 Digest 507, *616*; 38 L.J. M.C. 75.

Appeal by the occupier of licensed premises from a decision of the Divisional Court given on May 20, 1936, allowing an appeal from quarter sessions. The facts are fully stated in the report of the hearing before the Divisional Court in [1936] 2 All E.R. 304.

A. S. Comyns Carr, K.C., and *Harold Williams* for the appellant licensee.

F. J. Tucker, K.C., and *Michael E. Rowe* for the respondent committee.

Comyns Carr, K.C.: The divisional court were misled in thinking that their decision that this was a capital payment concluded the matter. From the point of view of the justices' licence, the question whether the payment is a capital one or not is immaterial. That licence does not of itself authorise the holder to sell intoxicating liquor, but only to hold an excise licence. To sell liquor, he must hold both. The licence is granted to an occupier, who may or may not be the owner. The payment of this monopoly value, even if it be a capital sum, is only a condition of the holding of the licence. No proceedings could be taken against the appellant to recover an unpaid instalment; the only consequence would be that his licence would lapse, because he would not obtain his excise licence, without which his justices' licence would be useless—indeed, would be forfeited. [Counsel referred to the dissenting judgment of Avory, J., in *R.* v. *Customs & Excise Comrs.* (2).] The statute provides that the tenant may deduct the monopoly value payment from his rent. The payment cannot therefore be a charge which he would take into consideration before he paid his rent, because he would then be deducting it twice over. *R.* v. *Amendt* (10) and *R.* v. *Taylor* (10) merely apply the rule that the monopoly value must be a lump sum fixed at the time of granting the licence. The assessment committee must not take into consideration special contracts in leases or otherwise: *Sunderland Overseers* v. *Sunderland Union* (11); *R.* v. *Rhymney Ry. Co.* (12).

Tucker, K.C.: This is a payment of a capital sum. In assessing premises on the profits basis, it would have been wrong for quarter sessions to give any weight to a payment of a capital nature which the tenant sought to include in his expenses. There is, in the case stated, a finding of fact that monopoly value is "almost invariably" paid by the landlord where the occupier of the licensed premises is not also the

owner. In view of that finding, quarter sessions were wrong in assuming that a hypothetical tenant, who, in fact, would not have to make such a payment, could be influenced by it in arriving at the rent which he would have to pay. *R.* v. *Shoreditch Assessment Committee* (4)—the
A "Crown and Shuttle" case—was decided under the Valuation (Metropolis) Act, 1869, s. 4. Under that Act, in order to arrive at rateable value the tenant deducts those other expenses which were due to be payable by the landlord for the purposes of gross value and are now deductable in arriving at the rateable value. Under the Act of 1925, these are
B expenses under the heading of repairs, and so forth, and the other expenses remain always, for the purposes of gross value, payable by the landlord, and there is a statutory scale whereby gross is converted into rateable value. In that case, all that the ratepayer had to show, in order to obtain a new provisional list under sect. 4 of the Act of 1869,
C was that the hereditament had been reduced in value. It was immaterial whether the gross value or the rateable value had been reduced. The tenant had to show that, through the increase of the licence duty payable by him under the Finance Act, the result would have been to reduce either the rateable or the gross value. It was
D therefore immaterial whether the payment of the excise licence was one which fell to be considered for the purposes of arriving at gross or rateable value. The *Shoreditch* case (4) and the *Sunderland Overseers* case (1) both dealt with payment of the compensation levy and excise duty: recurrent annual charges. Those decisions are of little assistance
E in dealing with a case involving monopoly value, which is a capital payment although it may be spread over a number of years. If this is not a capital sum which must be excluded from computation between landlord and tenant, then, if sect. 68 is taken as comprehensive, and as covering all payments between landlord and tenant, and if the payment
F is considered to come under one or the other of these branches, then it is in terms one of the other expenses necessary to maintain the hereditament in a state necessary to command the rent, and must be deemed to be payable by the landlord, whether it is in fact paid by him or not.

G *Comyns Carr, K.C.*, in reply.

Lord Wright, M.R.: In my judgment, this appeal fails, and should be dismissed. I have read, in addition to the judgments of the Divisional Court, those which have been prepared and are about to be
H delivered by Romer and Scott, L.JJ. In these judgments the facts of the case are set out, and I need not recapitulate them. I desire merely to state here, as briefly as I can, why I concur in the conclusion embodied in these judgments upon the difficult question involved in this case.

The question is put in the special case as one depending on the proper deductions to be made from the gross value as defined in the Rating and Valuation Act, 1925, s. 68. On that basis I should agree with the reasoning of ROMER, L.J., which follows the construction of the section adopted by the majority of this court in *Waddle* v. *Sunderland Union* (1), and accordingly treats the payments under the Licensing (Consolidation) Act, 1910, s. 14 (2), as payments which, under the hypothetical tenancy, fall on the landlord, and do not affect the rent which the tenant has to pay. I may here remark that in *Waddle's* case (1) the decision might have been reached by observing that, by sect. 21 (3) of the Act, the compensation charges under sect. 21 fall eventually on the landlord, because, though the tenant has to pay them, together with, and as part of, the excise licence duties, the tenant is entitled to deduct them from the rent. This would in itself constitute an additional, or even sufficient, justification for the conclusion of the Court of Appeal in *Waddle's* case (1). There is no express provision in sect. 14 defining whether the tenant or the landlord is in the first instance to make the payments under that section, or which party has eventually to bear them. As a matter of policy, it would seem at least as fitting that they should fall on the landlord as that the compensation charges should so fall. But there is another and different way of looking at the matter, which supports the decision of the Divisional Court. The grant of the justices' licence in this case is for a term of 5¼ years, and is upon the condition of the payment of a monopoly value of £3,000. The character of such a payment under sect. 14 of the Act has been discussed by this court in *R.* v. *Customs & Excise Comrs.* (2). The justices have, in the words of LORD COZENS-HARDY, M.R., at p. 397, to fix:

> a lump sum, to be ascertained once for all, though when so ascertained it is competent to the justices in their discretion to say how that monopoly value is to be secured to the public, and whether it is to be paid in one sum or by instalments.

That latter course was, in the present case, adopted by the justices, who made the £3,000 payable in five annual instalments of £600 each. But the sum fixed is, in the apt words of LUSH, J., in the Divisional Court in the same case, at p. 497:

> the capital sum which represents the monopoly value. I should have thought that, when one speaks of the value which premises either do now bear or will bear when licensed, one refers to the sum which they would realise if converted into money, the market value, the sum which they are worth. One does not naturally think of that in the terms of rent, but in the terms of purchase money. Sect. 20 and sect. 14 (1) (*b*) point, I think, to the same conclusion. The Lord Chancellor expressed the opinion that the section referred to capital value in the case I have cited.

LUSH, J., was there referring to *Inland Revenue Comrs.* v. *Truman, Hanbury, Buxton & Co., Ltd.* (3), at p. 658.

The materiality of this view, which indeed is only repeating the clear words of sect. 14 (1), is that the capital payment is based on the value of the premises, and has directly nothing to do with annual value or with rent. The payment, in a case like the present, where the grant is for a term under sect. 14 (2), is peculiar, in that, though it concerns the market value of the hereditament, it is limited to the number of years (not exceeding seven) for which the new on-licence is granted ; a further similar charge for a further period of monopoly value may be imposed, it seems, at the expiration of the term. But the payment is to be estimated as representing the difference for the relevant purpose between the market value of the premises as licensed and as unlicensed. Now, the gross value on which the hypothetical tenant's rent is ascertained is, in case of licensed premises, their gross value as licensed, and for use as licensed premises. It is true that the annual charge of the excise licence is payable by the tenant, and is to be taken into account as a deduction against the gross value in ascertaining the rateable value : *R.* v. *Shoreditch Assessment Committee, Ex p. Morgan* (4). That is an annual charge which the hypothetical tenant, who is notionally a tenant from year to year, may properly charge as part of his annual expenses ; it is the payment which he has to make for the privilege of selling intoxicating liquor ; but a payment imposed specifically, as representing the increased value of the premises when licensed, is something different. It is the precondition of the grant of the excise licence, because it is only to the holder of a justices' licence that an excise licence will be granted. The justices' licence is essential to give the premises the status necessary to enable a licensed victualler's business to be carried on. The rent paid is for the occupation of licensed premises ; the landlord has to provide the premises for the tenant ; that is, he has to provide the ground, the building, landlord's fixtures, and so forth ; all these enter into the value on which rent is payable ; so also do intangible elements of value, such as those arising from favourable situation, goodwill (other than what is merely personal), and, along with these, the monopoly value arising from the justices' licence. These elements are all constituents on which the gross value is ascertained under the notional tenancy from year to year of the statutory hypothetical tenant ; that is the starting point of capital value, as distinguished from annual expenses, either of landlord or of tenant. It may seem strange that the Act does not specify who is to make the payments under sect. 14. The tenant must hold the justices' licence before he can get his excise licence. The Act did not concern itself with the original or eventual incidence of the charge required to be made to secure the justices' licence, as it did in the case of the compensation payments. The legislature was, it seems, content to secure that the monopoly value payments were a condition of the existence of the excise licence, and was content to leave the incidence of these payments to depend on the exigencies of the position. What has been the general course in practice appears in the special case, which says that, where the occupier is not the owner, the payments in respect of monopoly value are almost invariably in fact paid to the commissioners of inland revenue by the landlord. This course seems to me to correspond to the realities of the position as I regard it. The monopoly value is an element in the value on which rent is paid. In the rent, the hypothetical landlord gets the benefit of that value. It is reasonable that he should pay the cost of this monopoly value just as much as that of any other element of value in the hereditament which he lets. The hypothetical tenant who enjoys from year to year the monopoly value in the sense of earning profits, will pay in the rent what corresponds to the annual value of that monopoly value. His occupation will be valuable accordingly, and that value will be included in the rateable value, the rate being a rate on beneficial enjoyment from occupation.

This course of reasoning agrees in substance with that of Lord Hewart, L.C.J., and that of Scott, L.J. It is an alternative to the reasoning by which Romer, L.J., arrives at the same conclusion. I prefer the line of reasoning which I have just sought briefly to develop, but I do not dissent from that preferred by Romer, L.J., if that alternative is adopted, as I think it should be, if the other is rejected. Whichever alternative is taken, the result is that the appeal fails, and must be dismissed with costs.

Romer, L.J. : In the month of Apr., 1932, the appellant, Hermann Appenrodt, applied for a new justices' on-licence in respect of the Brent Bridge Hotel, at Hendon, in the county of Middlesex, of which he is the owner and occupier. In due course the licensing justices granted the licence pursuant to the Licensing (Consolidation) Act, 1910, s. 14 (2), for a term of 5¼ years, and, pursuant to sect. 14 (1), attached to the licence a condition that the appellant should pay as the monopoly value of the hereditament a sum of £3,000 by five annual instalments of £600 each. The licence in the usual way authorised the appellant to hold an excise licence, and it required the first instalment of the monopoly value to be paid on taking out the first excise licence in pursuance of such authority, and the remaining four instalments to be paid on Oct. 1 in each of the four years next following. It is provided by sect. 14 (4) that a new justices' on-licence granted for a term under the section may be forfeited as therein mentioned if any condition imposed under the section is not complied with. On May 2, 1932, the licence was duly confirmed by the confirming authority.

By the Rating and Valuation Act, 1925, s. 68, the "gross value" of a hereditament for rating purposes is defined as meaning :

> the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

The question to be determined upon this appeal is whether the annual instalments in respect of the monopoly value of the hotel should be taken into account in calculating the rent that a tenant such as is mentioned in the section last referred to would pay for the hotel. If the tenant would have to pay the instalment, it is plain that this question must be answered in the affirmative. Let me suppose that there are two licensed hereditaments, precisely the same both as to earning capacity and otherwise, but that, in one case, the sum fixed as the monopoly value on granting the new justices' licence has been paid in one lump sum and, in the other, has to be paid by annual instalments. If, in the latter case, the instalments have to be paid by the tenant, it is obvious that he will not be prepared to pay the same rent as is paid by the tenant of the other premises. It was indeed argued on behalf of the respondent committee that, inasmuch as, from an accountant's point of view, the instalment of the monopoly value would be a payment on capital account, its payment would not affect in any way the trading profits earned by the tenant. But this consideration would be sorry comfort for the tenant, whatever satisfaction it might offer to an accountant. Most assuredly it would not be an inducement to the tenant to pay as high a rent for the premises as he would have been willing to pay if he were free from liability for the instalments.

If, on the other hand, the tenant can throw the liability for the instalments on the landlord, it is equally plain that the rent which a tenant may reasonably be expected to pay for the hereditament will not be affected by the fact that the instalments have to be paid. The question therefore resolves itself into this. On whom will the liability ultimately fall, on the landlord or on the tenant ? Now, we are told in the special case that, in practice, the liability is " almost invariably " undertaken by the landlord. This I can well believe. The landlord would find it difficult to get a tenant on any other terms. But, for the purpose of ascertaining the gross value of the premises, the existence of a tenant willing to take them from year to year, upon the terms stated in the Rating and Valuation Act, 1925, s. 68, has to be assumed. Those terms would not impose upon the tenant any contractual obligation to pay the instalments, for assuredly they form no part of the " usual tenant's rates and taxes." But, unless the terms impose upon the landlord a contractual obligation to pay them, the tenant would in fact have to pay them, or would at any rate enter upon his tenancy knowing that there was a strong probability that he would have to pay them. For one must assume that the landlord has refused to enter into an undertaking to pay them himself, and the tenant knows that, if they are not paid, the justices' licence will almost certainly be revoked, and that he will, in consequence, be unable to obtain an excise licence.

In my opinion, however, the terms of the hypothetical tenancy do throw upon the landlord contractual obligation to pay the instalments. By those terms he undertakes to bear, in addition to the costs :

> of repairs and insurance the other expenses (if any) necessary to maintain the hereditament in a state to command that rent.

A

In the present case, the hereditament in question consists of licensed premises, and, if they cease to be licensed premises, they will no longer be in a state to command the rent that a tenant would pay for such premises. It was contended on behalf of the appellant that the *ejusdem generis* rule should be applied, and that the expression "the other B expenses if any" must be treated as including only expenses of the same genus as the expense of repairs and insurance. But I can see no reason for applying the *ejusdem generis* rule in such a case as this, even if I knew what is the genus of which repairs and insurance are species. I am not prepared to exclude from the "other expenses," which the C landlord in the hypothetical tenancy agreement undertakes to bear, the instalments now in question. I am confirmed in this view by the judgment of Vaughan Williams, L.J., in the case of *Waddle* v. *Sunderland Union* (1), at p. 647, a judgment with which Farwell, L.J., expressed his agreement. That was a case arising under the Parochial Assessments D Act, 1836, s. 1, which provided that the poor rate should be made upon an estimate of the net annual value of the particular hereditament to be rated, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes and all tithe commutation rentcharge, if any, and after deducting E therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain the hereditament in a state to command such rent. By the Licensing Act, 1904, s. 3 (1), it was made obligatory upon quarter sessions in each year, unless they certified to the Secretary of State that it was unnecessary to do so in F any year, to impose, in respect of all existing on-licenses renewed, a charge as therein specified ; and it was provided by sect. 3 (2) that such charge should be levied and paid together with and as part of the duties on the corresponding excise licence. The question that had to be decided in the case was whether, in estimating the rateable value of licensed G premises, such charge could be deducted as being an expense necessary to maintain the premises in a state to command the rent thereof within the Parochial Assessments Act, 1836, s. 1.

It was held by the Court of Appeal that the charge could not be deducted, but, so far as Vaughan Williams and Farwell, L.JJ., were H concerned, solely because they regarded the charge as being part of the duty payable on the excise licence. Had they been able to treat the payment of the charge as being a condition necessary to be fulfilled before the justices' licence became operative, their decision would have been the other way. VAUGHAN WILLIAMS, L.J., after reading the Parochial Assessments Act, 1836, s. 1, said this, at pp. 649 and 650:

> I cannot myself doubt that, notwithstanding the use of the words defining the deductions from the rent at which the rateable hereditament might reasonably be expected to let from year to year, the words "other expenses," etc., may apply to expenses not *ejusdem generis* with "repairs and insurance," and that the words "necessary to maintain them in a state to command such rent" may include expenses which have no reference to maintenance in a physical condition to command the rent. Indeed, it is admitted that these words do so extend to analogous expenses in the case where the rateable hereditament is incorporeal: see *R.* v. *Goodchild* (5); *R.* v. *Smith* (6); and I myself have no doubt that, wherever the estimate of the net annual value of a rateable hereditament is based upon a condition not corporeal appertaining to the hereditament, such as a licence, or a canteen grant, one must, in making the estimate, deduct expenses necessary for the accrual of the condition. The favourable condition, if it be such that it is to be taken into consideration in the estimate of the net rent, must be taken into consideration subject to a deduction of the cost of the accrual of that condition: and, if I had been of opinion that the increased value consequent upon the grant of the justices' licence did not become operative until the grant of the excise licence, and that the payment of the charge in question was by the Licensing Act, 1904, s. 3, a condition precedent to the accrual of the value consequent upon the grant of the licence, I should have given judgment for the appellant.

With those observations I desire to express my respectful concurrence. Applying them to the present case, the instalments are an expense necessary for the accrual to the hotel of the incorporeal condition of being licensed premises. That favourable condition of the hotel has to be taken into consideration in the estimate of the rent which it may reasonably be expected to command, and the expense of maintaining it in that condition is one of the expenses to be undertaken by the landlord within the meaning of the Rating and Valuation Act, 1925, s. 68. The Divisional Court came to the conclusion that the liability for the instalments was not one that would fall upon the hypothetical tenant, and could not, therefore, be taken into consideration in estimating what rent he might reasonably be expected to pay for the hotel. With that conclusion, though for somewhat different reasons, I agree. In my opinion, the appeal fails, and should be dismissed.

SCOTT, L.J. [read by ROMER, L.J.]: The appeal is by the occupier, who objects that the figure contained in the valuation list for the gross value of the Brent Bridge Hotel, Hendon, of which he is both owner and occupier, is excessive. The respondent committee is the assessment committee. The hotel is fully licensed, a new justices' licence having been granted to the appellant in 1932 under the Licensing (Consolidation) Act, 1910, s. 14 (2), for a term of 5½ years, the monopoly value to be paid being fixed at the sum of £3,000, payable in five instalments of £600 each.

In the year 1935, the hotel then standing in the valuation list at £2,600 gross value and £2,163 rateable, the appellant made to the respondent committee a "proposal" under the Rating and Valuation Act, 1925, s. 37, for reduction, on the ground that the liability to the above payments made the figures in the valuation list excessive. The respondent committee made a small reduction, to £2,560 gross and £2,130, but refused to reduce further. The appellant then appealed to quarter sessions, and in Jan., 1936, the statutory committee of quarter sessions went into the matter afresh, and stated a case for the High Court. A In this it said that it reduced the figure for gross value to £2,278, if the payment for monopoly value ought as a matter of law to be ignored, but if, as it thought itself, it ought to be taken into account, then the figures should be £1,860 gross and £1,547 rateable. The sessions committee does not explain its reasoning very clearly or quite consistently. B In para. 3, it describes the appellant's contention as being that:

> the payment of the said £600 per annum in respect of monopoly value was the transfer to the public of the additional value added to the hereditament by the licence and would therefore be the first charge to be considered in any negotiation as to the rent. It should therefore be treated as one of the normal working expenses of the tenant. C

In para. 4, it records the respondent committee's argument in the following terms:

> that as between the hypothetical landlord and tenant the premises must be deemed to be licensed and any payments for monopoly value or otherwise to obtain such licence must be deemed already to have been made, or alternatively that the said D payment ought not to be included as a working expense in that it was a capital sum, or an instalment of a capital sum, and whether regarded as payable by the landlord or the tenant ought not to be taken into account in estimating the rental value of the said hereditament.

In para. 5, it in effect finds an agreement, between the parties before it, that, if the £600 is to be regarded as a working expense of the tenant's E business, the consequential diminution in the figure for the hypothetical rent will be £418. In para. 6, the sessions committee states its reasons and conclusions on the relevant issue thus:

> . . . we were further of opinion that the said payment ought to be taken into account and that the said gross value ought to be reduced accordingly to £1,860 on the grounds that, although the said payment was a capital sum, in this case it F has to be paid by the tenant in annual instalments and therefore was in our opinion an expense necessary to maintain the hereditament in a state to command the rent. We therefore allowed the said appeal and reduced the gross value of the said hereditament to £1,860 and the rateable value thereof to £1,547, but we made no order as to costs.

The above statements of facts and reasons are not as clear as they G might have been, but some further light is thrown upon them by the form of the question submitted in para. 8:

> The question for the opinion of the court is whether we were right as a matter of law in holding that the said annual payments in respect of monopoly value should be taken into account as diminishing the rent a hypothetical tenant would otherwise pay for the said hereditament. If the court answers such questions in the H affirmative our decision is to stand. If not, the court is requested to vary our order by increasing the gross value determined by us to £2,278 and the rateable value to £1,895.

In spite, however, of slight obscurity and confusion in expression, the substance of the special case is plain enough. The appellant's claim for a reduced gross value is based on the argument that the condition in the licence requiring payment for monopoly value made the licensed trade of the hotel so much the less profitable—in short, that what the justices gave with one hand they took away with the other, in order to A transfer it to the public in the form of cash ; that, therefore, in considering what a hypothetical tenant, wanting the premises in order to conduct a licensed victualler's business there, would consent to pay by way of rent, it would, as a matter of business or economics, be absurd not to recognise that his offer for the tenancy would be affected by the knowB ledge that, directly or indirectly, the £600 a year would have to come out of the trade profits. This is what the justices mean by calling the liability the first charge to be considered "in any negotiation as to the rent." So interpreted, the sessions committee accepts the appellant's claim as sound in fact and in law, subject to the legal question which it C submits to the court. Left to itself, it would plainly have reduced the gross value by £418. Whether this conclusion is right or not is the question in the appeal, and the question is in many aspects a difficult one, although I have no doubt that the conclusion reached by the Divisional Court was right.

D There is only one other finding to which I need call attention : it is in para. 2 (4) :

> In cases where the occupier of the licensed premises is not also the owner, the payments in respect of monopoly value are almost invariably in fact paid to the commissioners of inland revenue by the landlord.

E As nearly all licensed houses are to-day owned by brewers, and either let to tied tenants or occupied by the brewer and managed by the brewer's own servant, it is inevitable that the fact should be as stated in the subparagraph, but, in my view, it has no legal bearing on the questions we have to decide.

F We may assume, and I think were told by counsel, that the figure for the hypothetical rent had, in the present case, as in practically all cases of public houses to-day, been assessed by first estimating the probable trade which it was likely would be done at the Brent Bridge Hotel and then making a further estimate of the proportion of that G figure which would probably be paid as rent for the particular house. This method of valuing public-house property is to-day recognised as the only practicable way of getting at values, whether the objective be capital value or annual value. It is lucidly explained by KENNEDY, J., in *Ashby's Cobham Brewery Co., Petitioners, Re The Crown, Cobham* (7), H at pp. 761-764, where capital value was the objective, the valuation being required for the purpose of assessing the capital amount payable by way of compensation for the refusal of an old licence under the Licensing Act, 1904, s. 2 (now sect. 20 of the Act of 1910). That judgment has always been recognised as a sound exposition of the principles applicable to public house valuation. The cases of *Parr* v. *Leigh Union* (8) and *Cartwright* v. *Sculcoates Union* (9) are instances where the same method was applied to the ascertainment of annual value for rating purposes, and, in *Inland Revenue Comrs.* v. *Truman, Hanbury, Buxton & Co., Ltd.* (3), the Court of Appeal held, affirming HAMILTON, J., that the annual licence value must be ascertained, for the purpose of the excise duty imposed by the Finance (1909-10) Act, 1910, ss. 43, 44, Sched. 1, in accordance with the principles laid down in *Ashby's Cobham Brewery Co.* case (7). As long as " the basis " of value (the phrase used in sect. 44 (2)) is the same, there is no difficulty for a practical valuer in converting annual value into capital value, or *vice versa.* The vital question is to ascertain what are the component elements of value. A capital liability can always be brought into annual accounts by the device of interest and sinking fund.

We may accordingly picture the valuers on the two sides before the sessions, giving evidence, first, as to what they thought, on the facts in evidence, was a fair figure for the profits of the hotel, and then as to the percentage of that figure which might properly be considered a probable rent for the tenant to pay ; so that, if they first assessed profits at, say, £x, and then estimated the proportion which the hypothetical tenant would want for himself and family and savings at 30 per cent., they would reach the conclusion that the hypothetical tenant would be willing to close negotiations with the hypothetical landlord at £x minus 30 per cent., and, on this ratio of 100 : 70 between profits and rent, it would seem, from para. 5 of the case, as if the two sides were in agreement, as a reduction of £418 in the hypothetical rent, as a corollary of a reduction of £600 in the profits, is a reduction in about that ratio. The quarter sessions have, I think, in effect, expressed the view, subject to the question of law, that the payment of the £600 at the beginning of each of the five years would necessarily come out of the licence-holder's profits of the year, and they have concluded, accordingly, that that prospect would reduce the rent the hypothetical tenant would pay by £418, or, say, 70 per cent. of the reduction in profits. The Divisional Court have, however, decided that the amount of rent which the hypothetical tenant would be willing to pay is not in law affected by the payments of monopoly value. The main reason for the decision, as explained by LORD HEWART, L.C.J., was that a payment to be made for monopoly value is, according to the decision of the Divisional Court, affirmed by this court, in *R.* v. *Customs & Excise Comrs., Ex p. Morgan* (2), and followed by LORD READING, L.C.J., in *R.* v. *Taylor, R.* v. *Amendt* (10), a capital payment, whether payable in one sum or in several instalments. LORD HEWART, L.C.J., concluded his judgment thus ([1936] 2 K.B., at pp. 455, 456) :

> But the one thing that is clear about it is that it is a part of capital value, and in those circumstances it seems to me that it is impossible to hold that the sum

should be taken into account by way of deduction when the question is asked: What would the hypothetical tenant be prepared to pay by way of rent? I think, therefore, that the question which is put to us should be answered in the sense that the court below came to an erroneous conclusion in point of law, and that the order of that court should be varied in the manner indicated in the case—namely, by increasing the gross value determined by that court to £2,278 and the rateable A value to £1,895.

HUMPHREYS, J., expressed his agreement with LORD HEWART, L.C.J., and explained his opinion on the point by saying, first, that he found it very difficult to bring monopoly value into the language of the definition clause, and, again, at p. 458, that the monopoly payment: B

> made by the person who obtained this licence, which is a payment quite outside and not in the contemplation of the definition of "gross value."

DU PARCQ, J., took the same view as the other two learned judges about the capital nature of the monopoly payments, and the consequential C legal necessity of excluding them from an annual assessment, but he added an additional reason of his own, to the effect that, the hypothetical tenancy being from year to year, and the monopoly value being a capital item, the landlord would in fact pay it, and then put up the rent to the tenant in consequence.

D The view of the Divisional Court thus was that "the monopoly value" is, in its nature, a capital asset, that a lump sum payment for it is a capital item, and that the subdivision of such a payment into instalments, to be paid year by year during the period of the licence, does not convert them into true annual liabilities, or prevent their still being instalments E of a capital item. Taking these views, they drew the conclusion that the capital nature of the payments necessarily prevented their being taken into consideration in the ascertainment of the hypothetical rent. I agree that instalments of a lump sum payable for monopoly value under the Licensing (Consolidation) Act, 1910, s. 14, are not annual F payments in the accountancy sense, although, for reasons which I will give in a moment, I do not agree that either the instalments or the lump sum payable under sect. 14 (2) are necessarily capital payments. But I cannot agree that the accountancy test of capital or annual of itself affords a complete solution of the problem which we have to solve.

G Apart from sect. 14, I do not doubt that the monopoly value of the licence may often properly be regarded as a capital asset—as, for instance, on a valuation for estate duty under the Finance Act, 1894, s. 7; but I do not think that payments in respect of monopoly value made to the excise pursuant to conditions attached to the grant of a period licence H under the Licensing (Consolidation) Act, 1910, s. 14 (2), are necessarily capital payments in the true sense. That subsection differs materially from sect. 14 (1). Under sect. 14 (1), a new licence is granted for a year. At the end of the year it is no longer a new licence and application must be made for its renewal as an old licence under the provisions of sect. 16.

Consequently the monopoly payment to be exacted on its first grant as a new licence must cover the whole monopoly value. Once that payment has been made, the condition of the original licence is performed, and no further monopoly payments can be exacted when the licence comes up for renewal. A

On the question whether the lump sum payment under subsect. (1) is necessarily and always a capital payment, we need express no opinion in the present case ; and even in the case of *R.* v. *Shoreditch Assessment Committee, Ex p. Morgan* (4) I do not think that the members of the Court of Appeal used the epithet " capital " in their judgments, although B
Lord Reading, L.C.J., in 1915, did so in *Taylor's* case (10).

But, when a licence is granted for a term under subsect. (2), the position is radically different. In para. (*a*) of that subsection it is expressly provided that, on the expiration of the period, there will be no right of renewal, but, on the contrary, that the application for re-grant C
shall be treated as an application for the grant of a new licence, thus again bringing into operation the whole of the machinery of the section for exacting monopoly payment. This plan was, I presume, adopted in order to give the justices an opportunity of finding out by experience of trading results during the period what the real value of the monopoly D
is, and to enable them to adjust the ultimate total payment to the known result. As they have an unfettered discretion as to how they secure payment of the monopoly value during the period, I can see nothing to prevent their providing in each year for payment of an amount which they estimate will be the equivalent of the annual value of the monopoly E
in that year, if they so choose. But, whether they make it a lump sum for the period, payable once for all, or by instalments, or an annual payment proper at the beginning of each year, seems to me immaterial. It shows, at any rate, that a payment under subsect. (2) is not necessarily a true capital payment. F

There was a further point discussed in the judgments below, namely, the question of whether the five annual payments fell within the actual wording of either of the two categories of payments expressly mentioned in the definition, one set payable by the tenant, the other by the landlord. I agree in the conclusion at which they arrived, that the monopoly payments G
do not fall within either set of words. The monopoly payment is obviously not a " usual tenant's rate or tax ; " and I do not think it is an expense of the kind intended to be covered by the words referring to the landlord's undertakings. If I am not precluded by authority from expressing it, my own view is that the words " other expenses " H
cannot be read without regard to the presence of the two words " repairs " and " insurance " which precede them. The *ejusdem generis* rule is a particular application of the maxim of interpretation *noscitur a sociis.* A word used in one context may bear a meaning different from that which

it will bear in another, and I do not think the word " expenses " following those two words has so wide a meaning as if they had been omitted. The application of the *ejusdem generis* rule is in truth a matter of degree. I think this is what Kennedy, L.J., was in effect saying in the case of A *Waddle* (1), at p. 652, and I read the observation as showing some disagreement with the more absolute view expressed by Vaughan Williams, L.J., and Farwell, L.J., at pp. 649, 650. But even if the *ejusdem generis* rule be wholly excluded, as the two latter Lords Justices held (and it may be that their view is binding upon this court), I still B regard the monopoly payments as a kind of payment different from one " necessary to maintain the hereditament in a state to command the rent." *Waddle's* case (1) was not on the same point as the present appeal. It turned on a question of rateable value only, that is to say, on deductions from gross value for the purpose of arriving at rateable value. It C is also relevant to the present question to note the emphasis which Kennedy, L.J., in *Waddle* (1), laid on the fact that the compensation levy was imposed as a personal liability upon the holder of the licence: see Licensing Act, 1904, s. 3 (2), now sect. 21 (2) of the 1910 Act. So, here, I think that the payment of monopoly value to the excise com- D missioners, whether it is or is not made a debt from the licence holder to the Crown, is a condition of the personal licence granted by the justices to the licensee to carry on the business of a licensed victualler at the named premises, and does not affect " the state of the hereditament." There is a further point also. The word " maintain " is clearly not appro- E priate to an initial payment of the whole monopoly value made upon a grant of a new licence for a year under sect. 14 (1). That payment is made, once and for all, not for maintaining the licence, but in order to bring it into operation. Neither has the payment any recurrent aspect, such as is predicated by the word " maintain," and as characterises the F two objects of payment mentioned in the definition of gross value, namely, insurance premiums and repairs. And it must not be forgotten that, under the Parochial Assessments Act, 1836, the very words contained in the present definition of gross value, for describing the burden which it must be assumed the landlord will bear, were the measure of deductions G from gross value which produced " net annual value "—the former name for what sect. 22 of the present Act calls " rateable value." The language of the 1836 Act was this:

> The rent at which the hereditament might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation H rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent.

The words " probable average annual cost of " in the above provision of the 1836 Act, which for ninety years afforded the criterion of net annual value, in my opinion support the conclusion that we can get no help from the words relating to the landlord's supposed undertakings in the present definition of gross value.

There was one other aspect discussed with which I must deal shortly, in view of certain passages in the judgments of my two colleagues. It was argued for the respondent committee that the payments, whether a capital payment or not, affected the landlord as owner of the property, but not the tenant, as occupier of the premises and holder of the licence that, both in business and in law, it must be assumed that the landlord would make the payment, and that, accordingly, the hypothetical tenant could not say that it diminished his profits or affected his rent. Whether this argument is legally sound or not must depend primarily on whether the relevant statutes put the obligation on the landlord or the tenant, or on neither. I have considered the enactments which are or might be relevant, beginning with the Licensing Act, 1910, ss. 14, 20, 21, and including the Finance (1909-10) Act, 1910, ss. 43, 44, which deals with licence duty, also the Finance Act, 1911, ss. 6, 7, the Finance Act, 1924, s. 12 (1) (*b*), which provides that the annual value for calculation of licence duty shall be ascertained in the same way as gross value for rating purposes, and the Finance Act, 1934, s. 14, which enables the commissioners of customs and excise to reduce an assessment of annual value, and, in the event of over-payment, to refund the over-paid amount. It does not say to whom the refund is to be made, but presumably to the licence holder who paid the duty. This last provision is on similar lines to the provision in the Finance (1909-10) Act, 1910, s. 47, which authorises the commissioners of customs and excise to reduce and give credit in respect of either annual or capital payments of monopoly value, where the increase of excise duty under that Act caused a decrease in the real monopoly value.

The general scheme of these various provisions seems to support the view that in sect. 14 of the Licensing Act an obligation is impliedly imposed on the licence holder to pay the monopoly money. There is, however, one provision in the Licensing Act, 1910, which points the other way. Sect. 21 of that Act constitutes the compensation fund for old licences, and empowers the compensation authority to impose a levy in respect of all old on-licences at certain rates. Sect. 21 (2) says that these charges are to be "levied and paid together with and as part of the duties on the corresponding excise licence" (the provision to which Kennedy, L.J., referred in *Waddle's* case (1)). In sect. 14 there is no equivalent provision in respect of monopoly payments. The contrast is noteworthy. Possibly Parliament thought that the licensee's inability to carry on his business without his excise licence, and the impossibility of his getting that licence without paying the monopoly money at the same time as he pays his excise duty, are sufficient sanction to ensure payment, and therefore that it was not necessary to create any direct pecuniary obligation.

But, in my view, it is not necessary to decide which construction of the section is right. The fact that the excise licence will not be forth-
A coming unless the licensee actually hands the monopoly money with the excise duty to the collector is enough to create a business necessity for the licence holder himself to make the payment; and that prospect is one which a free tenant (and the hypothetical tenant is a free tenant) could not help having in mind when bargaining for a tenancy of a newly
B licensed house in respect of which no monopoly payment had yet been made to the excise, if that is the proper moment at which to investigate the hypothetical tenant's state of mind; for, in my opinion, whether it is the proper moment or not is the one and only question on which this appeal really depends. In one view of that moment, the mere fact that
C the monopoly payment may be a lump sum payment equal to the whole value of the licence (as under sect. 20 in the case of an old licence not renewed) does not prevent its being an element which must affect the hypothetical tenant's profit and loss account, and therefore his rental offer based on his estimated profit. If the moment of time at which the
D definition of gross value requires the tenant's rental offer to be ascertained is when the payment of monopoly value is still a liability, still prospective and not a *fait accompli*, he will perforce take it into his reckoning, and reduce his rental offer, and at that decisive moment it will make no difference except of amount whether the liability be a capital or an
E annual item. No lump sum payment which is not truly an annual item can, of course, figure as such in the hypothetical tenant's supposed profit and loss account; but that does not mean that, to a hypothetical tenant, bargaining for the tenancy of a house, in respect of which a new justices' licence is about to be granted under the Licensing Act, 1910, s. 14, such
F a lump sum payment would be irrelevant. He would inevitably take the commonsense view that the goodwill of the trade when he got the place would be worth so much less to him if he had to pay, for example, £3,000, than if he had to pay nothing; he would be forced to take it into consideration, and do that by setting against the estimated profits an
G annual charge representing interest and sinking fund on the lump sum. It must be presumed therefore, in the case I have supposed, that the hypothetical tenant, viewing the premises at the outset, would act like an ordinary business man, and debit his profits, not with the lump sum, or even an instalment of it, but with a proper annual item to represent
H the annual burden of the whole lump sum.

It follows, therefore, that, if the psychological moment when the hypothetical tenant's mind would be affected so as to cause a reduction in his rental offer is also the proper legal moment to inquire, it does not matter whether the prospective payment is capital or annual, or something *sui generis* and between the two; whatever it be, it would tend to reduce the assessment, the only question open being one of amount.

Thus the critical question on which the appeal depends is, what is the moment of assessment contemplated in the definition? The rival views may be stated as contentions of the two parties to the appeal.

The appellant's contention: "The business view should be taken; no sane man taking the tenancy would ignore the capital liability. The hypothetical tenant would certainly give less rent if he had to face such a charge on his profits."

The respondent committee's answer: "Your hypothesis does not fit in with the statutory position. The hypothetical tenant has not got to face the charge at all. So far as he is concerned, it is past history. He is bargaining in the market for a licensed, not an unlicensed, hereditament, for a hereditament possessing monopoly value because it is earning monopoly profits, and that involves the assumption that not only the justices' licence, but also the excise licence has already been granted, and therefore the payment required by the former duly made, in order to comply with its 'conditions adapted for securing to the public the monopoly value,' for the Licensing Act and the Finance (1909-10) Act, 1910, together make it impossible for the house to be effectively licensed until the monopoly money is paid to the commissioners of customs and excise."

In my view, the above re-statement of the respondent committee's argument is the sound view. The resultant position is almost as if all monopoly rights to be enjoyed under new licences had been nationalised by law, and as if the monopoly right of the house in question had been sold by the Government to the parties interested in the house the day before the licensee began business. If that analogy be legally apposite, it would seem to put the acquisition of the monopoly on the same footing as any capital improvement of the property effected before the licensed house was open for business, such as a swimming-pool. In the supposed case, the swimming-pool would increase the profits of the business, whether the cost of its construction had been paid for or not, and it is submitted that the same reasoning is applicable to the acquisition of the monopoly. By increasing the profits, each must tend to put up the annual value of the hereditament, whether paid for or not; the past cost is past history, and not relevant as a factor tending to diminish the present value of the licensed hereditament.

The above reasoning seems to me to show that the point of time at which we ought, under the Rating and Valuation Act, to picture the hypothetical tenant taking stock of his position, and making his bargain with the hypothetical landlord, is after the monopoly payment has been made, and, if so, it must be irrelevant.

Another way of stating the same legal view is to say that what is to be valued is the licensed hereditament as it stands, *rebus sic stantibus*, an effectively licensed house. If the proper moment of time for assessing rental value were before any payment of monopoly value were made, so to cause a reduction in gross value of the hereditament, the ridiculous result would follow that, as soon as the payment had been made, the gross value would go up, and justify a proposal by the Assessment Committee, under sect. 37, to increase the assessment. The absurdity of this result corroborates the conclusion that the monopoly payment, whether in one lump sum or in instalments, is not germane to the assessment of gross value.

In the present case, at the date of the proposal by the appellant for a reduction of his gross value in the valuation list, I gather that two at least of the five instalments had in fact been paid to the revenue, and in regard to them the position must be the same in principle as if all five had been paid. The answer which I think ought to be given to the question put in the special case is that the £600 payment should not be "taken into account in diminishing the rent a hypothetical tenant would otherwise pay for the said hereditament." I therefore agree with the conclusion of the Divisional Court, and think that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rye & Eyre* (for the appellant); *Blundell, Baker & Co.* (for the respondent committee).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

YUKON CONSOLIDATED GOLD CORPORATION, LTD. *v.* CLARK.

[KING'S BENCH DIVISION (MacKinnon, J.), **March 22, 1937.**]

Conflict of Laws—Foreign judgment—Cause of action—Judgment of Supreme Court of Ontario—Stay—Appeal to Privy Council—Administration of Justice Act, 1920 (*c.* 81), *s.* 9 (1)—*Foreign Judgments* (*Reciprocal Enforcement*) *Act,* 1933 (*c.* 13), *ss.* 1, 6, 7—*Privy Council Appeals Act* (*Revised Statutes of Ontario,* 1927, *c.* 86), *ss.* 2, 3 (*d*)—*Reciprocal Enforcement of Judgments* (*General Application to His Majesty's Dominions, etc.*) *Order,* 1933 (*S.R. & O.,* 1933, *No.* 1073).

The defendant brought an action against the plaintiff company in the Supreme Court of Ontario. The action was dismissed with costs, and an appeal to the Court of Appeal in Ontario was also dismissed with costs. The costs were duly taxed and a part of them paid or satisfied by money paid in by the defendant. The defendant gave notice of appeal to the Privy Council and, as required by the rules of court of the Court of Appeal of Ontario, he gave security for the costs of that appeal. The plaintiff company sought to recover in England the balance of the costs payable in respect of the earlier proceedings. The defendant contended that the plaintiff company could not sue upon the Ontario judgment, having regard to (i) the Administration of Justice Act, 1920, s. 9 (1); (ii) the Foreign Judgments (Reciprocal Enforcement) Act, 1933, ss. 1, 6, 7, and the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933; and (iii) the fact that the defendant had given notice of appeal to the Privy Council and had given security for the costs of that appeal:—

Held: (i) there was nothing in the Act of 1920 forbidding the bringing of an action in England on a colonial judgment. A

(ii) as no order in council under sect. 1 of the Act of 1933 had been made specifying that the Act should extend to Ontario and that the Supreme Court of Ontario should be deemed to be a superior court for the purposes of the Act, the plaintiff company was not entitled to register its judgment under sect. 2 of the 1933 Act and its action was therefore not barred by sect. 6 of the same Act.

(iii) as the defendant had not given security, as required by the Revised Statutes of Ontario, 1927, c. 86, s. 3 (*d*) for payment of the sums claimed if the appeal to the Privy Council were dismissed, there could be no stay of the plaintiff company's right to recover the sums claimed. B

[EDITORIAL NOTE. Although a general order has been made applying the Foreign Judgments (Reciprocal Enforcement) Act, 1933, Part I to the dominions generally, a further order is required applying that Act to each particular jurisdiction in the dominions. Until such order is made an action will lie in England to enforce a judgment in any particular jurisdiction in the dominions. As an appeal to the Judicial Committee of the Privy Council was pending, the plaintiff was given facilities for obtaining a stay of execution. C

As to Reciprocal Enforcement of Judgments, see HALSBURY Supp., Vol. 6, Conflict of Laws; para. 380; and for Cases, see DIGEST, Vol. 11, p. 471. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 734-738.] D

Action for £1,108 1*s.* 9*d.*, the balance of costs, due upon a judgment of the Supreme Court of Ontario, dated Feb. 15, 1936, and under an order of the Court of Appeal in Ontario dated Sept. 28, 1936. The facts are set out in the judgment. E

H. St. John Field, K.C., and *Gerald Gardiner* for the plaintiff company.

J. P. Eddy, K.C., and *F. H. Lawton* for the defendant.

St. John Field, K.C.: There has been no order in council under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 1, applying Part I of the Act to the province of Ontario. It is, therefore, open to the plaintiff company to sue on the judgments of the courts of that province given in its favour: see the note on Colonial Judgments in the Yearly Supreme Court Practice, 1937, p. 734; see also Annual Supreme Court Practice, 1937, p. 750. F G

Eddy, K.C.: This court has no jurisdiction to entertain this claim. By the Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 7:

> His Majesty may by order in council direct that this part [Part I] of this Act shall apply to His Majesty's dominions outside the United Kingdom and to judgments obtained in the courts of the said dominions . . . H

The Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933, directs that Part I of the Act of 1933 is to apply to His Majesty's dominions outside the United Kingdom and to judgments obtained in the courts of the said dominions.

It follows that the Act applies to the judgments of the courts of Ontario and by sect. 6 it is provided :

> No proceedings for the recovery of a sum payable under a foreign judgment, being a judgment to which this part of this Act applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in the United Kingdom.

There is no need for a separate order in council to apply the Act to each separate part of the British Dominions. Further, the defendant has a right of appeal to the Privy Council as he has duly given the necessary security.

MacKinnon, J. : The defendant in this action, as the trustee in bankruptcy for a Mr. Welsdale, brought an action in 1935 in the Supreme Court of Ontario against the present plaintiff company, in which he claimed that a number of shares in the plaintiff company belonged to Mr. Welsdale and that he was entitled to be registered in respect of them. In that action, the court of first instance in Ontario decided in favour of the present plaintiff company, and gave judgment dismissing the present defendant's claim with costs. An appeal from that judgment was made by the present defendant to the Court of Appeal in Ontario, and the Court of Appeal dismissed his appeal, and gave a further judgment in favour of the present plaintiff company, with the costs of the appeal. The costs payable to the present plaintiff company in those two proceedings in Ontario have been duly taxed. A certain amount of those costs has been paid or satisfied by money paid in by the defendant by way of security, and there remains a balance due of something over £1,100. On Jan. 20, 1937, the plaintiff company issued its writ against the defendant in this court, claiming that £1,100 odd as the balance of costs due to the plaintiff company upon the judgment of the Supreme Court of Ontario. There is no question whatever that, certainly up to 1920, and probably up to 1933, it was legitimate and possible for a plaintiff, if he had obtained judgment in a Canadian court for a sum of money, to sue upon that judgment in this court. The defence in this action raises the point that the right of the plaintiff company to sue upon that Canadian judgment has disappeared. It is said that the plaintiff company ought to have adopted a different form of machinery, as provided by the Administration of Justice Act, 1920, s. 9 (1):

> Where a judgment has been obtained in a superior court in any part of His Majesty's dominions outside the United Kingdom to which this part of this Act extends, the judgment creditor may apply to the High Court in England or Ireland, or to the Court of Session in Scotland, at any time within 12 months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case they think it is just and convenient that the judgment should be enforced in the United Kingdom, and subject to the provisions of this section, order the judgment to be registered accordingly.

Sect. 14 (1) provides :

> Where His Majesty is satisfied that reciprocal provisions have been made by

> the legislature of any part of His Majesty's dominions outside the United Kingdom for the enforcement within that part of his dominions of judgments obtained in the High Court in England, the Court of Session in Scotland, and the High Court in Ireland, His Majesty may by order in council declare that this part of this Act shall extend to that part of his dominions, and on any such order being made this part of this Act shall extend accordingly.

A

Certain orders in council have been made under that provision, but no order in council was made as regards Ontario. In fact, the only constituent province in the Dominion of Canada with regard to which an order in council was made, apparently, was Saskatchewan. Inasmuch as no order in council was made with regard to Ontario, I am satisfied B that it was not open to the plaintiff company in this case to apply under sect. 9 of the Act of 1920 to have its judgment for these costs registered pursuant to that Act. Even if it were so, I am not at all clear that it would not be entitled at its option either to apply for registration under that Act or to bring an action as it has done in this court. In other words, C there is nothing in that Act of 1920, as there is in the subsequent Act of 1933, forbidding the bringing of an action on a colonial judgment, and making it enforceable by registration under the Act as the only available method of procedure. There is only one further necessary matter to which I would draw attention in the Act of 1920. Sect. 13 provides that: D

> His Majesty may by order in council declare that this part of this Act shall apply to any territory which is under His Majesty's protection, or in respect of which a mandate is being exercised by the government of any part of His Majesty's dominions, as if that territory were part of His Majesty's dominions, and on the making of any such order this part of this Act shall, subject to the provisions of the order, have effect accordingly.

The effect of that seems to me to be that, if His Majesty, by an order in E council, says that some protectorate is deemed to be included in this Act, then it is treated as a dominion, or is in the same position as a dominion, but the question of registering would not arise unless a specific order in council was issued under sect. 14, specifying the courts of the protectorate to which this part of the Act of 1920 would apply. As there was never F any order in council under the Act of 1920 with regard to Ontario, I am quite clear that that Act did not apply, and the procedure relied upon in the Act was not open to the plaintiff company in this case. But there was a further Act in 1933, the Foreign Judgments (Reciprocal Enforcement) Act which provides by sect. 1: G

> His Majesty, if he is satisfied that, in the event of the benefits conferred by this part of this Act being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the superior courts of the United Kingdom, may by order in council direct (*a*) that this part of this Act shall extend to that foreign country. . .

H

Mr. Eddy argued that the defendant has an ample defence to this claim because this is a proceeding for recovery of a sum under a judgment to which this part of this Act applies, and, therefore, I am forbidden by sect. 6 to entertain this action. The question, therefore, is whether this judgment of this court in Ontario is a judgment to which Part I of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, applies. That, Mr. Eddy argues, is so by reason of sect. 7 :

> His Majesty may by order in council direct that this part of this Act shall apply to His Majesty's dominions outside the United Kingdom and to judgments obtained in the courts of the said dominions as it applies to foreign countries and judgments obtained in the courts of foreign countries, and, in the event of His Majesty so directing, this Act shall have effect accordingly and Part II of the Administration of Justice Act, 1920, shall cease to have effect except in relation to those parts of the said dominions to which it extends at the date of the order.

On Nov. 10, 1933, an order in council called the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933, was made, which directed that :

> (1) Part I of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, shall apply to His Majesty's dominions outside the United Kingdom and to judgments obtained in the courts of the said dominions . . .

The effect of that order in council was that Part I of the Act applies to the Dominion of Canada, and therefore to Ontario, as part of the constituent province of that dominion. What does that mean ? It means that, under sect. 1, the Dominion of Canada, coming under sect. 7 in effect, may be treated for the purposes of this Act, as being in the same position as a foreign country. It follows, under sect. 1, that His Majesty, by a further order in council may order that this Act shall extend to Ontario, and to such courts of Ontario as are specified in such further order for the purposes of this part of this Act. If that further order in council had been issued, directing that the Supreme Court of Ontario should be deemed a superior court for the purpose of the Act, then I agree that the plaintiff company, under sect. 2, might have applied to register, and that, under sect. 6, this present action, being proceedings for recovery of a sum of money other than proceedings by way of registration, would be one which I should be unable to entertain. But no order under sect. 1 of the Act of 1933 has ever been made specifying that the Act shall extend to Ontario and that these particular courts in Ontario shall be deemed to be superior courts. In my opinion, the result is that it was not for the plaintiff company to adopt the alternative, or, indeed, the essential, method of applying to register this judgment under sect. 2 of the Act of 1933, because there has not been the necessary order in council making that feasible. It must be noted that in the Act of 1920 there is the difference in language between the use of the word " apply " in sect. 13 and the word " extend " in sect. 2, so, in this Act of 1933, there is the same variation in language between the word " apply " in sect. 7 and the word " extend " in sect. 1. The result is that I think this action is not barred, either by the provisions of the Act of 1920 or by sect. 6 of the Act of 1933.

There remains a further point, taken by Mr. Eddy. The present defendant has given notice of appeal to the Privy Council from the judgment of the Court of Appeal in Ontario, and he has been required, under the rules of court of the Court of Appeal in Ontario, to give security for the costs of that appeal. That has been done to the satisfaction of the court of Ontario. Then Mr. Eddy relies on the Revised Statutes of Ontario, 1927, c. 86 (Privy Council Appeals Act) which provides in sect. 2: A

> No appeal [to the Privy Council] shall be allowed until the appellant has given security in $2,000, to the satisfaction of the court appealed from, that he will effectually prosecute the appeal, and pay such costs and damages as may be awarded in case the judgment appealed from is confirmed.

That is the giving of security to which I have just referred. Sect. 3 says: B

> Subject to Rules of Court, upon the perfecting of such security, execution shall be stayed in the original cause except in the following cases:
>
> (*d*) if the judgment appealed from directs the payment of money, execution shall not be stayed until the appellant has given security to the satisfaction of the Supreme Court or a judge thereof that if the judgment or any part of it is affirmed the appellant will pay the amount thereby directed to be paid or the part of it as to which the judgment may be affirmed, if it is affirmed only as to part, and all damages awarded against the appellant on the appeal. C

Now, no application for a stay of execution was made to the Supreme Court of Ontario, and no order for a stay of execution has been made by that court. It could direct a stay of execution only if the requirements of sect. 3 (*d*) had been complied with, namely, if the appellant, the present D defendant, had given security, to the satisfaction of the Supreme Court, of the payment of these moneys if the appeal were dismissed. No such security has been given, and, therefore, I am clear that the event has not happened upon which, either automatically or by any order of court in Ontario, there would be any stay of execution of the right of the E plaintiff company to recover these costs which it is now endeavouring to do. That being so, there is in that legislation no bar to the right of suing upon this judgment for these costs.

The result is, I think, there must be judgment for the plaintiff company for the amount claimed, with costs, but, having regard to the circum- F stances, I think it right to give effect to the spirit of sect. 3 (*d*) of the Revised Statutes of Ontario, 1927, c. 86, by further directing in this case a stay of execution for 14 days, and, if, within that time, the money is brought into court, or security for it is given to the satisfaction of a master, there shall be a further stay till the hearing of the appeal before the G Privy Council. There will be liberty to the plaintiff company to apply to remove such stay on the ground that the appeal has been abandoned, or that it has not been pursued with reasonable despatch.

Judgment for the plaintiff company with costs.

Solicitors: *Broad & Son* (for the plaintiff company); *Percy Haseldine* H *& Co.* (for the defendant).

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

ELMHIRST *v.* INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **March 17, 1937.**]

A *Income Tax—Computation of husband's liability to tax—Wife's income from foreign possessions—Three years' average—Wife's pre-nuptial income—Income Tax Act,* 1918 (*c.* 40), *Sched. D., Cases IV and V, All Schedules Rules, r.* 16.

B The appellant was assessed for the years ending Apr. 5, 1926, 1927 and 1928, in respect of income arising to his wife from securities, stocks, shares or rents in a place out of England. The appellant's wife was, before her marriage in Apr., 1925, an American citizen domiciled and resident in the United States, but she was ordinarily resident in the United Kingdom from 1925 to 1928:—

C HELD: the appellant's liability to tax was to be computed by taking into account, for the purposes of average, the income enjoyed by the appellant's wife during the three years before the years of assessment, despite the fact that during those years she was not married and was not chargeable to income tax in the United Kingdom.

D **[EDITORIAL NOTE.** For the purposes of tax, the income of a wife is deemed to be the income of the husband. The income is generally computed from the date of the marriage where that takes place within the year of assessment; but where the income has to be assessed upon a three years' average, the income of the wife in the three preceding years may be taken in consideration, although those years were both prior to the marriage and years during which the wife was not resident in the United Kingdom.

AS TO INCOME OF HUSBAND AND WIFE, see HALSBURY, Hailsham Edn., Vol. 17, p. 285, para. 566; and FOR CASES, see DIGEST, Vol. 28, p. 96, Nos. 570-573.]

E Cases referred to:

(1) *Inland Revenue Comrs.* v. *Brooke, Inland Revenue Comrs.* v. *Bell, Inland Revenue Comrs.* v. *Leith,* [1923] 2 K.B. 814; 28 Digest 112, *698*; 92 L.J.K.B. 1003; 129 L.T. 695; 8 Tax Cas. 527.

F (2) *Leitch* v. *Emmott,* [1929] 2 K.B. 236; Digest Supp.; 98 L.J.K.B. 673; 141 L.T. 311; 14 Tax Cas. 633.

(3) *Singer* v. *Williams,* [1921] 1 A.C. 41; 28 Digest 78, *430*; 89 L.J.K.B. 1218; 123 L.T. 625; 7 Tax Cas. 419.

(4) *Fry* v. *Burma Corpn.,* [1930] A.C. 321; Digest Supp.; 99 L.J.K.B. 305; 142 L.T. 609; 15 Tax Cas. 113.

G (5) *Back* v. *Whitlock,* [1932] 1 K.B. 747; Digest Supp.; 101 L.J.K.B. 698; 147 L.T. 172; 16 Tax Cas. 723.

APPEAL by way of case stated from a decision of Commissioners for the Special Purposes of the Income Tax Acts, upholding three assessments to income tax in the sums of £5,000, £150,000 and £100,000 for H the years ending Apr. 5, 1926, 1927 and 1928 respectively made upon the appellant under the provisions of the Income Tax Act, 1918, Sched. D, Cases IV and V, in respect of income arising to the appellant's wife from securities, stocks, shares or rents in a place out of the United Kingdom.

The facts are set out in the judgment. The Income Tax Act, 1918, Sched. D, Case V, r. 1, provides:

> The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years. . . .

A

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the appellant.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

Lawrence, J.: There are two questions involved in this case. The first is whether Mrs. Elmhirst, the wife of the appellant, was ordinarily B resident in the United Kingdom during the years for which the appellant has been assessed to income tax, namely, the years ending Apr. 5, 1926, Apr. 5, 1927, and Apr. 5, 1928. The question is whether there was any evidence upon which the Special Commissioners could come to the conclusion that Mrs. Elmhirst was ordinarily resident in the United Kingdom C during those years, or any of them. It is agreed, in the argument for the appellant, that the later years are more difficult than the first year, and the principal argument is that, in the year 1925/26, there was no evidence upon which the Commissioners could reasonably come to the conclusion that Mrs. Elmhirst was ordinarily resident in the United D Kingdom.

I need not go into the facts fully. Apparently, Mr. Elmhirst and Mrs. Elmhirst, having met in the United States of America before 1925, had both become interested in the subject of education, and particularly in the subject of co-education. Before the year 1925/26, Mrs. Elmhirst E had formed the intention or idea of founding a school for co-educational purposes in the United Kingdom and, in Mar., 1925, had asked Mr. Elmhirst to find a site suitable for such school. He had actually found a site at Dartington Hall, near Totnes, in Devonshire, and had communicated that site to her, and went subsequently to America in Mar., 1925. F Then, in April, 1925, the appellant and Mrs. Elmhirst were married. They came over to England in May, 1925, and, after inspecting the site which the appellant had provisionally chosen on Sept. 8, 1925, Mrs. Elmhirst entered into a contract for the purchase of Dartington Hall, Totnes, Devonshire, for this co-educational school. The case states that Mrs. G Elmhirst intended to see that the school was running smoothly before she returned to the United States, and that originally she had no intention of making a permanent residence for herself and the appellant in the United Kingdom, but subsequently she determined to take a cottage, and did take a cottage in 1928, and a flat in London in 1933, H and ever since she has resided in the United Kingdom, except for visits to the United States of America, where she has continued to maintain two residences fully staffed.

The appellant's argument, as I understand it, is that, at any rate during 1925/26, although the appellant resided in England for 8 months of that year, and Mrs. Elmhirst resided for 7½ months of that year in the United Kingdom, at that time they had no intention of staying permanently in the United Kingdom, that the object of their visit was of a nature which was extraordinary in the course of Mrs. Elmhirst's life and that, for that year, at any rate, it was impossible for a reasonable tribunal of fact to come to the conclusion that she was ordinarily resident in the United Kingdom. I find myself unable to accept this contention, or to say that the Commissioners were not entitled to find that Mrs. Elmhirst's residence for 7½ months during that year did not render her ordinarily resident in the United Kingdom for that year and, as is agreed by counsel for the appellant, *a fortiori* in the years which followed. I think there is ample evidence upon which the Commissioners might come to that conclusion, though it is possible that other tribunals of fact might have come to a contrary conclusion.

The second point which arises in the case is whether the income which Mrs. Elmhirst enjoyed during the three years before the years of assessment can be regarded for the purposes of computation of the appellant's income tax in the years 1925 to 1928. This question involves the construction of All Schedules Rules, r. 16, which is in these words, so far as material:

> A married woman acting as a sole trader, or being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that (1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee.

It is argued for the appellant that the case is really covered by the decision of ROWLATT, J., in *Inland Revenue Comrs.* v. *Brooke, Inland Revenue Comrs.* v. *Bell, Inland Revenue Comrs.* v. *Leith* (1). On the other hand, it is argued for the Crown that the case is covered by *Leitch* v. *Emmott* (2), *Singer* v. *Williams* (3), *Fry* v. *Burma Corporation* (4) and *Back* v. *Whitlock* (5). In the last group of cases, it was decided that profits or income, although they are not chargeable to income tax, and although the recipient of those profits or income himself is not chargeable to income tax, may be brought in as a basis of computation when the alleged taxpayer becomes chargeable to income tax. That is to say, a taxpayer may be assessable and chargeable to income tax by reference to profits or income which he received, or which accrued to him before he became chargeable to income tax.

The case of *Leitch* v. *Emmott* (2) was a case in which a lady who had been living with her husband became a widow in the year of assessment. It was held that she might be assessed for that year of assessment on the basis of the income which she had enjoyed during the previous year, although she was then a married woman living with her husband and, by virtue of r. 16, her profits were deemed to be the profits of her husband.

The real ground of that decision is, in my opinion, stated in the judgment of LAWRENCE, L.J., where he says at pp. 246, 247:

> Rule 16 provides, in the first instance, that a married woman entitled to any property to her separate use shall be assessable and chargeable to tax as if she were sole and unmarried. Then, turning back to r. 2 of the rules applicable to Case III, we find that the measure of that charge to tax is the amount of the income from her investments arising in the year preceding the year of assessment. It is clear to my mind, therefore, that the married woman is charged to tax in respect of her income for the year of assessment, to be measured by the income from the same investments received by her in the preceding year, thus showing that the income for the purpose of the charge and of the measure of the tax is treated as her income. The proviso does not alter the character of the income charged to tax or the measure of the tax, but merely provides, with the object of facilitating the collection of the tax, that the assessment and charge shall be made in the name of the husband, and that for that purpose the wife's income shall be treated as the income of the husband. This provision does not, in my judgment, operate to convert the income of the wife into income of the husband further than is necessary for the purpose of collecting the tax; with the result that it affords no valid ground for the contention that there was no income arising from the wife's investments in the year preceding the year of assessment within the meaning of r. 2 of Case III.

In my opinion, that case was based upon an interpretation of r. 16 (1), with which I respectfully agree: that it relates to the profits of the married woman for the year of assessment and provides that, if the married woman is living with her husband, her profits for the year of assessment shall be assessed and charged in his name, and does not affect the years of computation in any shape or form. If that is so, and it is the view of the Court of Appeal by which I am bound, and with which I agree, then r. 16 and the proviso have no effect upon the fact in this case that Mrs. Elmhirst was not a married woman living with her husband during the period of computation. She was a married woman living with her husband in the year of assessment, and, therefore, her profits for that year are to be assessed and charged in his name; but, as the Court of Appeal say in *Leitch* v. *Emmott* (3), that is only for the purposes of facilitating the collection of tax. If, therefore, it is remembered that there is nothing inconsistent with the scheme of the Income Tax Acts that a person should be taxed when ordinarily resident in the United Kingdom upon the basis of income received when not assessable or chargeable to tax because not resident in the United Kingdom, then it appears to me that there is nothing in the contention of the appellant that he ought not to be, or cannot be, assessed and charged to tax upon an income which Mrs. Elmhirst enjoyed when not chargeable to tax in the three years preceding the year of assessment in each case.

The difficulty of the case arises principally from the decision of ROWLATT, J., in *Inland Revenue Comrs.* v. *Brooks, Inland Revenue Comrs.* v. *Bell, Inland Revenue Comrs.* v. *Leith* (1), which were cases of super-tax, in which he held that a husband could not be assessed to super-tax in respect of his wife's pre-nuptial income, but that his wife was chargeable in respect of her income of the preceding year up to the date of her marriage.

notwithstanding that she was a married woman at the time of making the assessment. It has been contended for the Crown that that case is distinguishable, because it was decided upon the super-tax provisions of the Income Tax Act, 1918. I think that is a possible ground of distinction, because undoubtedly ROWLATT, J., does base his judgment upon the very words of sect. 5 of the Act of 1918, which are inapplicable to the present case, which deals solely with income tax. But ROWLATT, J., does treat the proviso to All Schedules Rules, r. 16, as though it had reference to the period of computation, and related to the profits accruing to a married woman during that period. One ground of his decision was that the husband could not be assessed to super-tax in respect of his wife's pre-nuptial income, because, within the meaning of r. 16, she was not pre-nuptially a married woman living with her husband. So far as that ground of the decision is concerned, in my opinion it is overruled by *Leitch v. Emmott* (2), although there is no reference in the judgment in the Court of Appeal to the case of *Inland Revenue Commrs. v. Brooke; Inland Revenue Commrs. v. Bell; Inland Revenue Commrs. v. Lock* (1) that, however, was cited in the Court of Appeal. In my judgment, the decision of the Court of Appeal upon the meaning of the proviso to r. 16 is inconsistent with the decision in, or the basis of, the judgment of ROWLATT, J., in the case that I have cited, and I therefore think it my duty to follow the case of *Leitch v. Emmott* (2). I am also of opinion, on the construction of r. 16, that the decision of the Court of Appeal is right. For these reasons, I think that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *McKenna & Co.* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

Reported by LESLIE CAMERON, *Esq., Barrister-at-Law.*]

Re BEAUMONT SETTLED ESTATES.

[CHANCERY DIVISION (Clauson, J.) February 18, 19, March 1, 1937.]

Settlement—Person having powers of tenant for life—Compound settlement—Person named in last deed of compound settlement as tenant for life of that settlement—Settled Land Act, 1925 (c. 18), s. 23 (1) (a).

Under a settlement of 1898 a jointure in favour of a widow was outstanding. In 1925 there was a resettlement by a disentailing deed under which a jointure rentcharge was created and certain charges by way of legal mortgage were made for raising portions and jointures. In 1932 the applicant, who was beyond dispute the tenant for life of the 1925 resettlement, by a voluntary settlement appointed and granted the settled estates to trustees in fee simple subject to the mortgages and all equitable incumbrances affecting the same upon trust that the trustees should, as soon as they lawfully could, for the purpose of giving effect to the trust for sale thereby given them in respect thereof, obtain a grant of the legal estate in the estates. By a further clause it was declared that the powers of a tenant for life under the Settled Land

Act were conferred upon the applicant during his life and after his death upon the trustees of the 1932 settlement :—

Held : as the Settled Land Act, 1925, s. 23 (1) vests the powers of a tenant for life in the person of full age on whom such powers are conferred by the settlement, the applicant was by virtue of the clause in the settlement of 1932, the tenant for life of the compound settlement.

[EDITORIAL NOTE. Immediately before the voluntary settlement here in question the land was vested in the applicant subject to the following charges, powers and trusts, taking effect in the order named : (i) a jointure charge and certain mortgages ; (ii) a general power of appointment vested in the applicant ; (iii) the trusts of a prior settlement. The applicant in 1932 resettled the property by a voluntary settlement exercising his general power of appointment, subject to such matters as were prior to that power. That voluntary settlement named the applicant as tenant for life of the settlement. It is held that the voluntary settlement of 1932 only affected the equitable interest of the applicant, but the clause naming him as tenant for life made him tenant for life of the compound settlement as it was not inconsistent with any other provision in the compound settlement.

As to Persons Having the Powers of a Tenant for Life, see HALSBURY, 1st Edn., Vol. 25, Settlements, p. 626, para. 1100 ; and for Cases, see DIGEST, Vol. 40, pp. 731-740, Nos. 2619-2687.]

Cases referred to :

(1) *Re Cowley Settled Estates*, [1926] Ch. 725 ; 40 Digest 768, *3003* ; 95 L.J. Ch. 477 ; 135 L.T. 568.

(2) *Re Bostock's Settlement, Norrish* v. *Bostock*, [1921] 2 Ch. 469 ; 40 Digest 635, *1746* ; 91 L.J. Ch. 17 ; 126 L.T. 145.

(3) *Re Egerton Settled Estates*, [1926] Ch. 574 ; 35 Digest 277, *321* ; 95 L.J. Ch. 153 ; 135 L.T. 105.

(4) *Re Leigh's Settled Estates*, [1926] Ch. 852 ; 40 Digest 739, *2678* ; 95 L.J. Ch. 511 ; 136 L.T. 395.

(5) *Re Parker's Settled Estates, Parker* v. *Parker*, [1928] 1 Ch. 247 ; 40 Digest 774, *3047* ; 138 L.T. 360.

(6) *Re Carnarvon's (Earl) Chesterfield Settled Estates, Re Carnarvon's (Earl) Highclere Settled Estates*, [1927] 1 Ch. 138 ; 40 Digest 729, *2599* ; 96 L.J. Ch. 49 ; 136 L.T. 241.

(7) *Re Ogle's Settled Estates*, [1927] 1 Ch. 229 ; 40 Digest 726, *2572* ; 96 L.J. Ch. 113 ; 136 L.T. 300.

(8) *Re Rush, Warre* v. *Rush*, [1923] 1 Ch. 56 ; 27 Digest 113, *906* ; 92 L.J. Ch. 87 ; 127 L.T. 713.

Adjourned Summons asking for the determination of the following question :

> Whether or not the . . . applicant is notwithstanding the execution of the . . . settlement dated July 15, 1932, still the tenant for life or the person having the powers of a tenant for life—

of a compound settlement relating to certain estates. The documents constituting the settlement were as follows : A settlement dated Mar. 11, 1872, the last beneficial interest under which—a jointure to the widow of Captain W. S. Beaumont, the tenant for life preceding the applicant herein of the settled estates—ceased on Apr. 9, 1932. By a resettlement in 1899 the estates were strictly settled on Capt. Beaumont and his son

D. J. Beaumont, with power to jointure and to appoint portions. Of the beneficial interests created under those powers the only one remaining unsatisfied was a jointure to Mrs. Hathaway, formerly the widow of D. J. Beaumont, who had died on Nov. 24, 1918, in the lifetime of Capt. Beaumont. He left him surviving three sons and three daughters. The applicant was the eldest son and on attaining 21 on Aug. 6, 1924, was, subject to Capt. Beaumont's subsisting life interest, tenant in tail under the 1899 settlement, and, in Nov., 1925, he, with the consent of Capt. Beaumont, disentailed the settled estates. By the 1925 disentailing deed the applicant granted the estates to a grantee to uses, subject to the estates and charges prior to, and all powers affecting, them prior to the applicant's own estate, but discharged from the applicant's estate in tail, to such uses, upon such trusts, and subject to such powers as Capt. Beaumont and the applicant should jointly appoint, and, subject to any such appointment, to such uses upon such trusts and subject to such powers as the applicant should appoint, and, in default of and subject to any such appointment, to the uses, upon the trusts, and subject to the powers subsisting or capable of taking effect immediately before the execution of that deed. By a deed of covenant dated Dec. 1, 1925, but executed contemporaneously with the disentailing deed, after a recital that that deed was executed in pursuance of an agreement prior to the disentailing deed that Capt. Beaumont would give his consent to the disentail as protector of the settlement provided the applicant bound himself to make provision for his wife and children in the event of his marriage, the applicant covenanted with Capt. Beaumont that, in case he should marry, he would, before or forthwith after such marriage, appoint and charge the settled estates with a jointure for any wife of his who might survive him, and with a sum as portions for his children or issue. No deed of joint appointment by Capt. Beaumont and the applicant was executed under the 1925 disentailing deed, but, on May 19, 1926, in consequence of the 1925 Property Acts coming into force, a vesting deed was executed in favour of Capt. Beaumont as the tenant for life of the compound settlement.

Capt. Beaumont died on Aug. 2, 1926, and administration limited to the settled land was granted to the Settled Land Act trustees, the first respondents herein. The applicant, upon his marriage in 1926, provided by an appointment a jointure for any wife surviving him, and a sum as portions for his issue by any marriage, securing such jointure and portions by a term of 1,000 years. On Dec. 27, 1926, the applicant, for the purpose of raising £1,500, executed a mortgage in the form of an appointment of the estates in further exercise of the power given him by the 1925 disentailing deed and subject to the charges affecting the premises which had priority to the applicant's power of appointment. By a conveyance dated Nov. 21, 1927, the Settled Land Act trustees vested the estates in the applicant. By a legal charge dated Mar. 22, 1928, the applicant raised £21,000 on legal mortgage whereout he paid all capital sums raisable for portions and otherwise charged on the estates by virtue of the powers in the 1899 settlement, and by a mortgage dated June 5, 1930, the applicant borrowed £600, and as security appointed the estates in similar terms as in the mortgage of Dec. 27, 1926. Further charges were at different times executed by the applicant in respect both of the mortgage of Dec. 27, 1926, and of June 5, 1930, and, in 1931, a further freehold property was acquired and settled in the same manner as the estates. Finally, on July 15, 1932, the applicant executed the voluntary settlement mentioned in the summons herein.

By this settlement the applicant as settlor, in exercise of the power conferred upon him by the 1925 disentailing deed, appointed and granted to the trustees the estates in fee simple subject to the 1928 legal charge and subject to the equitable incumbrances referred to in recital 6 thereof, and subject to the powers and provisions thereinafter declared concerning the same. After the settlor had also appointed and assigned unto the trustees capital moneys held on the trusts of the compound settlement, cl. 3 provided that the trustees should, so soon as they lawfully and effectively could, for the purpose of giving effect to the trust for sale thereinafter mentioned, obtain a grant of the legal estate in the said hereditaments (therein with capital moneys, etc., referred to as the trust property), and should stand possessed of the trust property upon trust for sale with power to postpone sale, and, until the trustees should obtain possession of the trust property as aforesaid, it should remain and be held upon the trusts and subject to the powers and provisions thereinafter declared concerning the proceeds of sale, and the net rents and profits until sale. Cl. 4 set out the trusts of the proceeds of sale, and by cl. 8 it was declared that the powers of a tenant for life under the Settled Land Act, 1925, were conferred upon the applicant during his life, and after his death and while the premises continued to be settled land the said powers were thereby conferred upon the trustees of the 1932 settlement.

The question of the effect of the settlement of 1932 was raised in 1936, when the applicant, purporting to act in the capacity of a person having the powers of a tenant for life, made inquiry of the Settled Land Act trustees as to whether he should raise money under the Settled Land Act, 1925, s. 71, for the purpose of meeting the cost of certain proposed improvements to the settled land. The Settled Land Act trustees replied that, as a result of the 1932 settlement, it was not certain that they still possessed the powers of a tenant for life, and that until that question should be decided they were not prepared to act on the applicant's suggestion. The applicant thereupon took out the present summons.

H. B. Vaisey, K.C., and *R. R. Formoy* for the applicant.

A. L. Ellis for the first respondents, the Settled Land Act trustees.

R. F. Roxburgh, K.C., and *J. G. Strangman* for the last respondents, the trustees of the 1932 settlement.

Vaisey, K.C.: It is necessary to consider the whole of the 1932 settlement, and, having regard to cl. 3, it is obvious that it was not intended to vest the legal estate in the trustees of that settlement, but that it should remain in the applicant. That clause means that when and so far as the preceding interest has fallen in, the trustees can call for the legal estate. It is clear that the applicant was dealing with his equitable, not his legal, estate, and the trust for sale is a trust for sale at a later date, taking effect only when the jointure has ceased. That is inconsistent with the view that the legal estate had already been, or was by this deed, placed in the hands of the trustees. Cl. 3 is not, therefore, inconsistent with the clear intention expressed in cl. 8. This deed was part of a new compound settlement, and was not intended to operate under the Settled Land Act, 1925, s. 23 (1) (*b*), so as to vest the powers of the tenant for life in the trustees: see *Re Cowley Settled Estates* (1). The only way in which the tenant for life could deprive himself of his statutory powers is under the Law of Property (Amendment) Act, 1926, s. 1. But to suggest that that section operates to defeat the obvious intention of the deed of 1932 is to put on its words a meaning that they cannot bear.

Formoy: The use of the word "grant," in cl. 8, instead of conflicting with the rest of the deed, as dealing only with the applicant's equitable estate, conforms with it, because "grant" is not only the correct word for the conveyance of an estate in fee simple, but also for the transference of an equitable fee simple: see *Re Bostock's Settlement, Norrish* v. *Bostock* (2). At the time when this deed was executed, the settled estates were subject to equitable mortgages in addition to the jointure, the effect of which might, taken in conjunction with the Fines and Recoveries Act, 1853, s. 21, have been to bar the estate tail, so that when the mortgages were reconveyed what would have been received would have been an estate in fee simple.

Ellis: The position of the applicant under the deed of 1925 was that he was given power by the Law of Property (Amendment) Act, 1926, to convey the legal fee simple, subject to the family charge. Another power he had, which was almost an obligation, was under the Settled Land Act, 1925, s. 16: see *Re Egerton Settled Estates* (3). He was, therefore, bound to give effect to this settlement under the power of appointment coupled with a grant of the legal estate.

As to the effect of the deed of 1932, I say that a grant by a man as settlor must be construed strictly against him, and the effect of the exercise of the power of appointment by the applicant was to extinguish

his equitable estate tail in possession, although it is true that he reserved a remote interest. Having discharged the entailed estate which gave him the powers of a tenant for life, he ceased to have those powers, and although the land continued to be settled land it was solely by virtue of the settlement of 1889. The deed of 1932 is not part of a compound A
settlement. There cannot be a compound settlement unless it can be brought within the Settled Land Act, 1925, s. 1 (1), and that is not possible here because there is no succession, since the trustees of the deed of 1932 are in possession of the full fee simple.

CLAUSON, J.: But see TOMLIN, J., in *Re Leigh's Settled Estates* (4). B

Ellis: That decision was not followed in *Re Parker's Settled Estates* (5). There has been no decision where there has been a fee simple subject only to a jointure. Under the Settled Land Act, when a tenant for life declares that he will hold the property on the trusts of the settlement (see the conveyance of 1925), that constitutes him sole trustee of the C
land, and as such it is his duty to find out who his *cestuis que trust* are. After 1925, the applicant's *cestuis que trust* included the jointress, and, after 1932, the trustees of the deed of 1932. Although the trust for sale created by the deed of 1932 could not override the jointure, when the jointress died, the 1932 trustees might have asked the applicant D
to convey to them the legal estate, and so have entitled themselves to exercise the trust for sale: see *Re Carnarvon's (Earl) Chesterfield Settled Estates* (6), and *Re Ogle's Settled Estates* (7).

Roxburgh, K.C.: There are four possible solutions: (i) that anybody can dispose of the settled land by selling the whole of it free from incumbrances; E
(ii) that the applicant has the power to dispose of the fee simple as the person having the powers of a tenant for life; (iii) that the trustees of the 1899 settlement have the powers of a tenant for life as statutory owners under sect. 23 (1) (*b*); (iv) that the trustees of the 1932 deed are the proper persons to dispose of the land under the Law F
of Property Act, 1925, s. 2 (2), as amended by the Act of 1926. If that Act does apply, the matter is taken out of the purview of the Settled Land Act, as it is not possible to have a statutory owner or tenant for life who is not entitled to the whole legal estate in the land. But the Act of 1926 is merely permissive, and the first thing, therefore, to decide, G
is whether this document purported to convey the whole legal estate in the land to the trustees for sale, or whether it operated to convey no legal estate at all. As it says that the trustees are not to take a legal estate immediately, it must be assumed that the applicant was endeavouring to make a disposition of his equitable estate only. *Re* H
Leigh's Settled Estates (4) and *Re Parker's Settled Estates* (5) are conflicting cases on what is a trust for sale, but there cannot be a trust for sale unless there is some person who has the legal estate on trust for sale, and that cannot be so where no legal estate has been conveyed by

the tenant for life. See also *Re Rush* (8). As, therefore, the Act of 1926 does not apply, the 1932 trustees are out of the question, and in that case I say that the applicant is the person in whom are vested the powers of the tenant for life, since the deed of 1932 was part of a compound settlement, and it does not matter under which of the documents creating such a settlement the powers are conferred: see *Re Cowley Settled Estates* (1). Once the legal estate vests in a tenant for life or statutory owner under the Settled Land Act, every document dealing with the equitable interest must be part of a compound settlement until someone is absolutely entitled to have the trustees discharged and the legal estate vested in him. Under the Settled Land Act, s. 3, the settlement continues as long as there are any subsisting charges. I say that the deed of 1925 is not a disentailing assurance, because it restricts the entail: see Settled Land Act, s. 22 (1). The applicant was not in possession under this deed, as his grandfather was still alive. It is clear that the applicant was not attempting, in the deed of 1932, to make a disposition under the Settled Land Act, and therefore sect. 18 (1) applies. Thus, prior to the execution of the deed of 1932, the land continued to be settled land by virtue of the Settled Land Act, s. 1 (1) (ii) (*a*) and (1) (*v*), and the only effect of that deed was to transfer it out of the first category, since it is settled land now only because it remains subject to these charges. On the authority of *Re Leigh's Settled Estates* (4), this case must be decided in favour of the applicant.

Clauson, J.: Immediately before July 15, 1932, the estates in question in this summons were vested at law in the applicant, Francis W. Lionel Collins Beaumont, and stood limited in trust for persons by way of succession. The trusts may be sufficiently summarised as follows: First, trusts to secure a jointure rentcharge created under a power conferred by a settlement of 1899; next, trusts to secure a jointure rentcharge created under a power conferred by a settlement of 1926; next, trusts to secure (*a*) certain sums raised to pay off portions, and (*b*) certain portions raisable in certain events by virtue of the same settlement of 1926, and (*c*) various sums raised by way of mortgage under a power contained in the same settlement of 1926, and subject to the preceding trusts and to a power of appointment vested in the applicant upon trust for the applicant as tenant in tail with divers remainders over. This being the position, the applicant executed, on July 15, 1932, a settlement, the construction of which has to be determined in order to deal with the question propounded for the court by the summonses—namely, the question whether the applicant has the powers of a tenant for life under the Settled Land Act over the land in question.

The document in question is clearly not a document created under or by virtue of the powers as a *quasi*-tenant for life vested, immediately before its execution, in the applicant.

It is, in my judgment, a document operating in equity under the general power of appointment reserved to the applicant by the settlement of 1926, and it appears to me to have this effect on its true construction, of extinguishing the applicant's equitable tenancy in tail and creating, in lieu, an equitable estate in the trustees therein named (being the last two respondents to the present summons), which, until sale of the land, is, during the applicant's life, burdened with a trust for distribution of the income, at the trustees' discretion, among certain beneficiaries, of whom the applicant is one, and, after the applicant's death, is burdened with divers trusts in favour of divers persons, including trusts under which divers children of the applicant take equitable tenancies in tail. There is a trust for sale which, in the circumstances, and on the true construction of the document, appears to me not to be an immediate binding trust for sale, and, in the event of sale, trusts of the proceeds are declared corresponding to the trusts declared of the property pending sale.

That being my view of the true construction and operation of this deed, it appears to me to follow that, after its execution, the land stood limited, by virtue of the deed and of the preceding settlements, in such a manner as to be settled land, and, accordingly, on my construction of the document, it was and is the last of the documents forming a compound settlement of the land.

There is, however, in view of the discretionary trust as to income, no tenant for life or *quasi*-tenant for life ; and recourse must, accordingly, be had to the Settled Land Act, 1925, s. 23, in order to ascertain who, if anyone, can exercise Settled Land Act powers. That section vests those powers, in the first place, in the person of full age on whom such powers are, by the settlement, expressed to be conferred. In the present case, cl. 8 of the document of July 15, 1932, is expressed to confer these powers on the present applicant. That document is, in my view, one of the documents constituting the compound settlement upon the trusts of which the applicant holds the legal estate in the property, and, since the provision in cl. 8 is in no way inconsistent with anything contained in any other document forming part of the compound settlement, I see no escape from the conclusion that the powers which, by that clause, are expressed to be conferred on the applicant are expressed to be conferred upon him by the compound settlement, and are, accordingly, effectively vested in him by reason of sect. 23 (1) of the Act of 1925, in which section the term " settlement " means (by virtue of the proviso to sect. 1 (1) of the Act of 1925) the compound settlement.

I shall, therefore, declare that the applicant has, by virtue of the provisions contained in cl. 8 of the settlement of July 15, 1932, the powers of a tenant for life under the Settled Land Act, 1925, over the land comprised in the said settlement, and in the other documents which therewith constitute the compound settlement whereof the said land is now the subject.

The costs of all parties as between solicitor and client will come out of the capital of the settled property.

Solicitors: *Preston, Lane-Claypon & O'Kelly*, agents for *Longrigg & Pye-Smith*, Bath (for the applicant and last respondents); *Ellis, Peirs & Co.* (for the first respondents).

[*Reported by* C. M. Young, *Barrister-at-Law.*]

Re WILLIAM PORTER & CO., LTD.

[Chancery Division (Simonds, J.), **March 16, 17, 1937.**]

Companies—Directors—Remuneration—Resolution forgoing remuneration—Company acting on resolution—Estoppel of a director.

F. was the governing director of a limited company. In Feb., 1934, at F.'s suggestion, a resolution was passed by the directors that no fees should be paid to the directors from Oct. 1, 1933, until it should be resolved otherwise. A minute of this resolution was read and confirmed on May 7, 1934, and it was acted upon by the company. F. having subsequently become bankrupt, and the company having passed a resolution that it be voluntarily wound up, the trustee in F.'s bankruptcy sought to prove in the liquidation for F.'s fees as a director subsequent to Oct. 1, 1933:—

Held: the resolution was not a mere act of benevolence on the part of the directors, but was intended to induce the company to carry on its business, and, the company having carried on its business in reliance on the resolution, no claim could now be made by a director in respect of his fees subsequent to Oct. 1, 1933.

[**EDITORIAL NOTE.** An agreement to forgo remuneration for which the directors receive no consideration is strictly *nudum pactum*, and not enforceable. An agreement of this nature made during the course of liquidation was held binding in *West Yorkshire Darracq Agency, Ltd.* v. *Coleridge* (1). Here the agreement was some time prior to the liquidation, but is held to be binding because the company accepted the arrangement as one that would help it to carry on business, and it had in fact carried on upon the strength of the arrangement.

As to Directors Forgoing Remuneration, see HALSBURY, Hailsham Edn., Vol. 5, p. 311, para. 524; and for Cases, see DIGEST, Vol. 9, pp. 464, 465, Nos. 3020-3025.]

Cases referred to:

(1) *West Yorkshire Darracq Agency, Ltd.* v. *Coleridge*, [1911] 2 K.B. 326; 9 Digest 464, *3022*; 80 L.J.K.B. 1122; 105 L.T. 215.

(2) *Moriarty* v. *Regent's Garage Co.*, [1921] 1 K.B. 423; [1921] 2 K.B. 766; 9 Digest 463, *3005*; 90 L.J.K.B. 783; 125 L.T. 560.

(3) *Cairncross* v. *Lorimer* (1860), 3 L.T. 130; 21 Digest 328, *1227*; 3 Macq. 827.

Application that the decision of the liquidator of William Porter & Co., Ltd., in rejecting a proof of the trustee in bankruptcy of a former director of the company might be reversed. The trustee in bankruptcy claimed arrears of salary due to the director under the provisions of the articles of the company.

The summons asked that the decision of the liquidator rejecting the claim of the trustee for the sum of £2,670 should be reversed or varied, and that the claim should be allowed either in full or to such extent as the court should think fit. The company was incorporated on Apr. 30, 1928, and, on Mar. 25, 1935, a resolution was passed that the company be wound up voluntarily. On Mar. 4, 1935, the governing director, Mr. Fontannaz, had resigned his directorship, and in Sept., 1936, he was adjudicated bankrupt. His trustee in bankruptcy claimed what he considered to be the arrears of salary due to him under art. 90 of the company's articles, in spite of a resolution passed at a meeting of the directors on Feb. 19, 1934. Art. 90 (*h*) of the articles of the company provides:

> The remuneration of the said Frederick Gustave Fontannaz as governing director shall be £1,800 per annum, or such greater sum as the company in general meeting may determine.

There were present at the meeting on Feb. 19, 1934, Mr. Fontannaz and the solicitor and the auditor of the company. Mr. Fontannaz, who was the governing director of the company raised the question of its financial position and pointed out that no salary had been paid to the directors since 1933. The position regarding directors' salaries had to be regularised, and it was resolved that no fees should be paid to the directors from Oct. 1, 1933, until it should be resolved otherwise. The resolution was duly and formally passed, and no further resolution on the matter was passed, so that it was never resolved otherwise until the date of the liquidation, Mar. 25, 1935. No payment was made, and no claim was made by the directors. A few days before the liquidation Mr. Fontannaz resigned.

Roger W. Turnbull for the applicant (the trustee).

Graham Mould for the respondent (the liquidator).

Simonds, J.: [His Lordship referred to the facts.] The trustee in bankruptcy puts forward his claim for remuneration under art. 90. The claim was rejected by the liquidator upon a number of grounds. First, it was rejected upon the ground of the resolution of Feb. 19, 1934, and secondly, that there was an agreement with the company by which Mr. Fontannaz had agreed to waive his rights. It does not appear to me that the liquidator supports his rejection of the claim. There was no agreement between the company and the directors who had these claims for remuneration. The case of *West Yorkshire Darracq Agency, Ltd.* v. *Coleridge* (1) was cited to me as bearing upon this question of agreement or no agreement, but in that case there was in fact an agreement by which each of the directors agreed to abandon his claim in consideration of the others doing so also. The only question was whether the liquidator could rely upon it, although no consideration moved from him. It has no relevance to the present case, where I find that there was no agreement made. With regard to the resolution, it was nothing more than a waiver of claims.

The next point is that it is said that, having regard to the terms in which remuneration is given by the articles, there could be no apportionment for the broken period of years. If this was material, I should feel that since the decision in *Moriarty* v. *Regent's Garage Co.* (2), where LUSH, J., and McCARDIE, J., after careful consideration, came to the conclusion that the Apportionment Act, 1870, applied in such circumstances as those in which remuneration is given in this case. I come to the final point, the point which has given me difficulty in this case, and it is this. This resolution was passed on Feb. 19, 1934, and it is material perhaps to observe that the minutes of that meeting were read and confirmed at a meeting of the board on May 7, 1934. That resolution was a resolution necessarily brought to the notice of all persons in the company who were concerned with the conduct of the company's business. In fact, Mr. Fontannaz himself was the governing director. Nothing could have been done without his assent, and he could veto anything of which he disapproved. That resolution was intended to induce the company to take a certain course of action. Waiving their remuneration was not an act of benevolence on the part of the directors. It was an act intended to induce the company to take a certain course of action, to carry on its business, to enter into transactions and to incur obligations which, but for that resolution, it might not have done. It appears to me that there is some direct evidence here, and, in my judgment, I am entitled to apply the rule, stated nowhere better than in the old case of *Cairncross* v. *Lorimer* (3). This was a Scottish appeal to the House of Lords, where LORD CAMPBELL, L.C., said, at p. 130, after some observations which are not material to the present case:

> The doctrine will apply which is to be found, I believe, in the laws of all civilised nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct

Also, a little further on at p 131:

> I am of opinion that, generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act, to their prejudice, than he would have had if it had been done by his previous licence.

In this case, I have come to the conclusion as a matter of fact upon the materials before me that the directors, by assenting to the postponement or abrogation of their legal right to claim remuneration due to them under the articles, did induce the company to a course of conduct from which it might have abstained, and the trustee is not now entitled to assert his claim. The company was entitled to assume that the directors would act in accordance with the provisions of the resolution they had passed, and would not claim remuneration until a further resolution was passed. No further resolution was passed. The company continued to carry on its business. In these circumstances, I dismiss this application, and uphold the rejection of the proof by the liquidator. The application must be dismissed with costs.

Application dismissed with costs.

Solicitors: *Whitehouse, Gibson & Oldershaw* (for the applicant, the trustee); *Hyman Isaacs, Lewis & Mills*, agents for *Herbert J. Davis, Berthen & Munro*, Liverpool (for the respondent, the liquidator).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re MORTIMERS (LONDON), LTD.

[Chancery Division (Bennett, J.), **February 15, 23, March 4, 1937.**]

Companies—Winding up—Voluntary winding up—Remuneration voted to liquidator—Compulsory winding up superseding voluntary winding up—Review of remuneration voted to liquidator in voluntary winding up—Companies Act, 1929 (*c.* 23), *ss.* 175, 232, 241—*Companies* (*Winding-up*) *Rules*, 1929, *r.* 192 (1).

An extraordinary resolution was passed for the voluntary winding up of a limited company, and a liquidator was duly appointed, and his remuneration fixed by the members. Subsequently an order was made for the compulsory winding up of the company which was found to be insolvent. The liquidator in the compulsory winding up sought to have the remuneration voted to the liquidator in the voluntary winding up reviewed:—

Held: the court has power, in any case where a voluntary winding up is superseded by a compulsory order, to review the remuneration which the members in a members' voluntary winding up or the committee of inspection or the creditors in a creditors' voluntary winding up have fixed as payable to the liquidator.

[EDITORIAL NOTE. In a voluntary winding up the remuneration of the liquidators is fixed either by the members or by the creditors acting by a committee of inspection. When this voluntary winding up is superseded by compulsory procedure the remuneration of the liquidator may be reviewed by the court and in a proper case any overpayment in this respect may be ordered to be repaid for the benefit of creditors generally.

As to Remuneration of Liquidator, see HALSBURY, Hailsham Edn., Vol. 5, p. 765, para. 1304; and for Cases, see DIGEST, Vol. 10, pp. 992, 993, Nos. 6874-6878.]

Case referred to:

(1) *Patent Agents Institute* v. *Lockwood*, [1894] A.C. 347; 42 Digest 613, *139*; 63 L.J.P.C. 75; 71 L.T. 205.

Summons by the Official Receiver and liquidator of the company asking that the amount of the remuneration voted to the respondent by the members of the company be reviewed by the court. The respondent had been appointed the liquidator of the company in a members' voluntary winding up but an order that the company be wound up compulsorily was made subsequently.

The company was incorporated on Oct. 17, 1928, to carry on the business of retail clothiers. On Mar. 21, 1933, a declaration of solvency was filed. Notice of the shareholders' meeting was given on Mar. 22, 1933, and on Mar. 31, 1933, an extraordinary resolution was passed that the company be wound up voluntarily by reason of its being unable to pay its debts. On Jan. 29, 1934, a winding up order was made by the court.

J. B. Lindon for the applicant: The liquidator takes the point that the fixing of the remuneration was a step in the winding up. But a big mistake was made here in thinking that this was a case in which there should be a members' voluntary winding up. It was a mistake to think that the company could pay its debts within 12 months.

H. A. H. Christie, K.C., and *Hon. Denys Buckley* for the respondent: In a normal case the court will not interfere with anything done in a voluntary liquidation unless there is reason for doing so on the ground of fraud or mistake. The Companies (Winding-up) Rules, 1929, r. 192, gives the court power to fix the remuneration where the liquidator has not been paid. The rule has statutory force. If the court considers that the rules are in accordance with the Act, there is no difficulty. But if there is any difficulty in reconciling them the Act will be the governing consideration. Sect. 175 is the governing consideration and r. 192 must be construed as subordinate to it. [Counsel referred to *Patent Agents Institute* v. *Lockwood* (1).]

Bennett, J.: The summons in this case was issued on Sept. 30, 1936, by the Official Receiver and liquidator of Mortimers (London), Ltd., and asks for an order fixing the amount of remuneration payable by the applicant to the respondent liquidator out of the assets of the company for services to the liquidator in the winding up of the company, or, alternatively, the amount of costs and expenses payable to him in lieu of any remuneration. The company, Mortimers (London), Ltd., went into liquidation on Mar. 31, 1933, as a members' voluntary liquidation. To enable that to be done, a statutory declaration of solvency had to be made under the Companies Act, 1929, s. 230, to the effect that the deponent, after having made the fullest inquiry into the affairs of the company, was of opinion that the company would be able to pay its debts in full in a period not exceeding 12 months from the commencement of the winding up. The respondent to the application was appointed by the members of the company to be the liquidator. On Dec. 21, 1933, A a meeting was held to receive a report from him and to fix his remuneration. The meeting was one at which only members of the company were present. So far from being solvent, the company was hopelessly insolvent. The only dividend which the respondent was able to declare was one of 6*d.* in the £. He gave notice of his intention to declare a B first and final dividend of 6*d.* in the £ on Jan. 9, 1934. At a meeting of the company held on Dec. 21, 1933, the shareholders fixed the remuneration of the respondent at £525. That sum has been paid. The voluntary liquidation was superseded by a compulsory liquidation, a compulsory winding up order being made on Jan. 29, 1934. [His Lordship then dealt C with the first question—an order of the court for the liquidator in the voluntary winding up to pay over a sum of money in his hands to the Official Receiver the liquidator in the compulsory winding up.]

The purpose of the second question is to have reviewed the remuneration voted by the shareholders—the members of the company—to D the respondent as liquidator. Whether there is a right to have it reviewed depends upon the Companies (Winding-up) Rules, 1929, r. 192, and the Companies Act, 1929, s. 175. This liquidation started as a members' voluntary liquidation, a voluntary liquidation which is based upon the view that the company is solvent and that all the creditors will be paid E in full within 12 months from the commencement of the winding up. In such a liquidation it is provided by sect. 232 of the Act that the remuneration to be paid to the liquidator may be fixed by the company in general meeting. That is upon the footing that the remuneration is to be paid out of the moneys to which those who fix the remuneration F are entitled. In a creditors' voluntary winding up, the liquidation proceeds upon the footing that there will be nothing for the members, and the remuneration of the liquidator is to be fixed, under the provisions of sect. 241, by the committee of inspection, or, if there is no such committee, the creditors may fix the remuneration to be paid to the liquidator. G This is neither a members' voluntary liquidation nor a creditors' voluntary liquidation. It has become, as the result of an order made on Jan. 29, 1934, a compulsory liquidation. The remuneration in such a winding up is to be fixed under the Companies (Winding up) Rules, 1929, r. 192, which is a rule having statutory force, under the provisions of sect. 305 H of the Act. The Companies Act, 1929, s. 305 (2), provides:

> All rules made under this section shall be laid before Parliament within three weeks after they are made, if Parliament is then sitting, and, if Parliament is not sitting, within three weeks after the beginning of the next session of Parliament, and shall be judicially noticed, and shall have effect as if enacted by this Act.

The material words of r. 192 are:

> (1) The assets of a company in a winding up by the court, remaining after payment of the fees and expenses properly incurred in preserving realising or getting in the assets, including where the company has previously commenced to be wound up voluntarily such remuneration, costs, and expenses as the court may allow to a liquidator appointed in such voluntary winding up shall . . . be liable to the following payments . . .

That has got to be read in connection with sect. 175, which provides:

> (1) Where before the presentation of a petition for the winding up of a company by the court a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.
>
> (2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up.

It is argued on behalf of the respondent in this case that there is no right to review the remuneration voted to the respondent by the members of the company because the voting of the remuneration to him by the members of the company was a proceeding taken in the voluntary winding up, and that it has not been proved that there was any fraud or mistake in connection with that proceeding. In my judgment, r. 192 enables the court, in any case where a voluntary winding up is superseded by a compulsory order, to review any remuneration which the members, in a members' voluntary winding up, or the committee of inspection or the creditors, in a creditors' voluntary winding up, have fixed as payable to the liquidator. To hold otherwise, it seems to me, and especially so in this case, would be to enable people who have no interest whatever in the money to vote it to somebody they have appointed liquidator. In some circumstances people can be extraordinarily generous with other people's money and it would be disastrous not to reserve to the court any power to review the matter. It seems to me that for these reasons the applicant is entitled to have the remuneration paid to the respondent, which was voted to him by the members of the company, reviewed and if the respondent is found to have been overpaid, he is entitled to an order for repayment of the surplus. I propose therefore to refer the matter to the registrar to ascertain the remuneration and expenses payable to the respondent as voluntary liquidator and if as a result of the inquiry it is found that the respondent has been paid more than the amount the registrar fixes as his remuneration, to order the respondent to pay the surplus to the applicant. In determining his remuneration, there must be taken into account payments he has made to agents and matters of that kind. There will be no order as to costs, but without prejudice to the Official Receiver's right to retain his costs out of the assets.

Solicitors: *Stafford Clark & Co.* (for the applicant); *Champion & Co.* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

RITZ CLEANERS, LTD. *v.* WEST MIDDLESEX ASSESSMENT COMMITTEE.

[Court of Appeal (Greer, Slesser and Greene, L.JJ.), **March 9, 10, 22, 1937.**]

Rates and Rating—Industrial hereditament—User as a retail shop—Cleaners and dyers—Work of the same nature as repair work—Articles received from and delivered to customers themselves—" Retail shop "—Rating and Valuation (Apportionment) Act, 1928 (*c.* 44), *s.* 3 (4).

The respondent company used certain premises for cleaning and repairing garments left for cleaning, and, to a very small extent, for dyeing. Articles for cleaning were brought to the premises by customers and the respondent company's vanman, who collected them from two receiving-offices, from an agency, and from customers' houses, in response to orders received. Not more than one-third of the articles received at the premises were brought there by the customers themselves. The premises consisted of three floors, one of the ground-floor rooms being fitted with a counter for receiving and dispatching goods, and the remaining rooms for cleaning and drying plant, for dyeing, pressing, and so on. No goods were displayed on any part of the premises. At quarter sessions, it was held that the premises should be treated as an industrial hereditament within the Rating and Valuation (Apportionment) Act, 1928, s. 3 (1), but that part of the ground floor was a retail shop, and an apportionment was made :—

Held : (i) the inference to be drawn from the facts found by quarter sessions was one of law and not one of fact.

(ii) as the company dealt direct with members of the public and did not work for any other firm, every part of the premises was used and occupied for the purposes of a retail shop, and there was no case for apportionment.

Decision of the Divisional Court ([1936] 3 All E.R. 121) *reversed.*

[EDITORIAL NOTE. The decision here turns upon the peculiar nature of the work of cleaning and dyeing and the definition of a retail shop in the 1928 Act. A retail shop includes any premises where retail trade or business, including repair work, is carried on. Cleaning is held to be similar to repair work, and as all the work was collected from and delivered to the customers of the business and not from and to traders or distributive firms, the premises are held to be occupied for the purposes of a retail trade. The case also restates the proposition that where the facts are found by the tribunal of fact, the inference to be drawn from such facts is a question of law and not one of fact.

As to Derating, see HALSBURY, Supp., Vol. 24, Rates and Rating, para. 88 ; and for Cases, see DIGEST, Supp., Rates and Rating, Nos. 226*a*-226*bb*.]

Cases referred to :

(1) *Finn* (*Wimbledon Revenue Officer*) v. *Kerslake,* [1931] A.C. 457 ; Digest Supp. ; 100 L.J.K.B. 271 ; 145 L.T. 73.

(2) *Toogood & Sons, Ltd.* v. *Green,* [1932] A.C. 663 ; Digest Supp. ; 101 L.J.K.B. 453 ; 147 L.T. 201.

(3) *Farmer* v. *Cotton's Trustees,* [1915] A.C. 922 ; 84 L.J.P.C. 137 ; 113 L.T. 657.

(4) *Pope* v. *Whalley* (1865), 6 B. & S. 303 ; 33 Digest 555, *377* ; 34 L.J.M.C. 76 ; 11 L.T. 769.

(5) *Harris* v. *Amery* (1865), L.R. 1 C.P. 148 ; 43 Digest 7, *23* ; 35 L.J.C.P. 89 ; 13 L.T. 504.

(6) *Turpin* v. *Middlesbrough Assessment Committee & Bailey,* [1931] A.C. 451; Digest Supp.; 100 L.J.K.B. 271; 145 L.T. 73.

(7) *Inland Revenue* v. *Gunn, Collie & Topping,* [1930] S.C. 389; Digest Supp.

(8) *St. Cuthbert's Co-operative Assocn.* v. *Edinburgh Assessor,* [1931] S.C. 386; Digest Supp.

A (9) *R.* v. *Bridge* (1890), 24 Q.B.D. 609; 33 Digest 409, *1192*; 59 L.J.M.C. 49; 62 L.T. 297.

(10) *Sparey* v. *Bath Rural District Council* (1931), 24 B.W.C.C. 414; Digest Supp.; 146 L.T. 285.

(11) *Pritchard* (*Cardiff Revenue Officer*) v. *Lewis* (*William*) *& Sons,* [1931] 1 K.B. 386; Digest Supp.; 100 L.J.K.B. 1; 143 L.T. 650.

B (12) *Wilkinson* (*Taunton Revenue Officer*) v. *Sibley & Donovan,* [1932] 1 K.B. 194; Digest Supp.; 101 L.J.K.B. 26; 146 L.T. 1.

(13) *Smith* v. *Anderson* (1880), 15 Ch.D. 247; 36 Digest 317, *8*; 50 L.J.Ch. 39; 43 L.T. 329.

(14) *Greg* v. *Planque,* [1936] 1 K.B. 669; Digest Supp.; 105 L.J.K.B. 415; 154 L.T. 475.

C (15) *Ideal Cleaners & Dyers, Ltd.* v. *West Middlesex Assessment Committee & Revenue Officer for West Middlesex* (1930), 143 L.T. 483; Digest Supp.

APPEAL from a decision of the Divisional Court dated Oct. 15, 1936, and reported in [1936] 3 All E.R. 121.

D *A. S. Comyns Carr, K.C.*, and *J. Scott Henderson* for the appellant committee.

J. G. Trapnell, K.C., and *W. G. H. Cook* for the respondent company.

Comyns Carr, K.C.: The divisional court declined to interfere with the justices' decision, upon the ground that it was one of fact and not E one of law. It is submitted that the question raised here is one of law: see *R.* v. *Bridge* (9). [Counsel referred to *Farmer* v. *Cotton's Trustees* (3), *Sparey* v. *Bath Rural District Council* (10), *Inland Revenue* v. *Gunn, Collie & Topping* (7), *Pritchard* (*Cardiff Revenue Officer*) v. *William Lewis and Sons* (11), *Finn* (*Wimbledon Revenue Officer*) v. *Kerslake* (1), F and *Turpin* v. *Middlesbrough Assessment Committee and Bailey* (6).] These premises fulfil the definition of a retail shop. It is admitted that a place to which the public do not resort at all, and to which all goods to be repaired are brought from other branches, is not a retail shop: *Finn* (*Wimbledon Revenue Officer*) v. *Kerslake* (1). [Counsel referred G to *Wilkinson* (*Taunton Revenue Officer*) v. *Sibley & Donovan* (12) and *Toogood & Sons, Ltd.* v. *Green* (2).] For premises to be a retail shop, there must be some sort of accommodation for the public, and the premises must be occupied and used as a shop; both those conditions are satisfied in this case. The word "business" includes, not only H buying and selling, but also any rendering of services, such as repair work. See *Smith* v. *Anderson* (13); *Greg* v. *Planque* (14). The addition of the word "business" to "trade" in the Act must mean something. Trade is buying and selling. Therefore business must mean something else; it means dealing direct with the public, without the intervention of a middleman. If repairs are done only for the trade, that is wholesale repairing, but if for the public direct, that is retail repairing. There is here a retail shop as a structure ; it is used as a retail shop ; it is used for taking in customers' clothes and cleaning them. That is business ; it is repair-work. There is accommodation for customers, and they can and do resort there. Therefore it is a retail shop. [Counsel referred to *St. Cuthbert's Co-operative Association* v. *Edinburgh Assessor* (8).]

J. Scott Henderson followed on the same side.

Trapnell, K.C.: Repairing involves the making good of defects or damage, and does not include cleaning and dyeing. If that were intended to be so covered, the legislature would have said so. Hence, cases on repairing are irrelevant. *Finn* (*Wimbledon Revenue Officer*) v. *Kerslake* (1) deals only with the particular facts of that case. The court must determine the type of user as a whole in each case. You cannot look only at the physical construction of the premises. Quarter sessions were right in saying that these premises were not used only as a shop. There is here no buying or selling, but merely the physical attributes of a shop. That does not entitle a court to say that it cannot be derated. Where part of a factory is devoted to retail uses, then the court must investigate what is the primary use that is made of the premises. The justices approached the matter correctly, and came to the right conclusions. [Counsel referred to *Ideal Cleaners & Dyers, Ltd.* v. *West Middlesex Assessment Committee and Revenue Officer for West Middlesex* (15).]

Comyns Carr, K.C., in reply : Cleaning is either repair work or retail trade ; the whole premises are used either for cleaning or for receiving and dispatching goods for cleaning ; there is, therefore, no need to consider the primary use. The only question left is, is it retail ? It is non-industrial only because it is retail. If it is not retail, it must be industrial.

GREER, L.J. [read by SLESSER, L.J.] : This appeal raises a question with regard to the interpretation, and application to the facts stated by quarter sessions, of the definition section in the Rating and Valuation (Apportionment) Act, 1928. The purpose of this Act was to cause valuation lists to be prepared which would enable Parliament, by a later Act (passed in the next year), to grant special rating exemption to industrial hereditaments. The 1928 Act required a special list of industrial hereditaments to be prepared by assessment committees so as to facilitate the derating provisions of the 1929 Act. For this purpose, it was necessary to define industrial hereditaments. Among the specified classes of industrial hereditaments defined by the Act of 1928 were factories within the meaning of the Factory Acts. But it was recognised that there might be hereditaments that were factories within the Factory

Acts that ought not to be classed as industrial hereditaments. Therefore, it was provided, by sect. 3, that the expression " industrial hereditament " should not include, *inter alia*, a hereditament primarily occupied and used as a retail shop, and " retail shop " was defined as :

> any premises of a similar character [similar in character to a shop] where retail trade or business (including repair work) was carried on.

The question then arose for decision whether, when part of premises behind a shop was used entirely for shop purposes, such part could be deemed to be primarily used for industrial purposes when it was solely used as ancillary to the shop, that is, for the purpose of preparing goods for sale in the shop, and whether the factory was still to be considered ancillary to the shop if orders were brought to it by the shop's vans as the result of orders taken by roundsmen. This question was finally determined by the Court of Appeal and by the House of Lords in *Finn* (*Wimbledon Revenue Officer*) v. *Kerslake* (1). That case is still binding on this court, notwithstanding the expression of opinion in *Toogood & Sons, Ltd.* v. *Green* (2), to the effect that the decision depended on the special facts of the case. In any case in which the facts found by the tribunal of fact are in essence the same as those in *Finn's* case (1), the court must follow the decision of the House of Lords in that case. In the present case, the premises could, in appearance and character, be properly described as a shop. Though the word " retail " is generally used as indicating sale of goods by retail, it appears to me quite plain that in sect. 3 (4) of the Act of 1928 it has a larger meaning. It seems to me that the words " retail trade or business " include premises in which a shop is used for the purpose of supplying services to customers who resort to the shop direct, though it does not include premises like Toogood's, where the warehouse presents none of the physical appearance or characteristics of a shop. In the present case, the assessment committee, in dealing with a proposal made by the occupier of the shop, decided that the hereditament was primarily used as a shop, and was not an industrial hereditament, and the occupier appealed to quarter sessions, who stated a case under the Rating and Valuation Act, 1925, s. 31. The facts found by the quarter sessions are stated in para. 8 of the case, and it is unnecessary to read them at length. The essential facts are stated as follows in para. 8 (6) :

> The respondents occupy and use the said hereditament for cleaning and for repairing garments left for cleaning and (to a very small extent) for dyeing. All the articles received by the respondents are cleaned, repaired or dyed at the said hereditament except that gloves and raincoats and sometimes flannel trousers are sent by the respondents to another firm for cleaning. No articles when cleaned are displayed on any part of the said hereditament. The respondents deal direct with members of the public and do not work for any other firm. Articles received for cleaning are brought to the hereditament by customers and by the respondents' vanmen, who collect from two receiving offices maintained by the respondents at Gerrards Cross and Beaconsfield and from an agency at Harefield and from customers' houses in response to orders received by post or telephone. Not more

than one-third of the articles received at the said hereditament is brought there by the customers themselves. Most of the articles brought by the customers themselves to the said hereditament are, after cleaning, delivered by the said vanmen.

The essential fact which, in my opinion, determines this appeal in favour of the assessment committee lies in the statement that the respondent company deals direct with members of the public, and does not work for any other firm. It seems to me immaterial whether the customers' goods come direct to the shop in the respondent company's vans, or whether they are delivered in depots or agencies on their way to the shop. The determining fact is that the order comes from a customer, and not from any merchant or distributing firm, and the delivery is made to the customer. I think this is just as much a retail trade or business as was the business of the baker's shop in *Finn's* case (1). As the facts are in essence the same as the facts in that case, it seems to me unnecessary to refer to the numerous decisions in other courts, Scottish or English, of which many were cited to us. Looking at the wording of the definition section in the 1928 Act, I should, in the absence of authority, be of opinion that the business carried on in the respondent company's premises was primarily the business of a retail shop, and this view is confirmed by reference to the decision of the House of Lords in *Finn's* case (1). It seems to me unnecessary to decide whether cleaning is repair work, though the reference to repair work indicates that retail shops are not to be confined to shops in which goods are sold.

As we are differing from the very careful judgments of the divisional court, I think I ought to indicate in what respects I differ from the three judgments delivered by the three judges. I am inclined to think that, if LORD HEWART, L.C.J., had felt that he had a free hand to differ from the quarter sessions, he would have been inclined so to differ. Where I think he was wrong was in treating the quarter sessions' decision as a decision on a question of fact. I agree with the expression of opinion, cited by GREENE, L.J., in the course of the argument (see *Farmer* v. *Cotton's Trustees* (3), at p. 932), that, where the facts are found by the tribunal of fact, the inference to be drawn therefrom is one of law, and not one of fact, unless the facts show that the question is one of degree. On the facts found by the quarter sessions and stated in the case, I think the true inference, as a matter of law, is that the hereditament in question was a retail shop or business, with a factory attached, as ancillary to the business of the shop which retailed its services to its customers. It seems to me also to be involved in the decision of the House of Lords in *Finn's* case (1), and in *Toogood's* case (2), that the question to be determined, on the facts stated in the case, called for a decision on a point of law, which they decided in *Finn's* case (1) in favour of the assessment committee and in *Toogood's* case (2) in favour of the occupiers of a warehouse which had none of the characteristics of a shop. In *Finn's* case (1), it was decided that the fact that the vans in many cases took the products of the ancillary factory direct from that part of the hereditament which was a factory within the Factories Acts did not cease to make it merely ancillary to the work of the baker's shop. In the present case, the quarter sessions decided that part of the premises constituted a shop, notwithstanding that no goods were being sold there, and they apportioned the valuation as £59 for the factory and £38 for the shop and other parts of the premises not used for factory purposes. As they found that part of the premises constituted a retail shop, they ought to have gone on to consider whether the factory was used for any purposes other than supplying the cleaned and mended goods to the shop, for re-delivery to the customers. As this was definitely established, they ought, in my judgment, as a matter of law, to have decided, in accordance with *Finn's* case (1), that the whole hereditament, which resembled a shop, and which was all used for the purposes of the shop, was not entitled to derating. As they did not do so, they were wrong in law in reversing the assessment committee. They ought to have affirmed it. With regard to the judgment delivered by du Parcq, J., I think it turns on a mistaken view of what was decided in *Toogood's* case (2), which we are bound to interpret as not having in any way differed from the decision of the House of Lords in *Finn's* case (1). With regard to the judgment of Goddard, J., it seems to me that he also failed to give effect to the decision in *Finn's* case (1), inasmuch as he concentrated his attention entirely on the part of the business which arose from the actual deposit of goods by customers at the shop, and attached no importance to the fact that all the business that came there, whether by vans or from the depots and agencies, came to the shop from retail customers.

For these reasons, I have come to the conclusion that the appeal of the assessment committee should succeed, and the committee should have its costs here and below, and the list as settled by the assessment committee should be restored.

Slesser, L.J.: The respondent company in this case carries on the business of cleaners and dyers in a hereditament situate in a shopping street in Uxbridge. On the ground floor there are two rooms, one with a counter for receiving and dispatching goods, and another with a plate glass window in which is a machine for cleaning and drying, which are said in the special case to comprise a shop. All the rest of the ground floor and the first floor and a boiler-house have been held to be occupied and used for industrial purposes within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 4. On this finding, the rating appeals committee of the Middlesex quarter sessions came to the conclusion that the hereditament was not primarily occupied and used for the purpose of a retail shop, and, on the proportions being agreed by the parties, apportioned on the basis of £59 for industrial purposes and £38 for non-industrial purposes. From this decision the assessment committee appealed to the divisional court, contending that, on the facts proved or admitted, the proper conclusion in law should be that the A whole hereditament was occupied and used for the purposes of a retail shop, and, therefore, should not be derated at all. The divisional court dismissed this appeal.

In my opinion, although the two rooms facing the street have been held to be a retail shop, the finding can be justified only by having B recourse to the definition of a retail shop contained in sect. 3 (4) of the 1928 Act. A retail shop is there said to include:

> any premises of a similar character where retail trade or business (including repair work) is carried on.

Without this addition of retail trade or business, although the premises C might have the physical characteristics of a shop, it could not properly be said to be "retail," a word which, to my mind, in its natural meaning involves buying and selling goods, though it may include places used for storing goods (*per* Mellor, J., in *Pope* v. *Whalley* (4), at p. 313), for trade has the technical meaning of buying and selling (*per* Willes, J., D in *Harris* v. *Amery* (5), at p. 92). But the services here rendered are clearly in the nature of a retail trade or business, for all the work is brought to be done, and taken away when completed, either by customers themselves or by vanmen receiving and returning from or to customers or receiving stations, without the intervention of a middleman, and, E on the facts as stated, the actual work done, being ancillary to the purposes of the shop, I do not think the evidence is capable of leading to other than one conclusion, namely, that the hereditament is occupied and used for the purpose of a retail shop within the meaning of the extended statutory definition, which includes any premises of a character F similar to that of a shop where retail trade or business is carried on.

The leading cases most resembling the present one, where service rather than sales is to be considered, are the garage cases (though there actual repairs were effected), the clothes-repairing cases, and the bakery case, *Turpin* v. *Middlesborough Assessment Committee & Bailey* (6), G *Inland Revenue* v. *Gunn, Collie & Topping* (7), and *Finn* (*Wimbledon Revenue Officer*) v. *Kerslake* (1), at p. 485. In *Turpin's* case (6), as in this case, the whole hereditament was registered as a factory, and accordingly was to be taken to be an "industrial hereditament," unless it was primarily occupied and used for the purposes of a retail shop. There H were windows exposing small accessories for sale, and outside the premises were three pumps for the supply of petrol to the public: sales took place daily. Much the larger part of the premises and practically the whole of the working time of the occupier and of his employees were devoted to repair work. No one was employed specifically for selling purposes. VISCOUNT DUNEDIN points out, at p. 473, that the hereditament is primarily occupied and used for the purpose of repair work without the intervention of any middleman. He points out that the words in the extended definition of a shop, the words " of a similar character," are not limited to the physical features of the premises, but that the character of the premises must be similar to the character of a retail shop. (In the present case many of the actual physical features of a shop are present.) He further points out, at p. 474, that the garage is like a retail shop; they:

> are both buildings to which the public can resort for the purpose of having particular wants supplied and services rendered therein.

He contrasts the case with *St. Cuthbert's Co-operative Association* v. *Edinburgh Assessor* (8), where the public did not resort to the hereditament, but the articles repaired were collected at the appellant's branch shops throughout Edinburgh (to which the public resorted) and brought to the hereditament in question. In *Toogood's* case (2) it was similarly held on the facts that no accommodation existed in the premises to which the public might resort. From these observations of VISCOUNT DUNEDIN in *Turpin's* case (6), it would appear that both requirements of the section, namely, the use and occupation (*a*) as a shop, (*b*) as retail, were both satisfied in *Turpin's* case (6), the former because the public could resort for the purpose of having services rendered, the latter in that the articles repaired were brought to the shop by the public themselves, without the intervention of a middleman. Once it is established that the premises are so used and occupied as a shop, the language of LORD HUNTER in *Inland Revenue* v. *Gunn, Collie & Topping* (7), which is expressly approved by LORD DUNEDIN in *Finn* (*Wimbledon Revenue Officer*) v. *Kerslake* (1), becomes important. Speaking there of a " unified business," and the application of the test of primary purpose to such a case, LORD HUNTER comments:

> It may be said that as nothing is manufactured or adapted for sale in any part of the premises, except for the purpose of satisfying the requirements of customers to whom goods have been sold retail, the primary purpose for which the business is used is the carrying on of a retail business. . . . The manufacture or adaptation for sale of the cloth . . . appears to me to be ancillary to the retail business of selling suits of clothing.

To this VISCOUNT DUNEDIN adds, in *Finn's* case (1), at p. 487:

> The dissection of a unified business, such as is in fact carried on here [a hereditament consisting of a baker's shop and bakehouse in the rear—the latter a factory], is not justified.

So in the present case, on the facts, seeing that all the goods to be treated by way of cleaning or repair are brought to and dispatched through the shop, either by or to customers direct, or by the agency of vanmen, as in *Finn's* case (1), and receiving stations, the business of cleaning and repairing is as much ancillary to the purposes of the shop as was the cleaning and repairing in the case of the garage in *Turpin's* case (6), the baking in *Finn's* case (1), or the tailor's manufacture of clothes, in the view of Lord Hunter, in *Gunn's* case (7). A

Thus, once the conclusion is arrived at that the whole business is a unified one, carried on " through " a shop, to use the language of Lord Thankerton in *Toogood's* case (2), at p. 672, as Viscount Dunedin has pointed out, strictly no question of dissection of purpose arises. The divisional court treated the decision of the quarter sessions as to primary B purpose as one of fact, and refused to disturb their finding. In my opinion, the facts of the case require us as a matter of law to hold that this hereditament was used and occupied without dissection of purpose for the purpose of a retail shop, all other activities being but ancillary to that purpose, and, consequently, that this appeal succeeds. C

Greene, L.J. : The first question which arises in this case is whether the business carried on by the respondent company upon its premises falls within the expression " retail trade or business (including repair work) " contained in the Rating and Valuation (Apportionment) Act, D 1928, s. 3 (4). The word " retail " is, according to the dictionaries, confined to sales, and it is not an accurate use of language to speak of, for example, " retail repairs," although in repair work, as in certain other kinds of work, there is a distinction analogous to that between retail and wholesale selling. For this reason, the expression " retail shop " would not, E in my opinion, by itself include the respondent company's premises, and it is accordingly necessary to have recourse to the extended meaning given in the definition section which I have quoted. The definition is not happily worded, but, in view of the fact that retail trade or business is said to include repair work, that is to say, repair work which, by an F easy analogy, may be described as retail, I think that the words " retail trade or business " are, in the context, wide enough to cover the business of the respondent company. I do not accept the view that the work of cleaning which it carries on is " repair work," as was argued by Mr. Comyns Carr ; this appears to me far-fetched. The question as to G the meaning of the word " retail " in this section was referred to by the House of Lords in *Turpin's* case (6), at p. 473, but, as the work there in question was repair work, it was not necessary to come to any decision upon it. I do not find in that passage anything which suggests that the view which I take is wrong. H

The other question is a rather more complicated one, although, in my opinion, when the relevant provisions of the statute are correctly construed and applied to the facts of the case, it does not present any real difficulty. Under sect. 3 of the Act read in conjunction with the definition section, a hereditament is not an industrial hereditament if it is:

> primarily occupied and used for . . . the purposes of a retail shop including premises of a similar character where retail trade or business (including repair work) is carried on.

Now, the premises must be " of a similar character " to a retail shop, and this similarity must exist not only with regard to " retail " character (which is already provided for in the words " retail trade or business "), but also with regard to " shop " character. It is not sufficient that retail business is carried on upon the premises, if the premises are not a shop, or similar to a shop. Now, the essential element in a shop is that people can shop in it. If a concern conducts its business entirely by mail-order, and does not invite the public to come to its premises to buy, or provide accommodation for them, the premises from which its business is conducted are not a shop, even though its business be entirely retail in character. It is upon this point that the House of Lords, in *Toogood's* case (2), took a view different from that taken by this court.

Upon the facts of this case, I am clearly of opinion that the hereditament in question is occupied and used for the purposes of a retail shop. But it is said that, even if this be so, it is not " primarily " so occupied and used. It is upon this ground that the judgment of the divisional court is based. DU PARCQ, J., and GODDARD, J., rely for their conclusion upon the fact that not more than one-third of the articles received at the hereditament for cleaning is brought there by the customers themselves, the remaining two-thirds being brought in by vanmen who collect them in unspecified proportions from customers' houses, two receiving offices and an agency. I do not myself find it possible to ascertain from the special case whether the court of quarter sessions based their decision upon the view that the hereditament as a whole is not occupied and used for the purposes of a retail shop or upon the view that it is not primarily so occupied. If they took the former view, they were, in my opinion, wrong, for the reasons which I have given. They were, moreover, wrong in law, since the question whether, upon the ascertained facts, the purposes for which the hereditament is used and occupied are those of a retail shop is, in my judgment, clearly a question of law: *Farmer* v. *Cotton's Trustees* (3), at p. 932, per LORD PARKER. The judges of the divisional court—at any rate DU PARCQ, J., and GODDARD, J.—treat the decision of the justices as based on the latter of the two views which I have mentioned. With all respect, I see no justification for this, since, as I have already said, there is nothing in the special case to show which of the two views the justices took, and this circumstance alone entitles this court, in my judgment, to form its own conclusion as to whether or not the facts found bring the case within the words of the statute. If justices decide that a hereditament is occupied and used for the purposes of a retail shop, but is not primarily so occupied and used, it may with plausibility be said that the question of primary user is in practice equivalent to a question of fact, and that their conclusion upon it ought not to be disturbed. But this is a proposition which must, in any event, be applied with great caution, since any such finding presupposes that the words "primarily occupied and used" in the statute have a certain meaning, and so involves a tacit decision upon a question of law. In my opinion, if the justices are to be treated as having decided this case upon the view that the hereditament as a whole, although occupied and used as a retail shop, is not primarily so occupied and used, they misdirected themselves as to the true meaning of the words "primarily occupied and used" in their application to the facts of this case. To those who prefer (inaccurately, in my respectful opinion) to treat such a decision upon the present facts, as a pure finding of fact, I would answer that, in my judgment, there was no evidence upon which the justices could so find.

I will now proceed to deal with the question upon its merits, unembarrassed by these considerations. The first point to notice in construing the statute is that the unit for rating purposes is the hereditament, and it is the nature of the user of the hereditament as a whole that falls to be considered. This is not a case where a defined portion of the hereditament is allocated to one user exclusively. The user of the whole hereditament is user for the purposes of a retail shop, since every part of it is used for those purposes. But it is said that the whole user of the hereditament is not for the purposes of a retail shop. The judges of the divisional court appear to have taken the view that, as two-thirds of the business was done by collection, it followed that two-thirds of the user was for purposes other than those of a retail shop. Thus Goddard, J., says that, if the whole of the business had been done by collection, the user could not have been said to be for the purposes of a retail shop. I agree. But the reason would have been that, in that case, there would have been no shop. It is one thing to say that premises used for a retail business of repair or cleaning, conducted entirely by collection, are not used for the purposes of a retail shop—such premises, as I have already pointed out, cannot be said to be of a "similar character" to a retail shop, since the necessary shop element is absent—but it is a totally different thing to say that, where the whole of the hereditament is used for the purposes of a retail shop, the fact that a part of the business of the shop is conducted by collection is to be treated as removing the hereditament *pro tanto* from the category of a retail shop. This distinction forms the basis of the decision in *Finn's* case (1), if I understand it correctly. Once it is ascertained that the entire hereditament is occupied and used for the purposes of a retail shop, the fact that part of the business of the shop is conducted by means of roundsmen, or collectors, appears to me to be irrelevant, since this is merely one of the ordinary ways in which retail shop business is conducted. In my judgment, the essential facts of this case are indistinguishable from those in *Finn's* case (1), and it must be decided accordingly. To use the words of LORD DUNEDIN in that case, the business is a " unified business," and it is not legitimate to " dissect " it into that part which is physically conducted in the shop and that part which is in part physically conducted away from the shop. The whole of the business is shop business, conducted from and by the shop, and that, in my judgment, disposes of the matter. I should add that, if the view which I have expressed is correct, there is no case for an apportionment under sect. 4 of the Act.

Appeal allowed with costs. Leave to appeal to the House of Lords.

Solicitors: *H. G. Greenwood* (for the appellant committee); *Ellis & Fairbairn* (for the respondent company).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

R. *v.* NAYLOR.

[COURT OF CRIMINAL APPEAL (Talbot, du Parcq and Atkinson, JJ.), **March 15, 1937.**]

Criminal Law—Borstal treatment—Suitability of case—Report of Prison Commissioners—Reasons—Prevention of Crime Act, 1908 (*c.* 59), *s.* 1 (1)

The Prison Commissioners in reporting, under the Prevention of Crime Act, 1908, s. 1 (1), that a case is not suitable for Borstal treatment would do well in future to attach their reasons.

[EDITORIAL NOTE. It was held in *R.* v. *Watkins* (1910), 74 J.P. 382; 14 Digest 480, *5238*, that it is incumbent upon the judge that he should consider the Prison Commissioners' report, but need not reach the same conclusion. Clearly if this is to be done the report should state the reasons upon which it is based.

AS TO DETENTION IN BORSTAL INSTITUTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 243, 244, para. 344; and FOR CASES, see DIGEST, Vol. 14, pp. 480, 481, Nos. 5238-5252.]

APPLICATION for leave to appeal against sentence. The applicant pleaded guilty at the Lincoln Assizes on Feb. 6, 1937, to stealing, with three other men, three wireless sets, and he was sentenced to three years' detention in a Borstal institution. The Prison Commissioners in reporting under the Prevention of Crime Act, 1908, s. 1 (1) that the case was not suitable for Borstal treatment, gave no reasons to the court for their conclusions. The Prevention of Crime Act, 1908, s. 1 (1) provides:

> . . . before passing [a sentence of detention under penal discipline in a Borstal institution], the court shall consider any report or representations which may be made to it by or on behalf of the Prison Commissioners as to the suitability of the case for treatment in a Borstal institution, and shall be satisfied that the character,

state of health, and mental condition of the offender, and the other circumstances of the case, are such that the offender is likely to profit by such instruction and discipline as aforesaid.

The case is reported only for the observations on the Prison Commissioners' report. A

The applicant was not present and was not represented.

du Parcq, J. [delivering the judgment of the court]: The judge, in considering whether this appellant was suitable for Borstal detention, said this, and we wish to associate ourselves with what he says: B

> I think in future when you are reporting that a prisoner is not fit for Borstal if he is physically and mentally fit, it will be well just to state the reason.

We hope the attention of those whose duty it is to make such reports will be directed to this statement. It is, of course, for the judge to decide whether the case is one which is suitable for Borstal detention. He has C to be actuated in his decision by the report of the Prison Commissioners, and it is important to state the reasons if a prisoner is unsuitable for Borstal, and, if he is not suitable on the face of it, to make, if necessary, further investigations.

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*] D

R. *v.* FOWLER.

[Court of Criminal Appeal (Branson, du Parcq and Lewis, JJ.), E **March 23, 1937.**]

Street Traffic—Driving licence—Disqualification—Indefinite period—Road Traffic Act, 1930 (c. 43), *s.* 15.

The appellant was convicted of driving a motor vehicle while under the influence of drink and was sentenced to six months' imprisonment F in the second division and disqualification from holding a licence for an indefinite period. The appellant had been convicted on two previous occasions for driving without due care and attention. The appellant appealed against the sentence:—

Held: (i) the offences of careless driving and of driving while under the influence of drink are of a similar character, and the court which convicted the appellant was entitled to take into consideration the two G previous offences when it imposed the sentence. There were no grounds for reducing the sentence of imprisonment.

(ii) the court had no power to disqualify for an indefinite period.

[EDITORIAL NOTE. The power to disqualify a person from holding a driving licence is a creature of statute and is therefore limited by the terms of the statute. H Those terms are not very precise, but it is here decided that disqualification cannot be for an indefinite period. From the point of view of the driver the point is unimportant, as after the expiration of 6 months he can always apply under the Road Traffic Act, 1930, s. 7 (3), for the removal of the disqualification; but it is important that such orders should be made in a form that the statute allows. This case also decides that, for purposes of imposing a more severe penalty upon a subsequent offence, driving without due care and attention is a similar offence to driving under the influence of drink.

As TO THIS DISQUALIFACATION, see HALSBURY, Supp., Street and Aerial
Traffic, para. 693 ; and FOR CASE, see DIGEST, Supp., Street and Aerial Traffic,
A No. 188*b*.]

APPEAL against sentence of imprisonment and disqualification in respect of an offence under the Road Traffic Act, 1930, s. 15.

B. B. Gillis for the appellant.

B *Maxwell Turner* for the Crown.

LEWIS, J. [delivering the judgment of the court] : In this case, the
appellant, Harold Addison Fowler, who is a motor driver, was convicted
at the Middlesex sessions before the deputy chairman on Feb. 11, 1937,
C for an offence under the Road Traffic Act, 1930, s. 15, which reads :

> (1) Any person who when driving or attempting to drive, or when in charge of, a motor vehicle on a road or other public place is under the influence of drink or a drug to such an extent as to be incapable of having proper control of the vehicle, shall be liable [to punishment].

D He was also charged in the same indictment with having driven a
motor vehicle on the same occasion in a manner dangerous to the public
contrary to sect. 11 of the same Act. The jury acquitted him on the
second count, and found him guilty of being under the influence of drink
so as to be incapable of having proper control of the vehicle. This
E application is an appeal against the sentence which was passed upon him,
of six months' imprisonment in the second division, and disqualification
from holding a licence for an indefinite period. We are asked to say that
the sentence of six months' imprisonment in the second division is too
harsh, and we are also asked to say that the disqualification for an
F indefinite period is contrary to law.

The appellant had been convicted on three previous occasions. Two
were for driving without due care and attention contrary to the Road
Traffic Act, 1930, s. 12, and one was for failing to have proper control
of his vehicle, it being suggested that on that occasion the brakes were
G out of order. The fact remains that twice he has been convicted of
driving a vehicle without due care and attention, and counsel has asked
us to say that the two previous convictions ought not to have been taken
into consideration by the learned deputy chairman because they were
of an entirely different character. We do not think we can do that.
H They were convictions for driving a motor vehicle without due care and
attention, and the offence of which he was convicted on Feb. 11 was
that of driving a vehicle while under the influence of drink to such an
extent that he had not proper control of the vehicle. It is an offence
for a man to drive a car unless he has proper control of the vehicle, which

means that he must cease to drive his car when he can drive it only in a careless way. We think that these two offences are of a similar character, and the deputy chairman was quite entitled to take into consideration these two offences when he imposed sentence. It is suggested that, even then, the sentence of six months' imprisonment in the second division A was too severe a sentence, and it is suggested that that is the maximum sentence. The maximum sentence is six months' imprisonment, with the power, if necessary, to inflict a fine, and the deputy chairman did not do so. For this reason, we do not think there are grounds for reducing this sentence of six months' imprisonment in the second division. B

With regard to the other point it seemed clear that what the deputy chairman had in mind in disqualifying the appellant for an indefinite period was this. He thought, no doubt for the safety of the public, that this appellant ought not to be allowed to drive a car again until he had given up his habits of drinking, and I have no doubt, and it C appears to us, that the motive of the deputy chairman was one very much in favour of the appellant. It is said by counsel that the deputy chairman could not have passed a period of disqualification for life, as that would be too severe, and it would be very difficult for the appellant to go to the court in a reasonable time and get the disqualification removed, D and we have no doubt that the deputy chairman, in dealing with the matter in the way he did, was giving the appellant the best possible chance of getting back his licence in six months' or in nine months' time, by persuading the court he was then fit to drive a car. The difficulty is this: the section which deals with these disqualifications, E sect. 15 (2), provides that any person convicted of being under the influence of drink so as to be incapable of having proper control of a vehicle shall:

> unless the court for special reasons thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified for a period of twelve months from the date of conviction for holding or obtaining a licence. F

Now, that section, it seems to us, does not give any power to the court to disqualify, for an indefinite period, a driver of a car, who has been found guilty of an offence under sect. 15 (1), and there is no doubt G that the disqualification which was passed on this man does not mean that it was for an indefinite period. In fact, the deputy chairman said in terms that, though he was disqualifying him indefinitely, he could apply in six months to get his disqualification removed. In view of that difficulty, we think that the disqualification for an indefinite period is H wrong, and we substitute for this indefinite period a period of five years. That means, just as the learned deputy chairman said, that, after six months, or perhaps longer, the court will, if it is satisfied that the appellant has pulled up, and has given up his habits of drink, and is once more fit to go on the road with a motor vehicle, from the point of view of the public, remove the disqualification.

Sentence of imprisonment and order for disqualification to run from the date of conviction.

Solicitors: *Theodore Elman & Co.* (for the appellant); *Solicitor for Metropolitan Police* (for the Crown).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

THE "STRANNA."

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **December 17, 18, 1936, March 22, 1937.]**

Shipping—Bill of lading—Negligence—Perils of the sea—"Charterers' risk"—Unexplained heeling of ship and loss of cargo when loading.

The "Stranna" was loading from boats a deck cargo of timber to be carried "at charterers' risk" and "perils of the sea excepted even when occasioned by negligence." During the process of loading the "Stranna" heeled suddenly, and part of the cargo was shot overboard, drifted away in the fog and was never recovered. The cause of the sudden heeling was not satisfactorily explained:—

HELD: as the shipowner could give no satisfactory explanation of the cause of heeling, negligence would be presumed against him, and the words "at charterers' risk" would not avail by themselves to protect him from liability; but the heeling, however caused, was a peril of the sea, and the shipowner was therefore excused under the terms of the bill of lading.

[**EDITORIAL NOTE.** This case raises a novel point upon what is a peril of the sea, and to the number of matters which have now to be decided to be such perils is to be added a sudden unexplained heeling of the ship during loading.

AS TO PERILS OF THE SEA, see HALSBURY, 1st Edn., Vol. 26, Shipping, pp. 110, 111, para. 190; and FOR CASES, see DIGEST, Vol. 41, pp. 414-417, Nos. 2573-2606.]

Cases referred to:

(1) *Wade & Sons Co., Ltd.* v. *Cockerline & Co.* (1905), 10 Com. Cas. 115; 41 Digest 435, *2730.*

(2) *Svenssons (C. Wilh.) Travaruaktiebolag* v. *Cliffe S.S. Co.*, [1932] 1 K.B. 490; Digest Supp.; 101 L.J. K.B. 521; 147 L.T. 12.

(3) *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484; 29 Digest 197, *1575;* 56 L.J. Q.B. 626; 57 L.T. 695.

(4) *Wilson, Sons & Co.* v. *Xantho (Cargo Owners), The Xantho* (1887), 12 App. Cas. 503; 41 Digest 414, *2573;* 56 L.J. P. 116; 57 L.T. 701.

(5) *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518; 41 Digest 414, *2574;* 57 L.J. Q.B. 24; 57 L.T. 726.

(6) *Sassoon (E. D.) & Co.* v. *Western Assurance Co.*, [1912] A.C. 561; 29 Digest 199, *1584;* 81 L.J. P.C. 231; 106 L.T. 929.

(7) *Grant, Smith & Co. & McDonnell, Ltd.* v. *Seattle Construction & Dry Dock Co.*, [1920] A.C. 162; 29 Digest 199, *1585;* 89 L.J. P.C. 17; 122 L.T. 203.

(8) *Blackburn* v. *Liverpool, Brazil & River Plate Steam Navigation Co.*, [1902] 1 K.B. 290; 41 Digest 431, *2707;* 71 L.J. K.B. 177; 85 L.T. 783.

(9) *Mountain* v. *Whittle*, [1921] 1 A.C. 615; 29 Digest 127, *799*; 90 L.J. K.B. 699; 125 L.T. 193.
(10) *Brooks Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.*, [1936] 1 All E.R. 258; [1936] 3 All E.R. 696; Digest Supp.
(11) *The Kite*, [1933] P. 154; Digest Supp.; 102 L.J. P. 101; 149 L.T. 498.
(12) *Morison, Pollexfen & Blair* v. *Walton* (1909), cited [1915] 1 K.B. at p. 90; 3 Digest 74, *143*.
(13) *Ballard* v. *North British Ry. Co.*, [1923] S.C. 43; 36 Digest 88, case *581 xix*.
(14) *The Glendarroch*, [1894] P. 226; 41 Digest 414, *2580*; 63 L.J. P. 89; 70 L.T. 344.

ACTION for damages for breach of contract and negligence. The facts and issues are fully stated in the judgment.

Sir Robert Aske, K.C., and *J. V. Naisby* for the plaintiffs.

H. U. Willink, K.C., and *Cyril Miller* for the defendants.

LANGTON, J.: The case arises out of the loss of a certain portion of a timber cargo which had been placed on the deck of the Norwegian steamship "Stranna." The governing documents in the contract of carriage are agreed to be bills of lading in a fairly familiar form which provide, *inter alia*: (*a*) that the deck cargo is to be carried "at charterers' risk," and (*b*) the following exceptions:

> . . . perils of the sea . . . and all and every other dangers and accidents of the seas, rivers and navigation wheresoever, including ports of loading . . . of whatever nature and kind soever . . . always mutually excepted, even when occasioned by negligence, default or error in judgment of the . . . master, mariners or other servants of the shipowners.

The uncontroverted facts are as follows. On July 23, 1935, the "Stranna" was lying in an open roadstead called Herring Cove, New Brunswick. She had been lying at anchor at this spot since July 12, taking on board a cargo of timber composed of 1,200 standards, or 48,130 pieces, of which 9,618 pieces were to be carried on deck. At about noon on July 23, about 12 standards remained to be loaded. The weather was a thick fog, there was no appreciable wind, and the water was calm. Herring Cove is situated just north of Matthews Head, in Chignecto Bay, off the coast of New Brunswick, and the cargo of the "Stranna" was being brought out to her in vessels known as motor-scows, which came out of the river Alma into the cove. In the early afternoon, the vessel, whilst still loading, listed to port, and carried away the wooden uprights or stanchions on the port side, thereby causing a considerable quantity of timber to be lost overboard. The vessel then rolled to starboard, and uprights on that side were likewise broken, causing or allowing more of the cargo to fall overboard. A flood tide was running at the time. The timber drifted away, and was soon lost sight of in the prevailing fog, and was not recovered. In all, the lost timber amounted to 4,843 pieces.

I was left with a clear explanation, as far as it went, of how the cargo

had come to be lost, but with no material upon which to base a finding
as to the cause of the vessel's strange behaviour, in listing as she did
before taking on board the full complement, which she had carried
previously in safety, and was expected to carry again. That casualties
A of this character occur in the timber trade is not only common knowledge,
but is also witnessed by several reported cases. Two of the best known of
these are *Wade & Sons Co., Ltd.* v. *Cockerline & Co.* (1) and *C. Wilh.
Svenssons Travaruaktiebolag* v. *Cliffe S.S. Co.* (2), in each of which,
though the contract of carriage differed in terms from that in the present
B case, the facts were not dissimilar. To this meagre and unsatisfactory
material it becomes necessary to apply the contract, in order to
ascertain whether the defendants are liable.

Mr. Willink, for the shipowner, takes two points. If either of them be
sound, the defendants have a complete defence to the action. I will
C summarise them as follows: First, he says, this is a peril or accident
of the sea, and, if this be so, it is immaterial whether such a peril or
accident was caused by negligence, because negligence is excepted in
so far as it causes such perils or accidents. Secondly, the deck cargo was
at "charterers' risk," and, although it is conceded that this exception
D does not include risk caused by negligence, no negligence has been
established here, and the cargo owner takes the chance under this clause
of loss by unascertained causes. The first of these points raises the
question of law which Sir Robert Aske claims to be new. On behalf of
the plaintiffs, he replies that the loss in this case is not a peril of the
E sea. All that is known is that the vessel heeled, and that the lost cargo
fell overboard into the sea. The mere falling of cargo into the water is
not a peril of the sea, nor is stability a property peculiar to the sea, or
governed only by the sea. In a word, the plaintiffs' point is that this
is a peril *on* the sea, not a peril *of* the sea. The argument proceeded thus:
F What you do of your own volition to a ship is not a peril or accident of
the sea. If the heeling of the ship be produced by putting cargo into or
upon her, it is the cargo and not the water which is heeling the vessel.
What you do by design is not fortuitous, and therefore neither a peril
nor an accident. The occurrence here under consideration accordingly
G lacks both the elements necessary to bring it within the exception relied
on: it has no special marine character which would allow it to be classified
as being "of the sea," and it has no quality of the fortuitous which
would enable it to be ranked as a peril or accident.

It is, I think, useful to trace a little of the recent legal history of this
H class of occurrence, in order to appreciate the angle of approach by which
this point has come to be reached. In *Wade* v. *Cockerline* (1), where the
facts resembled these with which I have to deal, the exceptions clause
contained the words "accident to hull." The phrase "deck load . . . at
charterers' risk" was also included in the bill of lading, but the decision

went in favour of the shipowner, on a finding that the breaking of the stanchions constituted an accident to hull, and the second point, though considered, was not decided. In *Svenssons* case (2) WRIGHT, J., dealt with facts almost identical with those in the present case. In that case, the last load of cargo was actually on board, but not actually stowed. A In a most careful and illuminating judgment, which has not, I believe, ever been questioned, WRIGHT, J., held, first of all, that there was no breach of the warranty of seaworthiness. Since, in the present case, the facts fall a little short of those in the *Svenssons* case (2), it would clearly have been idle for the plaintiffs to attack upon the line of unseaworthiness. B Secondly, WRIGHT, J., following *Wade* v. *Cockerline* (1), held that the loss fell within "accident to hull even when occasioned by negligence, etc.," and that the shipowner was thereby protected. These words do not occur in the present bills of lading, so that the shipowner here could obtain no assistance from the decisions in either *Wade* v. *Cockerline* (1) C or the *Svenssons* case (2), in so far as they dealt with that point, which (as I have noted above) was the only *ratio decidendi* in *Wade*'s case (1). Finally, WRIGHT, J., in the *Svenssons* case (2), decided that the words at "charterers' risk" standing alone in a separate clause did not excuse the shipowner from negligence. The shipowner therefore was driven in the D present case either to rely upon "charterers' risk" (which phrase also stands alone in a separate clause in these bills of lading), and to take the chance of negligence being proved against him, or to find a new line of defence. Hence comes, for the first time, the defence of perils or accidents of the sea. E

The *locus classicus* upon this subject, what is and what is not a "peril of the sea," is, of course, to be found in what Mr. Willink referred to as a famous trilogy of decisions which follow each other directly, viz., *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (3), *Wilson, Sons & Co.* v. *Xantho (Cargo Owners), The Xantho* (4), and F *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (5). These well known cases set at rest many controversies then current in the legal world concerning the insurance and carriage of goods by sea. For present purposes, the first of the three seems to me to be the most fertile, both in principle and in canons of construction. G

In this first case, it is well to note at once the warning of LORD MACNAGHTEN, at p. 502:

> Your Lordships were asked to draw the line and to give an exact and authoritative definition of the meaning of the expression "perils of the sea" in connection with the general words. For my part I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper H to be included, and no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad common sense view and not by the light of strained analogies and fanciful resemblances.

Where LORD MACNAGHTEN has forborne to tread, lesser men may be excused from the adventure. I shall attempt no definitions. I was invited by Mr. Willink to test the foundations of Sir Robert Aske's argument by a passage in the opinion of LORD HERSCHELL in the *Thames & Mersey* case (3), at p. 498:

A It will be observed that LORD ELLENBOROUGH limits the operation of the clause to "marine damage." By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject or which possess in relation to it a special or peculiar character.

This passage appears to me to shed great light upon the problem. B The actual words in these bills of lading are:

perils of the sea . . . and all and every other dangers and accidents of the seas . . . wheresoever, including ports of loading.

There are not many judicial pronouncements upon the term "dangers C and accidents of the seas," but we have again the high authority of LORD HERSCHELL in *The Xantho* (4), at p. 508:

The question, What comes within the term "perils of the sea" (and certainly the words "dangers and accidents of the sea" cannot have a narrower interpretation) . . .

Armed with this authoritative *dictum*, we can at least proceed with the D certainty that the introduction of the term "dangers and accidents" does nothing to cut down the ambit of "perils of the sea," and I would draw special attention to the words "including ports of loading" in this case. With these matters in mind, one may pass now to a review of the principal authorities, remembering always that the occurrence must be E fortuitous, and must have a marine character, in order to fall within the meaning of this exception.

The cases of *Thames & Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (3) (the donkey-engine case), *E. D. Sassoon & Co.* v. *Western Assurance Co.* (6), and, perhaps strongest of all, the case of *Grant,* F *Smith & Co. and McDonnell, Ltd.* v. *Seattle Construction & Dry Dock Co.* (7), lie on one side of the line, and provide instances of occurrences causing loss on the sea which are not "perils of the sea." In the donkey-engine case, the air chamber of the donkey-pump gave way, under an excessive pressure of water, owing to the outlet being closed. The House G of Lords held that this accident was devoid of any special marine character. In *Sassoon's* case (6), a worn-out hulk sank by the incursion of water, owing to its rotten condition, and the Privy Council held that there was nothing fortuitous. What must happen is not an accident. In *Grant, Smith & Co.'s* case (7), the question was more difficult. A dry dock H capsized, sank, and was lost, whilst being used for a legitimate purpose to submerge caissons, as a feature of harbour construction. There could be little doubt of the marine character of the operation, and, at first sight, it would appear that there was some element of the fortuitous in the occurrence. But the Privy Council held that the dock was "destroyed because of its own inherent unfitness for the use to which it was put" (p. 170), and followed the Board's own decision in *Sassoon's* case (6). Lord Buckmaster, in giving the judgment of the Board, at p. 171, compared the dock to a vessel unfit to carry her cargo:

> A It is just as though a vessel, unfit to carry the cargo with which she was loaded, through her own inherent weakness, and without accident or peril of any kind, sank in still water.

Again, therefore, the element of the fortuitous was negatived. On the other side of the line are *The Xantho* (4), *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (5), *Blackburn* v. *Liverpool, Brazil and River Plate Steam* B *Navigation Co.* (8), and *Mountain* v. *Whittle* (9).

In *The Xantho* (4), the House of Lords held that foundering by collision is within "dangers and accidents of the sea." Lord Herschell, at p. 509, disposes of the contention that the words are limited to casualties produced by tempestuous conditions: C

> It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other D vessel, falls within the same category.

Lord Bramwell, at p. 514, adds to the catalogue of fair-weather casualties:

> The argument is, that wind and waves did not cause the loss, but negligence in some one. But surely, if that were so, a loss by striking in calm weather on a E sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. I cannot bring myself to see that such cases are not losses by perils of the sea.

In *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (5), where rats gnawed a hole in a pipe on board the ship, whereby sea-water escaped and damaged F the cargo, the House of Lords held that the damage was within the exception "dangers and accidents of the seas." Lord Halsbury, L.C., at p. 524, says:

> I think the idea of something fortuitous and unexpected is involved in both words, "peril" or "accident"; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by G vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas . . . and I think in this case it was a danger, accident, or peril, in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword-fish from without, the sea water did get in.

Lord Herschell, at p. 530, says: H

> It arose directly from the action of the sea. It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage and therefore to be anticipated.

In *Blackburn's* case (8), an engineer, having opened the sea-cock with the intention of filling the ballast tank, inadvertently opened the wrong valve, and thereby introduced water to the deep tank where bags of sugar were stowed, thus damaging the sugar. After a lengthy review of the authorities, WALTON, J., a great master of mercantile law, held, following *The Xantho* (4), and *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (5), that the occurrence was accidental, and the danger maritime, since it was a danger that sea-water should come in, and therefore that it was a "peril of the sea."

In *Mountain* v. *Whittle* (9), a houseboat towed by a large and powerful tug sank, as the result of the towage, because water entered through some of her side seams, which proved to be defective. The House of Lords held that the houseboat was lost by a peril of the sea, but it is important to observe that, in the opinions delivered, much stress was laid upon the fact that the tug was of disproportionate size and power, and that the breast-wave caused by the towage was accordingly in excess of what might reasonably have been expected. It is also important to remember that the policy upon which the houseboat was insured was a time policy, so that the unseaworthiness of the vessel, which was found as a fact, offered no defence to the claim. Save for the unusual and unexpected size of the wash or breast-wave, it would have been extremely difficult to distinguish this case from *Sassoon's* case (6). It results plainly from the total of these authorities that exceptional violence of winds and waves is not essential to a "peril of the sea," and *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (5) and *Blackburn's* case (8) show that not only need the violence not be exceptional, but also there need be no violence at all. The quiet, undisturbed flow of perfectly calm water into a ship may be a peril of the sea if it enters fortuitously, and not, as in *Sassoon's* case (6), because it was the inevitable consequence of exposing the vessel to the action of water.

Sir Robert Aske rightly claimed *Grant's* case (7), as the spear-point of his argument. The action of sea-water in calm conditions upon a body designed to work in such water does not produce a peril of the sea. I agree, but only when the element of the fortuitous is excluded, as it was in that case by the finding of the Board. Let us turn again at long last to the "Stranna." There is here no violence of wind or wave, the agency causing the vessel to heel was human rather than elemental, namely, the addition of deck cargo: but are these matters the ultimate test of a peril of the sea? I return to LORD HERSCHELL in the *Thames and Mersey* case (3), in Mr. Willink's preferred passage at p. 498. Was this "damage of a character to which a marine adventure is subject"? For my part it seems to me that it was. LORD HERSCHELL says at p. 498:

> Such an adventure has its own perils, to which either it is exclusively subject or which possess in relation to it a special or peculiar character.

I cannot shut out from my recollection that I spent a pleasant morning during the hearing of this case in reviewing and reviving my notions of the factors governing the stability of a ship, under able tutelage from both sides. May I not ask why ? Is not the stability of a ship a special branch of marine engineering ? Is it not a feature, sometimes (fortunately at rare intervals) a sinister feature, of every marine adventure ? To my thinking, the answers to these questions are very clear, and I would go further, and fit the whole of the tests of LORD HERSCHELL to this case. It is true that I do not know exactly how this casualty was caused, but I do know that unseaworthiness is not suggested. Either the cargo was badly stowed, or parts of it were wet, which caused an uneven and uncalculated distribution of weights, or the tanks, which form so important a part in the stability of the vessel, were mismanaged, or some other factor which has occurred to nobody's mind so affected her stability as to cause her to heel in an unexpected manner. It seems to me that it matters nothing how this particular heeling was produced, the ultimate facts are the same. A vessel in water took a wholly unexpected, i.e., fortuitous, list, or series of lists, and cargo was thereby lost. In my eyes, following LORD HERSCHELL, this is " damage which has been caused by the sea " ; it is " damage to which a marine adventure is subject " ; it is damage by a peril to which marine adventures are " exclusively subject," and which possesses in relation to them a " special and peculiar character." Although it is right, in one sense, to say that the heeling was produced by a human agency, in that it resulted from cargo being put on board, it is to be observed that this heeling was not only undesigned, it was also the exact reverse of the effect desired and designed. Finally, there is, I think, significance to be attached in this case to the words " ports of loading " which occur in the bill of lading. Before now, in a hurricane, vessels have broken adrift, and thereby suffered heavy damage in a port of loading : buoys have come adrift from their moorings, and vessels lying at the buoys have been damaged. But, apart from cases of extraordinary weather, it seems difficult to me to imagine a case more exactly fitted than this one to a peril of the sea or accident of the sea occurring in a port of loading. Since this case may go higher, and I may prove to be wrong in my determination of this first point, I think it is due to the parties that I should also express my view as to the second point raised by Mr. Willink. I would gladly have refrained from doing so. It is true that I am relieved by the judgment of WRIGHT, J., in *Svenssons* case (2) from the initial difficulty as to the meaning of the words " at charterers' risk " standing alone. As WRIGHT, J., gave this judgment as a judge of first instance, I suppose it would be my duty to express any doubts I might feel concerning it. I have no such duty, because I have no doubts. But I have very considerable hesitation in expressing my view as to the question of negligence in this case.

I observe with some relief that both BRANSON, J., and a Court of Appeal composed of LORD WRIGHT, M.R., ROMER, L.J., and MACNAGHTEN, J., in the case of *Brooks Wharf & Bull Wharf, Ltd.* v. *Goodman Bros.* (10), expressed a view, concerning the onus of proof
A resting upon a bailee who had lost the goods entrusted to him, which seems to be in accordance with an earlier decision of my own in the case of *The Kite* (11). In the *Brooks Wharf* case (10), a remarkably clever gang of fur thieves had succeeded in abstracting a consignment of Russian squirrel-skins from a bonded warehouse. The trial judge, BRANSON, J.,
B was satisfied that the warehouseman had taken all reasonable precautions to guard against theft, and LORD WRIGHT, M.R., delivering the judgment of the Court of Appeal, confirmed that finding. Founding himself upon statements of LORD LOREBURN, L.C., and LORD HALSBURY in a case in the House of Lords *Morison, Pollexfen & Blair* v. *Walton* (12), and upon a
C particularly helpful passage from LORD DUNEDIN in a dissenting judgment in *Ballard* v. *North British Ry. Co.* (13), at p. 54, LORD WRIGHT, M.R., held that, in the circumstances, the warehousemen had discharged the burden of proof which lay upon them to give an explanation of how the loss could have occurred without negligence.

D My decision in the case of *The Kite* (11) was founded upon the same opinion of LORD DUNEDIN, and, although I am confident that my view was covered by his words, I appreciate that the Court of Appeal were on more certain ground in this case than I was in *The Kite* (11). LORD WRIGHT, M.R., states, in terms, in his judgment, that the court was satisfied
E that the warehousemen "had taken all reasonable precautions." It follows that they were not negligent. In *The Kite* (11), I could find only that, upon the explanation furnished by the bailees, the accident was equally as consistent with no negligence as it was with negligence, there was no preponderating probability one way or the other, and I held
F that this satisfied the onus upon them. This appeared to me to be the meaning which LORD DUNEDIN attached to "explanation" as distinguished from proof. The bailees had not to disprove negligence, they had to give an explanation. Applying this line of thought to the present case, I am at once confronted by the difficulty that the explanation given
G by the shipowner is exceedingly meagre. His theory of cross-currents is quite untenable, and his evidence, at the best, leaves the cause of the heeling completely unexplained. Mr. Willink urges that, although the words deck cargo "at charterers' risk" do not excuse him for negligence proved and determined, they will avail to put upon the goods
H owner the risk of loss through unascertained causes. As to this, I feel that the statement is too wide. I can quite easily read the words at "charterers' risk" to mean that the goods owner takes the chance of some imperfectly ascertained causes of loss, but to say that it confers upon the shipowner a right to claim exemption from liability in every

case in which the cause of the loss is unknown seems to me to be a construction altogether too benevolent in favour of the party who has inserted the exception. Pushed to its logical conclusion, this argument would appear to go to the length of saying that these words excuse a bailee from giving any explanation of the loss of goods entrusted to him. Indeed, he might well deem it wiser not to attempt an explanation, since without one he must succeed. As usual, in cases of onus of proof, *The Glendarroch* (14) was much canvassed before me. I cannot think that this decision is very helpful in the present case. It must be remembered that, in *The Glendarroch* (14), the hearing in the court of first instance was purposely confined and restricted, and the Court of Appeal were called upon to deal only with the position of the parties before any inquiry into the question of negligence had begun. It was a case of damage, and not a case of loss, and the decision established only that, where a bill of lading contained an exception of perils of the sea, but no further limitation of negligence, there was no burden upon the shipowner to disprove negligence. I do not see how this perfectly unassailable decision throws much light on either the construction of the phrase "at charterers' risk" or the burden of proof thereunder.

The defendants in the present case have essayed an explanation of the heeling of the "Stranna" which I cannot accept, and they have put forward, as a conceivable alternative to this theory, and to negligence on their part, that the wood was so weighted by wet as to render it out of the power of a reasonable and prudent seaman to load it without damage and loss. In support of their care in loading, they gave me evidence of testing the effect of what they were proposing to do by hanging certain weights of cargo in slings over the ship's side. This evidence was anything but clear in the result, and I do not feel at all satisfied that the tests spoken of were carried out at the times deposed to, or with the weights stated. I am ready to believe that some experiments were made, at some period of the loading, but, if the facts spoken to in evidence are to be taken as true, the heeling of the "Stranna" almost immediately afterwards would not only be a mystery, it would also be a miracle. In the result, I do not think that the defendants have succeeded in providing an explanation which is in any sense comparable in probability with the probability of their own negligence. The loading of timber cargoes on deck is admittedly a difficult process. The preservation of a ship's stability during this process may be a matter of nice calculation. But one cannot pretend ignorance of the fact that both the process and calculation are being successfully accomplished practically every day, and that the comparatively rare cases of failure are usually due to carelessness or to a fairly elementary blunder. If the facts were otherwise, the carriage of timber cargo upon deck would have earned an unpopularity, at least among underwriters, which it does not appear to enjoy, and it is unlikely that the construction of the now familiar phrase "at charterers' risk" would have been delayed as late as the year 1937. Upon the second line of defence put forward by Mr. Willink, I have accordingly reached the conclusion, though not without some doubt A and hesitation, that, in the absence of a reasonably probable alternative explanation, the heeling of the "Stranna" was caused by negligence, for which the shipowners are not protected by the words "at charterers' risk." As, however, they are protected by their first defence, the plaintiffs' claim fails.

B Solicitors: *Waltons & Co.* (for the plaintiffs); *William A. Crump & Son* (for the defendant).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

C

MEDCALF AND ANOTHER *v.* R. STRAWBRIDGE, LTD.

[KING'S BENCH DIVISION (Atkinson, J.), **March 16, 17, 18, 23, 1937.**]

Highways—Improper user—Injunction—Damage to support action by frontager without joinder of Attorney-General.

D *Nuisance—Public nuisance—Damage to unadopted road—Frontagers—Special damage.*

The owner of a vehicle attached to his vehicle a skid-pan which did damage to the surface of an unadopted road. In an action by two of the frontagers to restrain the continued use of the skid-pan, the owner of the vehicle contended that, if what was being done amounted to a E nuisance, it was a public nuisance and, the damages being common to all the subjects of the Crown, the Attorney-General alone could sue. The plaintiffs claimed to have a separate interest on the grounds (i) that they were under a contractual obligation to repair, (ii) that they had an interest in maintaining the road which might be taken over by the local authority under the Private Street Works Act, 1892, s. 6, and repaired or re-made at the frontagers' expense, and (iii) that the F value of the plaintiffs' premises might be, and would be, affected by the condition of the road:—

HELD: the plaintiffs had a separate interest and were entitled to an injunction restraining the use of the skid-pan.

SEMBLE: frontagers constitute a class for the purposes of a representative action.

G **[EDITORIAL NOTE.** The principle is that private persons can only complain of a public nuisance if they suffer damage over and above that suffered by the public generally. The repair of an unadopted road is a serious item for frontagers now that both the cost and standard of road repair have so greatly increased. It is therefore a welcome decision that they as private persons can be protected against the improper use of the road by the owners of vehicles, and can obtain an H injunction restraining such use. The case incidentally affirms the well known proposition that a covenant to repair a road being a positive covenant does not run with the land.

AS TO DAMAGE TO SUPPORT THE ACTION, see HALSBURY, Hailsham Edn., Vol. 16, pp. 365-367, para. 488; and FOR CASES, see DIGEST, Vol. 26, pp. 452-454, Nos. 1670-1708.]

Cases referred to:

(1) *Vanderpant* v. *Mayfair Hotel Co., Ltd.*, [1930] 1 Ch. 138; Digest Supp.; 99 L.J. Ch. 84; 142 L.T. 198.

(2) *Stockwell* v. *Southgate Corpn.*, [1936] 2 All E.R. 1343; Digest Supp.; 155 L.T. 437.

(3) *Litchfield-Speer* v. *Queen Anne's Gate Syndicate (No. 2), Ltd.*, [1919] 1 Ch. 407; 28 Digest 405, *321*; 88 L.J. Ch. 137; 120 L.T. 565.

Action by the plaintiffs suing in a representative capacity on behalf of themselves and others, frontagers of Cedar Avenue, East Barnet, for an injunction to restrain R. Strawbridge, Ltd., its servants or agents from driving a vehicle with a skid-pan along Cedar Avenue, so as to damage the surface of the said avenue. The facts are set out in the judgment.

Robert Fortune for the plaintiffs.

Roland Burrows, K.C., and *H. Hillaby* for the defendant company.

Atkinson, J.: In this action two frontagers, Mr. Medcalf and Mrs. Kemp, living in Cedar Avenue, East Barnet, are claiming an injunction to restrain the defendant company from causing unnecessary damage to the surface of Cedar Avenue, a private road which has not been taken over by the local authority. Mr. Edward Horace Thompson was and is the owner of a building-estate in East Barnet. He seems to have acquired his title under an indenture dated Oct. 4, 1911, which imposed certain obligations upon him as to making and maintaining roads. He sold a number of plots to different persons, and, on Oct. 4, 1920, there was entered into between him and his various purchasers what was called a deed of mutual covenant, whereby each purchaser agreed to perform such of the stipulations contained in the schedule thereto as were applicable to the plot purchased by him. One of the stipulations in the schedule was to pay to the vendor a reasonable proportion of the cost of maintaining all roads appertaining to the land sold in common with the adjoining land. Mrs. Kemp's house is known as "Creek Moor." She bought from Lily Freestone, on Aug. 25, 1927. Her land certificate has been produced, and it states that the land held by her is subject to a restrictive covenant contained in the conveyance of Oct. 4, 1911, so far as it runs with the land, and to the purchaser's covenants in a transfer dated Feb. 11, 1920, from Mr. Thompson to a man named Eyres. Those covenants are set out, and the relevant covenant is in the same terms as the one relating to the maintenance of roads in the indenture of Oct. 4, 1920. It looks as if Eyres must have sold to Freestone. Eyres was not a party to the indenture of Oct. 4, 1920, nor, so far as I know, was any predecessor in title to "Creek Moor."

Mr. Medcalf owns a house known as "Maxie" in Cedar Avenue. He acquired direct from Thompson, on Apr. 11, 1924. The land was transferred subject to the restrictive conditions appearing upon the registered title, and also to the conditions and stipulations contained in the deed of Oct. 4, 1920. In Oct., 1927, Medcalf was called upon by Thompson to pay, and did pay £2 5*s*., his proportion of road repairs at 1*s*. 3*d*. per foot frontage. In 1933 further repairs to the road were carried out, apparently by arrangement between the frontagers, and he paid £1, and Mrs. Kemp also made the same contribution. The road was not well made ; it consisted of 6 ins. of hard core, and on the top of that 6 ins. of stone gravel. The paths were not formed, at any rate not kerbed. The road falls fairly steeply from Alverstone Road towards the north-east. The average fall was stated to be 1 in 12 as far as Lovelace Road, where I gather the road becomes level, and Lovelace Road itself is level. Every day a four-wheeled van belonging to the defendant company was driven down Cedar Avenue. The company had a customer near the top of the avenue, and one or two just above Lovelace Road. The cart or van was driven by Davidson. He had been driving that, or a similar cart, down the road for, he says, 3 or 4 years. In August last he began to drive down this hill with a skid-pan on the near rear wheel, and I am quite satisfied that he began to do this only about last August, and that he is not telling the truth when he says he had done it for 3 years. I accept the evidence that the explanation of this method of driving down the hill was that the driver did not want to be bothered with driving ; he hung up his reins and was busy putting into his basket the necessary bread or loaves he was delivering, and making entries in his book as to deliveries made. Many other vehicles used the road, and drove down constantly, and nobody has ever seen one with a skid-pan of this sort before, and I am quite sure the use of it was quite unnecessary. Since the writ was issued, this use has been discontinued and there is no question of there being any trouble whatever.

The other relevant facts are these. On July 23 of last year, the local authority passed a resolution relating to the taking over of this road. On Oct. 19, the local authority approved a provisional specification and apportionment of the expense for making the road, and, on Nov. 7, the resolutions had been advertised and notices served upon the owners. Various objections, apparently, had been lodged to the apportionment, and some of these had been arranged in a friendly way and some had not, and apparently they can be dealt with only by proceedings before the magistrates. Those proceedings have not yet taken place. There is no obligation upon the local authority to take over and make the road. It has not committed itself to it, it can change its mind at any time, and I am told that the taking over of the road has been a matter of discussion for many years, and the plaintiffs think it might very well be quite a long time before anything really is done. At any rate, that is the position.

The main defence is, I gather, that no injunction will lie at the suit of these plaintiffs. It is said that, if what is being done does amount to a nuisance, it is a public nuisance, and, the damage being common to all the subjects of the Crown, the Attorney-General alone can sue. There is no doubt that, to entitle a person to maintain an action to restrain a A public nuisance, he must show that he has sustained, or will sustain, some particular damage, other than and beyond the general inconvenience and injury suffered by the public. That is how it was put in *Vanderpant* v. *Mayfair Hotel Co., Ltd.* (1), at p. 153. Mr. Medcalf and Mrs. Kemp sued on behalf of themselves and all other the frontagers of Cedar Avenue, B each being in the county of Hertford. There was some criticism about the right to sue in a representative capacity, and I am quite certain that there was and is a class on behalf of the members of which they would be entitled to sue. It is only a matter of correctly defining it, but, to avoid questions of that kind, Mr. Fortune was willing to, and did, amend C his title by striking out this reference to other frontagers, so that it then became a claim by Mr. Medcalf and Mrs. Kemp.

The two plaintiffs reply to this argument in this way. They claim to have a separate interest on three grounds. First, they said, they were under a contractual obligation to repair. Secondly, the plaintiffs said D that under the Private Street Works Act, 1892, s. 6, if the local authority decided to make the road and take it over it will be done at the expense of the adjoining owners, and that the existing condition of a road is a material matter for the authority to consider before exercising its powers, and, therefore, that they, the plaintiffs, have a special interest in maintaining E the road in a satisfactory condition, and so postponing the making and taking over. The relevant wording of the section is:

> Where any street . . . is not sewered, levelled, paved, . . . made good . . . to the satisfaction of the urban authority, the urban authority may . . . resolve . . . to do . . . the following works . . . F

so that it is clear that the existing condition of a road is a matter which is material for the council to consider, and, if it gets into a state of disrepair, it may lead to the council making the road in an expensive way as far as the frontagers are concerned, and making it at their expense. The third ground on which a special interest was claimed was that the G value of these premises might be, and would be, affected by the condition of the road. As to the first of these contentions, I think Mrs. Kemp's claim breaks down. She did not take directly from Mr. Thompson, and the covenants relating to the maintenance of the road could bind her only if they ran with the land. I am satisfied that none of the covenants H relating to the road does run with the land, and therefore I cannot see that she is under a contractual liability to repair. Mr. Medcalf's position is different. He bought directly from Mr. Thompson, who apparently is the owner of the roads. I can see no reason to suppose that the frontagers own any part of the road, but there is a direct purchase from Mr. Thompson. I have before me the transfer to Medcalf. The land was transferred to him subject to the restrictive conditions appearing on the registered title, and also subject to, and with the benefit of, the conditions and stipulations contained in the deed of mutual covenant. One of the conditions and stipulations in the deed of mutual covenant was a covenant to keep this road in repair. The covenant was :

> to pay to the vendor [Thompson] his heirs or assigns on demand a reasonable share or proportion towards the cost and expense of maintaining and repairing all roads . . . appertaining to the said road adjoining to the said land until the same shall be taken over.

It was said, on the other side, that this was not a covenant on Mr. Medcalf's part, but it seems to me that, if land is conveyed to a purchaser subject to the conditions and stipulations of another deed, and in that other deed there is a covenant to pay a proper share of the cost of making the road, then Mr. Medcalf is in that way under a contractual obligation to Mr. Thompson to bear some share of the cost of maintaining the road.

As to the second ground, in my judgment, the possible liability under sect. 6 does place the two plaintiffs in a position differing from that of the general public, and does enable them to say successfully that they were in November threatened with a particular injury. All the expense had been incurred and paid in 1927, and again in 1933, in maintaining the road in a satisfactory condition, and I am quite satisfied that, if this injury had gone on, the frontagers would very soon have been faced with the necessity of expenditure to maintain the road in a satisfactory condition. The retort to that was this. It was said : That would be all very well if the council was not going to take over the road, but there are the resolutions, and therefore this is merely a threatened expense, which does not really exist. I am not satisfied about that. I repeat, the council is not bound to go on, it is still talking, and there are objections which have not yet been dealt with, and I cannot think that, if the plaintiffs would have had a right of action if no resolution had been passed, the passing of the resolution deprives them of that right. I think, at any rate, on that ground they have an interest to sue, an interest differing from that of other members of the public.

As to the third ground, again I agree with Mr. Fortune that the owners of houses or premises on a private road have a special interest in preventing damage to the road because of the possible effect on the enjoyment and value of the houses. This can be tested by an extreme case. Supposing there was a user which so destroyed the surface of a road as to make it quite unfit for motor cars to use it without serious risk to the springs, such a road which anybody who possibly could would avoid using, can it really be said that the owners of the houses adjoining that road do not suffer an injury differing from that of the other members of the public ? I have in mind two roads which I used to use constantly. They have both been completely ruined, full of potholes and ruts, by some extraordinary traffic. They are wholly unusable by motor cars unless you crawl slowly in the lowest gear, and then all the time you are fearing some damage to your car. They are roads which nobody uses if they can possibly help it. The ordinary members of the public can go another way, but the people living on those two roads cannot help using the roads. Can it seriously be said that the injury inflicted on those two roads has not affected the value of the houses adjoining them ? Anybody coming to make an offer for those houses sees a road which is in such a wretched condition that it cannot be comfortably or properly used, and it seems to me idle to say that the value of the premises was not being substantially affected by the condition of the road.

This point, as to whether injury of that sort placed a member of the public in a special condition, was considered by Porter, J., in *Stockwell* v. *Southgate Corporation* (2). Mr. Roland Burrows was good enough to call my attention to the case. Neither Mr. Fortune nor I was aware of it. It is a case against himself, and I owe the knowledge of it actually to him. His Lordship was there considering whether the plaintiff had a right of action. Apparently there was some doubt as to whether a certain high road was still a private road, or was repairable by the public at large, and the plaintiff brought an action for a declaration. Mr. Burrows, who was in the case, took the point that the action would lie only at the suit of the Attorney-General. Porter, J., said, at pp. 1351, 1352, referring to Mr. Burrows :

> He said this is an action for a declaration which arose with regard to a highway repairable by the inhabitants at large. That is a matter, put in that form, by which all the inhabitants of the road would be affected, because the question whether it is to be a highway or not is one which affects the whole country, and, when that remedy is asked for, the Attorney-General ought to be a party to the action. In a matter where the whole of the country is affected and the particular party who makes the claim is not peculiarly affected, the principle that when that exists the Attorney-General must be made a party is well known and requires no authority ; but one has to ask oneself : Are these particular people peculiarly affected or are they not ? In my view, they are peculiarly affected. I think the question does not depend upon the exact question whether their property is invaded in any way ; I think it depends upon the much broader question : Are they peculiarly affected ? One way of asking oneself that question is : What would happen supposing they endeavoured to sell the land ? The answer would be that if this is not a highway repairable by the inhabitants at large, but comes under the Private Street Works Act and the obligation imposed by it, the frontagers would get much less in price for their property than they would have got had the road been a highway repairable by the inhabitants at large. It is quite true that a man cannot recover merely for damage to himself in a case where the claim is a matter which affects the public at large, as well as himself, but this is not a case where the frontager is affected in his person ; it is a case where the land which he holds is affected. That may be seen by the fact that if he disposes of the land it is the purchaser who is affected. It is only in the right of his land and not in right of himself. For these reasons I hold that the Attorney-General need not be a party to this action.

It is said it was only *obiter*, but I should pay the very greatest respect to it if it was only *obiter*, and, forming my own opinion about it, I think that must be right. Here the conditions of the road would affect the value of the land in two ways. First of all, if there was no idea of the council taking it over, the worse the road gets, surely the lower the value of the premises upon it becomes, and always hanging over the purchasers A would be the fear that, if the road got bad enough, the council would eventually take it over and make it up at their expense. Those fears must affect the value of the land to some extent, and therefore they do put the existing owners, it seems to me, in a position differing from that of other members of the public.

B The position is this. I am satisfied that the plaintiffs have established their right to sue. I am satisfied that, if the defendant company's driver were permitted to continue the use of this skid-pan indefinitely, the damage caused to the road would very soon be sufficiently established to necessitate the expenditure of money in making good the road in C order to maintain it, and also to maintain it in a condition satisfactory from the point of view of a local authority, and that it would tend to hasten the day when the road would be taken over. It is said that a *quia timet* action can be brought only where there is an apprehension of special damage. In *Litchfield-Speer* v. *Queen Anne's Gate Syndicate* D (*No.* 2), *Ltd.* (3), at p. 412, the principle was put by P. O. LAWRENCE, J. :

> In all cases of apprehended nuisance the authorities show that if the plaintiff proves that he will certainly sustain substantial damage by what the defendant is about to do the court will restrain the defendant from doing the act and will not wait until the plaintiff has sustained the damage.

E I am quite certain here that this act is an illegal act, illegal in the sense that the man was inflicting damage to this road in a wholly unnecessary way. It is not a case of may inflict damage. I am quite satisfied that the result would be a certainty. Mr. Roland Burrows emphasised the word "substantial," and said: Can you say this is substantial or F sufficiently substantial to justify the interference of the court? I think it is. Certainly, if one looks at it from the point of view of the frontagers as a whole, there can be no question about it. I think, if one confined oneself to the damage suffered by the two plaintiffs, it is substantial within the meaning of that principle. The extent to which it would G affect the value of their land is unknown, but something going on day after day makes the state of the road worse and worse, cutting it up into ruts in the way described, and must lead to some expenditure, which nobody could call trivial, and, as I say, must tend to hasten the day, unless expense is incurred, pending the time the road is taken over. H I think it would be an amazing thing if the court could not interfere at the instance of people prejudiced in this way to protect a road used by them, and upon which they live, and upon which other people live, to protect it from injury of this kind. Therefore I think the damage which they would suffer is sufficiently substantial to impose an obligation not merely to justify an interference, but also an obligation on the court to interfere and protect it.

The form of the injunction which, subject to anything anybody might say, I propose to make is this. It will be an injunction to restrain the defendant company, its servants and agents, until the taking over of Cedar Avenue, East Barnet, from locking the wheel of any horse-drawn van with a skid-pan when descending Cedar Avenue so as to injure the said road.

Solicitors: *H. H. Kemp* (for the plaintiffs); *Billinghurst, Wood & Pope* (for the defendant company).

[*Reported by* Gerald Abrahams, Esq., *Barrister-at-Law.*]

ALLEN AND ANOTHER *v.* TREHEARNE (INSPECTOR OF TAXES).

[King's Bench Division (Lawrence, J.), **March 19, 22, 24, 1937.]**

Income Tax—Profit from employment—Sum payable on termination of office—Death—Assessment on executors—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 18—*Finance Act,* 1927 (*c.* 10), *s.* 45 (5), (6).

The managing director of a company was entitled, under an agreement with the company, by way of remuneration for his services, *inter alia,* to a terminal sum of £10,000 to be payable by the company to the managing director or his personal representatives upon the final termination from any cause whatsoever (other than the wilful default of the managing director in the performance of his duties) of his service with the company. The managing director died during the subsistence of the agreement and £10,000 was duly paid to his executors. The executors were assessed to income tax under Sched. E in respect of the sum of £10,000:—

Held: upon the construction of the Finance Act, 1927, s. 45 (5), (6), the assessment was properly made.

[EDITORIAL NOTE. The Finance Act, 1927, s. 45 (5) provides for the cessation of a source of income taxable under Sched. E in the course of the year of assessment. Subsect. (6) provides for the death of the person assessed. It was contended here that for both subsections to be applicable there must be a cessation, followed by death after the lapse of a period of time, and not as here cessation by the death of the assessee. This contention, however, did not find favour with the court.

As to Finance Act, 1927, s. 45, see HALSBURY, Hailsham Edn., Vol. 17, pp. 219, 220, para. 443; and for the Section of the Act, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, p. 699.]

Appeal by way of case stated by the Commissioners for the Special Purposes of the Income Tax Acts confirming an assessment to income tax under Sched. E for the year ending Apr. 5, 1934, made upon the appellants as executors of the will of Percy Murray, deceased. The assessment under appeal was made upon the appellants to charge a sum of £10,000 paid to the appellants as his executors, on the death of Percy

Murray, in accordance with the terms of an agreement made between Percy Murray and Lewis Berger & Sons, Ltd., and dated Oct. 20, 1931. By that agreement Percy Murray held the office of managing director of Lewis Berger & Sons, Ltd., for a period of 10 years certain from Aug. 1, A 1930, and by cl. 4 it was provided that the company should pay to the managing director by way of remuneration for his services, *inter alia*, (c) a terminal sum of £10,000 with an addition thereto at the rate of £800 for each year of service after July 31, 1935, to be payable by the company to the managing director or his personal representatives upon B the final termination from any cause whatsoever (other than the wilful default of the managing director in the performance of his duties) of his service with the company whether such termination should take place under or during the subsistence of the agreement or any subsequent agreement for the extension of his service.

C The Income Tax Act, 1918, All Schedules Rules, r. 18, provides:

> Where any person dies without having delivered a statement of all his profits or gains chargeable to tax with a view to an assessment thereon in due course, an assessment in respect of the profits or gains which arose or accrued to him before his death may be made at any time within the year of assessment, or within three years after the expiration thereof, upon his executors or administrators, and the D amount of the tax thereon shall be a debt due from and payable out of his estate.

The Finance Act, 1927, s. 45, provides:

> (5) Where in any year of assessment a person ceases to hold an office or employment or to be entitled to an annuity, pension or stipend chargeable under Sched. E, tax shall be charged for that year on the amount of his emoluments for the period beginning on Apr. 6 in that year and ending on the date of the cessation. . . .
>
> E (6) In the case of the death of a person in whose case, if he had not died, tax would, under the provisions of the last preceding subsection, have become chargeable for any year, the tax which would have been so chargeable shall be assessed and charged upon his executors or administrators, and shall be a debt due from and payable out of his estate.

The Attorney-General (*Sir Donald B. Somervell, K.C.*) and *Reginald P.* F *Hills* for the Crown.

Raymond Needham, K.C., and *Terence Donovan* for the appellants.

LAWRENCE, J.: In this case, the appellants are the executors of Mr. Percy Murray, who was managing director of Lewis Berger & Sons, G Ltd., up to the time of his death on Jan. 17, 1934. Under the agreement which he had with Lewis Berger & Sons, Ltd., he was entitled to payment, to himself or to his executors, of £10,000, and certain other sums after a certain date, upon the final termination, from any cause whatsoever, other than his wilful default in the performance of his duties of his H service as managing director. The appellants received the sum of £10,000 in pursuance of this agreement on July 5, 1934, and the question I have to determine is whether they can be assessed to income tax on that sum—a question which depends upon the construction of the All Schedules Rules, r. 18, and the Finance Act, 1927, s. 45 (5), (6).

It is contended for the appellants that sect. 45 (5) of the Act of 1927 does not contemplate death, and that sect. 45 (6) applies only to cases where a person ceases to hold office and dies thereafter ; secondly, that the £10,000 did not come to the deceased as his income, and therefore is not liable to tax ; and, lastly, that it cannot be said that, if he had not died, tax would, under the provisions of sect. 45 (5) have become chargeable, because he might have ceased to hold his office for misconduct, in which case he would not have received the £10,000, and would not have become chargeable to tax on that sum. I am of opinion that these contentions are unsound. In my opinion, under sect. 45 (6), the commissioners have to see whether, if the person had not died, tax would have become chargeable under sect. 45 (5) in the circumstances which have happened. They are not directed to make any other supposition except that the deceased has not died. For the rest, the facts which have actually happened, namely, that he has ceased to hold office and has received or become entitled to certain emoluments, must be looked to, and the same tax charged upon his executors as would have been charged upon him.

If the commissioners are not to have regard to the facts as they have happened, to what are they to have regard ? They might suppose anything, and the subsection refers to the one supposition only, namely, that the deceased had not died, and gives no other guidance. The fact that the deceased could never have received the £10,000 himself if he died in office is, in my view, irrelevant, since the subsection directs that the tax is to be chargeable as if he had not died. I cannot read the subsection as confined to cases in which the deceased has ceased to hold office before his death, since its terms seem to me to include the case where he ceases to hold office by reason of death. Nor do I think that it is proper to have regard to any fact which has not occurred except the death.

I therefore agree with the decision of the commissioners, and dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitors : *Windybank, Samuell & Lawrence* (for the appellants) ; *Solicitor of Inland Revenue* (for the Crown).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

KNOWLES *v.* SOUTHERN RAILWAY COMPANY.

[HOUSE OF LORDS (Lord Thankerton, Lord Russell of Killowen, and Lord Roche), **March 1, 2, April 8, 1937.]**

A *Workmen's Compensation—Accident "arising out of and in the course of the employment"—"For the purposes of and in connection with the employer's trade or business"—Van-driver leaving van to get intoxicating liquor—Prohibition against consuming intoxicating liquor while on duty—Driver killed while remounting van—Workmen's Compensation Act,* 1925 (c. 84), *s.* 1 (1), (2).

B The driver of a horse-van while on duty dismounted from his box-seat and went to a neighbouring public house for the purpose of drinking a glass of beer. In doing so he was committing a breach of one of the rules issued by his employer, of which he had full knowledge, that "employees must not consume intoxicating liquor while on duty." The driver subsequently returned to his van, and was in the act of mounting the box-seat when he slipped, fell under a wheel of the van, C and was fatally injured. The appellant, as dependant of the deceased, claimed compensation :—

HELD : (i) the accident did not arise out of and in the course of the driver's employment.

(ii) as the act which caused the accident was not done for the purposes of and in connection with the employer's trade or business, the accident could not be deemed to have arisen out of and in the course of the D employment within the Workmen's Compensation Act, 1925, s. 1 (2).

Decision of Court of Appeal ([1936] 2 All E.R. 682) *affirmed.*

[**EDITORIAL NOTE.** The point made in this case is that the act which the workman was engaged in doing at the time was not an integral part of his employment, but only an act reasonably incident to his employment, and done for his own pur-E poses. It seems in such a case that, apart from absolute necessity, if such an act only reasonably incident to the employment is expressly prohibited by the terms of that employment, then the act cannot be in the course of the employment. It is not part of a man's employment to do an act, no part of his duty, which has been forbidden by a genuine and express prohibition.

AS TO EXPRESS PROHIBITION, see HALSBURY, 1st Edn., Vol. 20, Master and F Servant, pp. 173, 174, para. 363 ; and FOR CASES, see DIGEST, Vol. 34, pp. 297-309, Nos. 2471-2545.]

Cases referred to :

(1) *Warren* v. *Hedley's Colliery Co., Ltd.* (1913), 6 B.W.C.C. 136 ; 34 Digest 296, *2460.*

G (2) *Taylor* v. *Lock* (1930), 23 B.W.C.C. 55, 444 ; Digest Supp. ; 99 L.J.K.B. 245 ; 142 L.T. 537.

(3) *Everitt* v. *Eastaff & Co.* (1913), 6 B.W.C.C. 184 ; 34 Digest 296, *2459.*

(4) *Davies* v. *Gwauncaegurwen Colliery,* [1924] 2 K.B. 651 ; 17 B.W.C.C. 181 ; 34 Digest 313, *2572* ; 94 L.J.K.B. 229 ; 132 L.T. 221.

H APPEAL from an order of the Court of Appeal (SLESSER, GREENE and SCOTT, L.JJ.), dated Apr. 7, 1936, setting aside an award made by His Honour JUDGE BENSLEY WELLS at Southwark County Court in favour of the widow of a deceased workman. The facts and the arguments are set out in the judgment of LORD RUSSELL OF KILLOWEN, and in the proceedings in the Court of Appeal which are reported in [1936] 2 All E.R. 682.

G. J. Lynskey, K.C., and *W. Shakespeare* for the appellant.

Edward Cave, K.C., and *F. W. Beney* for the respondent company.

Lord Russell of Killowen: My Lords, in this case one's sympathies lie naturally with the appellant, whose husband met with his death in singularly unlucky circumstances, and with their children; but we must, on this account, be all the more careful to see that no liability is cast upon the employer unless it is so cast by the Act of Parliament.

The arbitrator made his award finding that the injury which resulted in the death of George Knowles was an injury by accident arising out of and in the course of the employment, and awarding compensation to the dependants. The only question in dispute is whether the accident arose out of and in the course of the employment, or is to be deemed to have so arisen. I need not state the facts which led up to the accident. They have been found by the county court judge, and are not in dispute. It is sufficient to say that the appellant claims alternatively (i) that, if the course of the employment had been interrupted when the man left the driver's seat of his horse-van, the employment had been resumed before the accident occurred, and that, therefore, the accident in fact arose out of and in the course of the employment, or (ii) that, if the accident did not arise out of and in the course of the employment, it must, by virtue of sect. 1 (2) of the Act, be deemed to have so arisen. The Court of Appeal set aside the award, and ordered that an award be entered for the employer.

Two preliminary matters must first be made clear. The first relates to the rule of the employers which provided that: "Employees must not consume intoxicating liquor while on duty." The county court judge held, treating it as a question of fact, that this rule merely regulated the conduct of the workman within the sphere of his employment and was not a rule limiting the scope or sphere of his employment. By that I understand him to mean that a man, while in the act of breaking the rule, could still be said to be doing that which he was employed to do. In my opinion, the judge was wrong both in treating the question for decision as one of fact, and in the conclusion at which he arrived. I agree with the view expressed by Greene, L.J., *viz.*, that, where a man leaves his work in order to break a rule, he necessarily takes himself out of the scope or sphere of his employment, and remains outside its limits until the time (whenever that may be—and that is another question) when he resumes his employment.

The second matter is this: the county court judge has made the following finding of fact:

> It may be, of course, that Knowles' dominant purpose on all the occasions when he visited the "Gladstone" was to relieve himself, but in my view the proper inference to draw from the evidence is that the primary object of the visits to the "Gladstone" was to get a glass of beer, and I find as a fact that that was Knowles' dominant purpose when he visited the "Gladstone" on the evening when he met his death.

Upon this finding, an argument was addressed to us by the appellant's counsel, based upon the view that, in quitting his van opposite one public house in the Borough High Street, and making his way down Lant Street to another public house more than 100 yards away, Knowles was influenced as much by a desire which involved no breach of a rule, as by the wish for liquor which did. I can find no trace of this double purpose argument in any of the judgments, either in that of the county court judge or in those of the Court of Appeal. Nor do I think that the finding of the county court judge will support it; for I do not understand him to mean anything other than this: that the stoppage in the Borough High Street and the expedition to the "Gladstone" were brought about in order to obtain a drink of beer, and that advantage was taken of the visit to the "Gladstone" for the accomplishment of the other act. If he had meant by his finding that a twofold purpose caused the stoppage, he would assuredly have said so in express terms. In fact, he was, by his finding, answering the alternative question which he had posed earlier in his judgment, *viz.*:

> Whether Knowles visited the "Gladstone" on this occasion for the purpose of relieving himself, or for the purpose of having a glass of beer.

In my opinion, his finding means that, had the workman not wished to have the glass of beer, he would not have interrupted his journey. For myself, I feel bound to deal with the case on that footing.

Taking the view which I take on these two preliminary points, I am of opinion that, from the moment that the workman left the driver's seat, as the first step towards the "Gladstone," he broke off his employment; and that none of the acts which he did, such as chaining up the near hind wheel, or unfastening the near trace, or putting the reins through the harness ring, were acts done in the course of his employment. They could not be; for he himself had interrupted that course, and was doing acts the opportunity or necessity for which had only arisen from his desire to do something which his employers forbade him to do. The only question then on this part of the case would appear to be, did the accident happen before or after he had resumed his employment? If before, then it did not arise out of and in the course of the employment; if after, then it did. Authorities were cited to us, such as *Warren* v. *Hedley's Colliery Co., Ltd.* (1), in which, in the particular case, a workman was held entitled to compensation, he having "practically" got back, and resumed his work. Each case must depend upon its particular facts, which must be examined and weighed before arriving at a conclusion whether or not the accident happened in the course of the employment. The use of the word "practically," leaves the door ajar, and no doubt Cozens-Hardy, M.R., in using it, had in mind the difficulty of laying down any specific test which would be applicable, and infallible in its application, to all conceivable facts. But undoubtedly the phrase A in the authorities which most closely applies to the facts of the present case is contained in the judgment of Romer, L.J., in *Taylor* v. *Lock* (2), at p. 63, where he used the following language in reference to a workman who had got down from a steam-driven lorry and was killed in attempting to climb on to it again, whilst it was in motion : B

> Having temporarily left his employment, it was his duty to his employer to re-enter the employment as soon as possible, and, in my opinion, when he was . . . getting up on the step to get into the steam engine again he had re-entered his employer's employment.

This *dictum* (for it is only a *dictum*) must, I think, be based on the use by C Cozens-Hardy, M.R., in *Warren's* case (1), of the word "practically." If the *dictum* simply means that, on the facts which were proved to exist in *Taylor* v. *Lock* (2), the man was in the employment at the time of the accident, it would be correct ; because it would appear, as pointed out by Greene, L.J., in the present case, that, in the view of the court, the D employment had never been interrupted. As Slesser, L.J., stated when the case came before the Court of Appeal a second time, the court had, on the first occasion, come to the conclusion that the employment had not been interrupted. But, if the *dictum* means that a workman, who, for his own purpose, has left his work as a lorry-driver, must be E taken to have re-entered the employment the moment he tries to regain the driving-seat of his lorry, I would not agree with it.

My Lords, I will not attempt, and I think it would be unwise to attempt, to define a point of time or place at which, and only at which, the workman in the present case could be said to have resumed his employment. F Events might have happened (which did not in fact happen) which might conceivably alter either the point of time, or place, or both. It is sufficient to state why I think that, on the actual facts of this case, the accident happened before the interrupted employment had been resumed. When the man returned to the van, he had perforce to do several things before G he could resume the work which he was employed to do. He had to unchain a wheel, refasten a trace, take possession of the reins, and regain effective control of his horses in order to start them again on their interrupted journey. The doing of these various things cannot, in my opinion, be properly attributed (as the county court judge has attributed H them) to the discharge by the workman of his duty to his employer. They were things done in order to repair a breach of duty, the necessity for doing which had been brought about solely by the breach of duty. The accident in fact happened before the workman had completed the series of acts, which, owing to his breach of duty, had to be performed before he could begin to regain effective control of his horses for the purpose of restarting them on the interrupted journey. The arbitrator's finding of fact, that the workman had resumed his employment at the time of the accident, was based upon the view that the unchaining of the wheel and replacing of the trace were acts done in the discharge of a duty to the employer, and, therefore, a resumption of employment. This view is erroneous, and appears to be inconsistent with the decision of the Court of Appeal in *Everitt* v. *Eastaff & Co.* (3). In my opinion, it is impossible, on the facts of this case, to hold that the man had resumed his employment at or before the time when the accident happened. From this it follows that the accident did not arise out of and in the course of the employment.

I would add only this. A point was urged on behalf of the appellant, *viz.*, that, according to the evidence, on returning to his van, and before unchaining the wheel, Knowles handed to the van-boy the consignment notes. This fact, it was said, established a definite resumption of employment at that moment. This argument can, I think, have been used only in your Lordships' House. The county court judge never mentions the incident, nor do the Court of Appeal. In my opinion, however, the handing over of the consignment notes, where and when they were handed over, could not effect a resumption of the employment, any more than it would have effected such resumption had the van-boy accompanied Knowles to the "Gladstone," and had the notes been handed over to him on those premises.

The appellant's claim must, therefore, fail, unless, as she contends, the accident is, by virtue of sect. 1 (2) of the Act, to be deemed to have arisen out of and in the course of the employment. My Lords, I think the answer to this contention is short. A necessary condition for the application of the subsection is that which is designated by the words :

> If such act was done by the workman for the purposes of and in connection with his employer's trade or business.

The words "such act" must mean the act which is referred to in the preceding words :

> The workman was at the time when the accident happened acting in contravention of any statutory or other regulation applicable to his employment—

and the succeeding words. The only act which the workman can be said to have been doing at the time of the accident in contravention of a regulation applicable to his employment, was attempting to regain the driver's seat, as one part of a composite act of consuming intoxicating liquor while on duty. This act is one which, being expressly forbidden by the terms of employment, can by no stretch of imagination or language be said to be an act "done by the workman for the purposes of and in connection with his employer's trade or business." Indeed, as WARRINGTON, L.J., pointed out in *Davies* v. *Gwauncaegurwen Colliery*, (4), at p. 660, those words indicate an intention to prevent the section applying to acts merely incidental to the employment. In truth, the facts of the present case cannot be made to fit into the requirements of the subsection.

I would dismiss this appeal.

LORD THANKERTON and LORD ROCHE concurred.

Appeal dismissed.

Solicitors: *Pattinson & Brewer* (for the appellant); *William Bishop* (for the respondent company).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

ALDERMAN *v.* GREAT WESTERN RAILWAY COMPANY.

[HOUSE OF LORDS (Lord Thankerton, Lord Russell of Killowen and Lord Roche), **February 26, April 8, 1937.**]

Workmen's Compensation—Course of employment—Interruption of employment—Railwayman in lodgings away from home—Accident between lodgings and railway station—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 1.

A railway ticket-collector lived at Oxford, his home station. His duty consisted of travelling from Oxford to Swansea, via London, on one day, and returning from Swansea to Oxford, via London, on the following day. He stayed overnight in Swansea in lodgings of his own choice, the address of which he gave to the station officials, in case his services were required for an emergency. One morning, while walking from his lodgings in Swansea to the station, to join his train for London, he slipped in the public street, about a quarter mile from the station, and broke his ankle, being incapacitated for about six months. He claimed compensation in respect of the injury:—

HELD: the accident did not arise in the course of the appellant's employment.

Decision of Court of Appeal ([1936] 1 All E.R. 571) *affirmed.*

[**EDITORIAL NOTE.** The question for decision here is whether or not there has been an interruption of the employment by the employee leaving the employer's premises. This must turn upon whether the purposes for which the employer's premises were left were the purposes of the employer, or those of the employee. In the present case it is held that in going to his lodgings, the employee was breaking his employment, since from the time he left the employer's premises he was free to travel as he liked and free to spend his time as he liked and had no duty to perform in respect of his employment.

FOR THE LAW ON THE POINT, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 172, para. 362 and Supp., and DIGEST, Vol. 34, pp. 283, 284, Nos. 2379-2388.]

Cases referred to:

(1) *Davidson* (*Charles R.*) *& Co.* v. *M'Robb or Officer*, [1918] A.C. 304; 10 B.W.C.C. 673; 34 Digest 276, *2339*; 87 L.J. P.C. 58; 118 L.T. 451.

(2) *London & North Eastern Ry. Co.* v. *Brentnall*, [1933] A.C. 489; 26 B.W.C.C. 225; Digest Supp.; 102 L.J. K.B. 438; 148 L.T. 530.
(3) *Sparey* v. *Bath Rural District Council* (1931), 24 B.W.C.C. 414; Digest Supp.; 146 L.T. 285.

A APPEAL from an order of the Court of Appeal dated Mar. 25, 1936, affirming the award made in the county court at Marylebone in an arbitration under the Workmen's Compensation Act, 1925, on Dec. 2, 1935, in favour of the respondent company, and ordering that the said award be affirmed and the appeal dismissed with costs. The proceedings B in the Court of Appeal are reported in [1936] 1 All E.R. 571. The facts and the arguments are set out in the judgment.

G. J. Lynskey, K.C., and *W. Shakespeare* for the appellant.

Edward Cave, K.C., and *D. C. Bartley* for the respondent company.

C LORD RUSSELL OF KILLOWEN: My Lords, the appellant, James Alderman, has been in the service of the Great Western Railway Co. for a number of years, during which he has been employed on what is known as "double home turn," between Oxford and Swansea via Paddington. The nature of this duty is best explained by stating D exactly what he does. He signs on at the Oxford station at 10.30 a.m. He travels on a train to Paddington. From Paddington he travels on a train to Swansea, where he signs off at 6.30 p.m., having thus been on duty for eight hours. He signs on again the next morning at Swansea at 8.30 and travels on a train to Paddington, and thence on a train to E Oxford, where he signs off at 4.30 in the afternoon, having thus again been on duty for eight hours. On each of the four trains he acts as a travelling ticket-collector. He is also a qualified guard, but has not acted in that capacity. During the intervals between signing off and signing on at Swansea, and during the intervals between signing off F and signing on at Oxford, he is free to do what he wishes, to go where he wishes, and to lodge where he wishes, but he must acquaint the Oxford Station with his Oxford address, and the Swansea Station with his Swansea address. The reason for this requirement is that, in case of some emergency arising, he could be called upon, if the company could G get in touch with him, to do emergency duty for extra pay. This, as can be imagined, would be a rare occurrence, and in fact it has never happened to the appellant.

It was suggested that the terms of his employment fettered him in his choice of abode (whether at Oxford or Swansea), and bound him to H live near the company's station. I can find no justification for this view. The evidence on the point given by the appellant, was as follows:

> When I book off I can go to any lodgings I like. I do not think the company like you to stay too far away. . . . The company do not exercise any sort of control where we should spend the night, but we leave address so that we might be sent for.

The only other evidence on this point was given by another servant doing double home turn who said:

> We make our own arrangements—sleep where we like. Company make no arrangements. Entitled to sleep anywhere.

It appears to me that, during the intervals when the appellant was off A duty at Swansea and at Oxford, he was completely his own master, subject only to the possibility of an emergency call being made and finding him accessible.

The appellant's standard wage was 65*s.* a week. In addition he received a lodging allowance in respect of the extra expense occasioned B to him by having to spend nights away from his home. This was calculated, in accordance with an arrangement between the company and the men's union, at 1½*d.* for every hour which elapsed between his signing on and signing off at Oxford, viz., 30 hours. His allowance in the present case would accordingly amount for the six week days to 11*s.* 3*d.* C

Let me now state the events which have led up to the present appeal. The appellant was at Swansea on Jan. 16, 1935, having signed off at Swansea Station that afternoon. He slept at his usual lodgings in Swansea, and left them the next morning to sign on again at the station. On the way, he slipped, fell, and broke his ankle, with the result that D he was incapacitated for some 22 weeks. He claimed compensation for the injury, on the footing that it had been sustained by him by accident arising out of and in the course of his employment. The company denied that the accident arose in the course of the employment. That was, and is, the sole question in issue between the parties. If the E accident is held to have arisen in the course of the employment, the company does not dispute that it also arose out of the employment. Upon the hearing of the arbitration, the county court judge made his award in favour of the company. He was of opinion that the course of the appellant's employment was interrupted when he signed off at F Swansea, and that the mere fact that the accident happened while he was going to his work was not enough to establish that the accident happened in the course of the employment. An appeal from the award was dismissed by the Court of Appeal.

I have stated the facts of this case in some detail, because the decision G whether a particular accident to a particular workman did or did not arise in the course of his employment must necessarily be dependent on the facts of the particular case. Authorities are of little assistance, except in so far as they lay down principles which are of general application. One such principle, however, is clearly established in *Davidson* H (*Charles R.*) *& Co.* v. *M'Robb or Officer* (1), viz., that the words "in the course of the employment" do not mean during the currency of the time of the engagement, but in the course of the work which a man is employed to do, and what is incident to it. A man may well be in the employment of another at the time when the accident happens, and yet the accident may not have arisen "in the course of" the employment. A passage from the opinion of LORD DUNEDIN in that case may appropriately be cited, in which he said at p. 321 :

A

> In my view "in the course of employment" is a different thing from "during the period of employment." It connotes, to my mind, the idea that the workman or servant is doing something which is part of his service to his employer or master. No doubt it need not be actual work, but it must, I think, be work, or the natural incidents connected with the class of work—e.g., in the workman's case the taking of meals during the hours of labour; in the servant's, not only the taking of meals, B but resting and sleeping, which follow from the fact that domestic servants generally live and sleep under the master's roof.

The appellant's case seems to have been understood by the Court of Appeal as depending upon the proposition that, because the appellant's choice of lodgings at Swansea was to some extent limited by his contract, C he was, while walking from those lodgings to the Swansea Station, doing something which he was employed to do, or at all events, something necessarily incidental thereto, and that it was because he was performing a duty under his contract of service that he found himself at the spot where the accident befell him. The employment was, accordingly, a D continuing one, and the accident, therefore, arose in the course of it. The Court of Appeal rejected that argument. For myself, I can see no foundation for any such contention on the facts of the present case. As I have already indicated, there is no evidence of any contractual limitation at all of the man's choice of abode, either at Swansea or at Oxford. E But, even if there had been some term of the contract, which ensured that his lodging should not be unreasonably far from the Swansea Station, it would still have been impossible to say that his contract of employment necessitated his presence on the spot where the accident occurred. He was there only because it lay on the route between the F station and the particular house which he himself had happened to select. The case would still have failed to contain the element of fact which was the essential ground of the decision in *London & North Eastern Railway Co.* v. *Brentnall* (2), viz., the contractual obligation to go to the particular place where the accident happened.

G Before your Lordships, however, another and alternative argument was presented, which was independent of any question of limitation of choice of lodging. It was said that the appellant's contract of employment compelled him to go to Swansea and return to Oxford the next day, that, therefore, he was employed to go the next day from wherever H he spent the previous night to Swansea Station, and that, accordingly, in being on the spot where the accident occurred he was doing something which he was employed to do, with the result that the accident arose in the course of his employment. This argument proves, I think, too much. Put it the other way round. It is just as true to say of him that, when he signed on at Swansea, his contract of employment compelled him to go to Oxford and return to Swansea the next day, and that, therefore, he was employed to go the next day from wherever he spent the previous night to Oxford Station; and yet it has all along been conceded that, if an accident befell him on his way to the Oxford Station, it would A not have arisen in the course of his employment. The truth is that this alternative argument is only the old one, with this addition, that it is said that the fact that the workman's home is at Oxford, and that his contract of employment takes him away from his home, makes all the difference. My Lords, I am unable to appreciate how this can be. The B cases in which men are employed to work at a distance from their homes and have to find lodgings for themselves must be innumerable. Yet there is no case in the books, or at all events none was cited, in which such an one, meeting with an accident, when merely on his way to or from his work, has been held entitled to compensation. In order to C entitle him to compensation in such a case, some other element must be present (involving the discharge of a contractual duty to the employer) which in law extends the course of his employment so as to include the moment of time when the accident occurred.

The words used by **LORD BUCKMASTER** in *Sparey* v. *Bath Rural District* D *Council* (3), in relation to a workman leaving his work, apply equally to this appellant, who was going to it. He said at p. 418:

> The course of employment continues while the workman is lawfully upon the employer's premises. Hazards which he then encounters will, if they result in accident, be risks which the workman has run in the course of his employment, E but when once the premises are left and the workman is no longer under any control, and is in all respects and for all purposes in the same position as an ordinary member of the public enjoying the same liberty and sharing the same risks, the danger he there encounters is one which other members of the public equally share.

So, in the case of this appellant; when he set out from the house in which he had chosen to lodge in Swansea, to go to sign on at the station, F he was (and had been ever since he had signed off on the previous afternoon) subject to no control, and he was for all purposes in the same position as an ordinary member of the public, using the streets in transit to his employer's premises.

My Lords, in my opinion, this is, upon its facts, a plain case of an G employment interrupted on each signing off at Swansea and Oxford, and resumed at each signing on at Oxford and Swansea, the workman, during the intervals between every interruption and resumption, being free and his own master in all respects (except only for the very remote possibility of his being called upon to undertake a fresh emergency H employment for extra pay), with the result that nothing which happened during those intervals can be said to have happened in the course of his employment.

I would dismiss this appeal with costs.

LORD THANKERTON and LORD ROCHE concurred.

Appeal dismissed with costs.

Solicitors: *Pattinson & Brewer* (for the appellant); *A. G. Hubbard* (for the respondent company).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

TIBBALS *v.* PORT OF LONDON AUTHORITY.

[HOUSE OF LORDS (Lord Thankerton, Lord Russell of Killowen and Lord Roche), **March 2, 4, April 8, 1937.]**

Master and Servant—Superannuation—Public authorities—War bonus—Basis of calculation of pension.

Upon its incorporation the respondent authority took over a pension scheme, whereby it was provided that deductions be made from the wages payable to certain employees (including the appellant), and that, for the purpose of computing the superannuation allowance or pension payable to each employee, the wages were to be deemed to be at the rate of the actual wages paid to him at the time of his superannuation or retirement "exclusive of any gratuities, allowance for house, or other additions." From 1915 onwards, a weekly sum called "war bonus" was paid to each employee in addition to wages. The bonus rose from time to time, and, in May, 1918, a part of the bonus was consolidated with the wages. In 1919 a document, containing the words "war bonus 15*s.* per week added to wage, counting for pension, plus 11*s.* 6*d.* per week floating war bonus," was left with each employee. In the same year the appellant (as one of the employees), when asking for a reconsideration of his rate of wages, added "Present conditions of annual leave, sick pay, and pensions." No deduction in respect of superannuation or pension was made from that part of the wages which formed the bonus. In Mar., 1925, when a further revision took place, the wages of the appellant were described in a circular issued by the respondent authority as "68*s.* 6*d.* per week as a maximum, non-pensionable floating bonus 12*s.*" The respondent authority, in rejecting a demand by the appellant for deductions from the bonus payments, informed him that "the authority are prepared to continue the payment of a non-pensionable bonus in addition to your wages in accordance with the terms of the circular, and by accepting that bonus you must be deemed to have agreed to the conditions upon which it is granted." Without accepting the view of the authority, the appellant continued to work as usual, and to receive the bonus payments. Upon his retirement, the appellant claimed that the payments of war bonus made to him were part of his wages, and ought to be included in the computation of the amount of his superannuation allowance or pension:—

HELD: by the terms of the agreement between the employers and the workmen, the bonus payments were at all times to be regarded as non-pensionable, and therefore could not be taken into consideration for the purpose of calculating the amount of pension.

Decision of the Court of Appeal ([1936] 2 All E.R. 819) *affirmed.*

[EDITORIAL NOTE. The Court of Appeal differed in their views whether the words "other additions", as a matter of construction, included bonus payments; but that decision was not necessary to determine the case. The House of Lords, agreeing with the Court of Appeal that the case was concluded by the agreement of the parties, found it unnecessary to deal with the matter of construction and expressed no view upon it.

As to Superannuation, see HALSBURY, 1st Edn., Vol. 24, Revenue, pp. 748-753, paras. 1605-1620; and for Cases see DIGEST, Vol. 39, pp. 307, 308, Nos. 836-841.]

Case referred to:

(1) *Salford Union* v. *Dewhurst*, [1926] A.C. 619; 37 Digest 215, *105*; 95 L.J. Ch. 457; 135 L.T. 514.

Appeal from an order of the Court of Appeal (Slesser and Romer, L.JJ., and Eve, J.), dated June 17, 1936, affirming an order of Crossman, J., dated Dec. 11, 1935. The facts are set out in the judgment. The proceedings in the Court of Appeal are reported in [1936] 2 All E.R. 819.

D. N. Pritt, K.C., and *H. G. Garland* for the appellant.

Fergus D. Morton, K.C., and *J. H. Stamp* for the respondent authority.

Lord Roche: My Lords, the appellant was for many years in the employment of the respondent authority and of its predecessors, and became entitled, upon his retirement, on June 6, 1928, to be paid a superannuation allowance by the respondent authority. Questions arose between the parties as to the proper amount to be paid to the appellant for such allowance, and, on Nov. 15, 1934, the appellant brought his action against the respondent authority to have his rights declared. The point at issue between the parties is compendiously but sufficiently stated in para. 5 of the appellant's statement of claim, which reads as follows:

> Since the said June 6, 1928, the defendants have paid the plaintiff a superannuation allowance of £2 5*s*. 8*d*. a week, and have disregarded in computing the same that part of the plaintiff's wages described as war bonus. The plaintiff affirms and the defendants deny that the plaintiff is entitled to a superannuation allowance of eight-twelfths of his wages not excluding that part called war bonus.

The action was tried before Crossman, J., who decided against the appellant's contention, and gave judgment for the respondent authority. Upon appeal to the Court of Appeal, the appeal was dismissed. I will presently refer to the reasons assigned for their conclusions by the trial judge and in the Court of Appeal. The appellant now asks for a reversal of the order of the Court of Appeal, and for judgment.

The facts of the case are simple, and not in controversy, and are as follows: The appellant was employed by the Surrey Commercial Dock Co. from 1889 to 1909 as a rafter in their timber business. In Apr., 1903, he became one of the permanent men on the Dock Co.'s staff, and on Aug. 7, 1903, became a party to an indenture of that date between himself (and others the members of the permanent staff) and the Dock Co. providing for and regulating the payment of superannuation allowance, and for contributions towards it by deductions from wages, in accordance with rules contained in a schedule. The material rules read as follows:

> 2. Subject to the provisions hereinafter contained every officer who shall continuously and faithfully serve the company and shall contribute as prescribed in r. 5 shall from and after the date of his superannuation or retirement at or after the prescribed age from the service of the company receive from the company during the remainder of his life a yearly superannuation allowance according to the prescribed scale.
>
> 4. The prescribed scale according to which the superannuation allowances shall be computed shall be as follows:
>
> After 30 years' service eight-twelfths of the yearly amount of salary or wages. For the purpose of computing the superannuation allowance in accordance with the prescribed scale, the salary or wages of the officer shall subject to r. 13 be deemed to be at the rate of the actual yearly salary or wages paid to him at the time of his superannuation or retirement exclusive of any gratuities, allowances for house or other additions. An officer who shall not have been in the service of the company for so long a period as 10 years subject to r. 11 shall not be entitled to any superannuation allowance.
>
> 5. In consideration of the superannuation allowance to be made as aforesaid, the company shall be entitled to deduct and shall deduct from every payment hereafter to be made in respect of the salary or wages of the officer as and by way of contribution towards the superannuation allowance such a sum as shall be equal to the percentage upon such payment prescribed by the following scale:—

Rate of Salary or Wages.	Per cent.
Not exceeding £100 per annum	1
Exceeding £100 per annum and not exceeding £200 per annum	1½
Exceeding £200 per annum and not exceeding £500 per annum	2
Exceeding £500 per annum	2½

Pursuant to the Port of London Authority Act, 1908, the business of the Dock Co. was taken over by the respondent authority, and on Mar. 31, 1909, the appellant passed into the service of the respondent authority, and, for the purposes of superannuation, his rights and obligations were unaffected, save that the respondent authority became the other party to the scheme, instead of the Dock Co.

During the war of 1914 to 1918, the appellant and other rafters in the respondent authority's employment (as no doubt were other persons employed by the respondent authority) were paid sums per week of varying amount called war bonus. The respondent authority agreed to pay such a bonus during the war, and thereafter until the expiration of a 14 days' notice to terminate the payments. A table which was put in evidence showed that such bonus was paid at all material dates from 1915 to the date of action, and that it varied up and down. It began at 3*s.* per week in 1915, and went up to a maximum of 35*s.* 6*d.* per week in 1920, and thenceforward declined to 12*s.* per week in 1925. From time to time part of the bonus was, by agreement between the parties, consolidated with or transferred to the weekly wage. Thus the appellant's wages, apart from bonus, which were £1 18*s.* per week in 1915, were £3 8*s.* 6*d.* in 1928. The evidence for the respondent authority was quite clear that at all times the staff, including the appellant, who took a considerable part in negotiations on wage and kindred questions, were on every occasion told that war bonus did not rank for pension. There was put in evidence at the trial a memorandum dated May, 1919, and relating to important changes in conditions of employment arranged at that date, which contained this sentence:

> War bonus—15*s.* per week added to wage counting for pension and 11*s.* 6*d.* per week floating war bonus.

It was proved that the proper officer of the respondent authority went through this memorandum with the appellant, and discussed the matters dealt with in the sentence quoted above. The appellant was not called as a witness, and the evidence of the respondent authority was not challenged. The trial judge accordingly had ample and compelling evidence upon which to find as he did, as follows:

> I find as a fact that in Mar., 1919, Mr. Matthews, one of the defendants' officials, told the plaintiff that the war bonus did not count for pension, and I also find that in Mar., June, and July, 1919, the plaintiff wrote letters to the defendants' officials in which he clearly recognised that the defendants took this view. I draw the inference that the plaintiff, who did not give evidence, knew at all material times that the war bonus was paid to him by the defendants on the footing that it did not count for pensions and that he never objected to this until the year 1925.

This view of the facts was adopted by all the judges in the Court of Appeal, and it is, as it seems to me, an inevitable conclusion from the evidence. Always and at all times contributions towards superannuation were deducted in accordance with this agreement as a percentage on wages, known as such, and not including war bonus.

So matters proceeded until May, 1925, when the respondent authority issued a circular to its staff, including the appellant, the effect of which was to raise his wages from £3 5*s.* to £3 8*s.* 6*d.* per week and to reduce the bonus from 15*s.* to 12*s.* per week. The circular stated that the floating bonus was not pensionable, and was variable from time to time, as might be decided by the respondent authority. The appellant and others then for the first time demurred to this statement, and claimed that the bonus should be rated as wages, both in respect of future contributions towards superannuation and in respect of superannuation allowances. The respondent authority refused to accede to any such claim, and continued to follow the course of including nothing in respect of the bonus amount in either contributions or allowances for superannuation. Eventually the present action was brought. CROSSMAN, J., held as a matter of construction that the bonus was throughout an "other addition" within the meaning of the superannuation deed of 1903, and was, therefore, excluded by it from the wages which constitute the basis of calculation for superannuation payments. It was, therefore, unnecessary for him for his own purposes to decide the other matter raised, as to the effect of the subsequent agreement between the parties; but, in order that his findings and views might be known, he stated his conclusions as to what had been in fact agreed in the language which I have already quoted to your Lordships. A point had been raised before him which was expressly abandoned in this House, that the superannuation scheme had, by reason of the Port of London Act, 1909, A statutory force, and could not be affected or varied by agreement between the parties thereto. He decided this contention against the appellant, and distinguished the case from that of the *Salford Union* v. *Dewhurst* (1). It is now undisputed that the parties could make any agreement they pleased as to the operation of the scheme. CROSSMAN, J., however, B thought that the protest of the appellant in 1925 was in time to save the position for him, if it was necessary for the respondent authority to rely upon anything outside the terms of the original deed. In the Court of Appeal, SLESSER, L.J., differed from CROSSMAN, J., on the matter of construction. ROMER, L.J., was of the same opinion as C CROSSMAN, J., on the matter of construction. EVE, J., assented to the view of SLESSER, L.J., on this point. But all three members of the court agreed in holding that, to use the words of SLESSER, L.J. (p. 828):

> So long ago as 1919, if not earlier, this workman agreed to take a bonus on the basis, and on the basis only, that he should not claim pension upon it.

D SLESSER, L.J., proceeded to discuss the proceedings in 1925, and found it:

> impossible to come to the conclusion . . . that the variation of the original agreement, as I think it was, in 1915 or 1919, was ever varied again in the direction sought by the workmen to say that it was, that is to say, to restore the bonus to the position that it should be regarded in calculating the pension.

E ROMER, L.J., held that it was plain that, down to 1925, the appellant was serving the respondent authority upon the terms that the bonus was not to be taken into consideration for the purposes of pension, and that, neither in 1925 nor thereafter, was any variation of those terms agreed between the parties. EVE, J., concurred in these conclusions.

F My Lords, I am clearly of opinion that the conclusions of the Court of Appeal on this point were well founded, and end this case. In deference to the careful argument, which was addressed to your Lordships, upon the effect of what was done in 1925, I would add to the reasons of the Lords Justices only a few observations. The agreement held by the Court of Appeal to govern the situation was, as I see it, an agreement G by the employers to pay a bonus and by the workmen to receive it, upon the terms that it should not be treated as wages within the meaning of the superannuation deed, be it for purposes of contribution or allowance. That being the agreement, to complete the picture of events it should be recalled that, not by any mistake but by virtue of the above described H agreement, contributions for superannuation were made without any question for 10 years, on the basis that the bonus was not to count for the purposes of contributions, or for any purpose connected with pension, and that the scheme proceeded upon this footing. To hold that the basis could be radically altered 10 years thereafter, in 1925, at the wish of one party, would be both actuarily disturbing, and also, in my judgment, legally impermissible.

With regard to the question of construction which caused a divergence of view in the courts below, it is clear from that divergence of view that the question is one of nicety and difficulty. This might well be the case A in the circumstances. War bonus was an unknown thing in 1903, when the superannuation deed was signed, and whether, when that bonus came into existence, the words " other addition " were apt or not apt to describe it, or whether it was covered by those words of exclusion, may not unnaturally be a matter of some uncertainty and debate. It B was such uncertainty, if not debate, which the parties, as I think, effectually resolved, and precluded by the agreement at which they arrived, when the bonus terms were discussed and arranged in advance of any actual dispute arising as to the treatment of the bonus in relation to the superannuation deed. My Lords, having regard to the view C which I have presented as to the effect of the agreement, and as to the correctness of the decision of the Court of Appeal on this point, it appears to me that it is as unnecessary as it would be inexpedient to pronounce upon the question of the place into which the bonus falls under the superannuation deed, as a pure matter of construction. It is not easy to D dismiss from the mind, for the purposes of discussing and pronouncing upon that question, what the parties did about the matter, and I see no reason for entering upon a discussion which, in the circumstances, is purely academic, or for attempting the solution of the question, as a pure matter of construction, which is already solved, as I think, com- E pletely and satisfactorily by following another and a plainer path.

For these reasons, I would dismiss this appeal with costs.

Lord Thankerton and Lord Russell of Killowen concurred.

Appeal dismissed with costs.

Solicitors: *Pattinson & Brewer* (for the appellant); *J. D. Ritchie* (for F the respondent authority).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

DUCKWORTH *v.* LOWE (INSPECTOR OF TAXES). G

[King's Bench Division (Lawrence, J.), **March 22, 1937.**]

Income Tax—Assessment of non-resident—War Loan interest and bank interest receivable by wife—Wife resident in United Kingdom—Wife living with husband within All Schedules Rules, r. 16*—Husband in United Kingdom part of each year—Place of assessment—Income Tax Act,* 1918 (*c.* 40), H *s.* 102 (3), *Sched. D, Misc. Rules, r.* 4 (5).

The appellant was assessed to income tax in respect of War Loan interest and bank interest receivable by his wife. The appellant was not resident in the United Kingdom during any of the years for which the assessments were made. He carried on no trade, profession, employment or vocation, and was not a householder in the United Kingdom during any of such years. His wife, however, was a person residing in the United Kingdom for those years, and she was during the whole period a married woman living with her husband within the Income Tax Act, 1918, All Schedules Rules, r. 16. The appellant visited the A United Kingdom for a short period during each of the years for which the assessments were made, and was at some time during each of those years at a certain address in Liverpool. The assessments were made as at that address. The appellant contended that no assessment could be made upon him for any of the years in question as he was not a resident in the United Kingdom during any of those years; that Sched. D, Misc. Rules, r. 4, was exhaustive as to the place of assessment, B and that the Income Tax Acts provided no machinery for assessing him in the particular circumstances of the case:—

HELD: Sched. D, Misc. Rules, r. 4, is not exhaustive as to the place of assessment, but reference may be made to the Income Tax Act, 1918, s. 102, and upon the construction of that section, read in conjunction with Misc. Rules, r. 4 (5), persons who are not resident in the C United Kingdom are liable to assessment whenever they come into the United Kingdom. The appellant was therefore properly assessed.

[EDITORIAL NOTE. In previous proceedings (*Browning* v. *Duckworth*, [1935] 1 K.B. 605; 19 Tax Cas. 149; Digest Supp.), it was held that the wife could be not assessed in respect of her income whilst she was a married woman living with her husband. It was now sought to assess the husband, who, however, was non-D resident in the United Kingdom. The contention on the husband's behalf was that, although a non-resident may be chargeable to tax, there is no machinery for assessing him. This contention is rejected, it being decided that the Income Tax Act, 1918, s. 102, and Sched. D, Misc. Rules, r. 4 (5), allow an assessment to be made on any person as soon as he comes to live in any parish, whether he be in fact "resident" in the United Kingdom for the year in question or not.

E As TO PERSONS ASSESSABLE, see HALSBURY, Hailsham Edn., Vol. 17, p. 10, para. 8; and FOR CASES, see DIGEST, Vol. 28, pp. 95-97, Nos. 558-579.]

Cases referred to:

(1) *Kensington Income Tax Comrs.* v. *Aramayo*, [1916] 1 A.C. 215; 28 Digest 102, *622*; 84 L.J. K.B. 2169; 113 L.T. 1083; 6 Tax Cas. 613.

F (2) *Tischler & Co.* v. *Apthorpe* (1885), 52 L.T. 814; 28 Digest 32, *169*; 2 Tax Cas. 89.

(3) *Levene* v. *Inland Revenue Comrs.*, [1928] A.C. 217; Digest Supp.; 97 L.J. K.B. 377; 139 L.T. 1; 13 Tax Cas. 486.

(4) *Inland Revenue Comrs.* v. *Lysaght*, [1928] A.C. 234; Digest Supp.; 97 L.J. K.B. 385; 139 L.T. 6; 13 Tax Cas. 511.

G APPEAL by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts, confirming assessments made upon the appellant by the Additional Commissioners of Income Tax in Liverpool, in respect of War Loan interest and bank interest receivable by his wife.

H The appellant was not resident in the United Kingdom during any of the years for which the assessments were made. He carried on no trade, profession, employment or vocation, and was not a householder in the United Kingdom during any of such years. His wife, however, was a person residing in the United Kingdom for those years, and she was during the whole period a married woman living with her husband within the Income Tax Act, 1918, All Schedules Rules, r. 16. The appellant visited the United Kingdom for a short period during each of the years for which the assessments were made, and was at some time during each of those years at a certain address in Liverpool. The assessments appealed against were made as at that address. A

J. Millard Tucker, K.C., and *P. L. E. Rawlins* for the appellant.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondent.

B

Lawrence, J.: In this case, the appellant, Mr. Duckworth, has been assessed in respect of his wife's War Loan interest, bank interest, and National Savings Bonds interest, and he appeals against that assessment. The appellant has been found not to be resident in the United Kingdom. His wife, on the other hand, although she has been found C to be a married woman living with her husband, has also been found to be ordinarily resident in the United Kingdom. She, in the first instance, was assessed to tax in respect of this interest, but it was held, on her appeal, that the assessment had been improperly made upon her, because, under All Schedules Rules, r. 16, as she was a married woman living with D her husband, the income tax had to be assessed upon her husband, and not upon her. In those circumstances, her husband has been assessed, and now appeals from the assessment.

The argument that has been presented to me on behalf of the appellant is that, as the appellant is not resident within the United Kingdom, he E is not assessable. It is admitted, of course, that a non-resident may be chargeable to income tax; but it is said that only residents are assessable, and reliance is, in the first place, placed upon the decision of the House of Lords in *Kensington Income Tax Comrs.* v. *Aramayo* (1), in which the House of Lords held that the Income Tax Act, 1842, ss. 106, F 108, were exhaustive. They were there dealing with foreign income, which, it was provided under sect. 108, fell to be assessed at the four principal ports of the United Kingdom, London, Liverpool, Glasgow and Bristol. They held that those sections, when read together, were exhaustive, and that the taxpayer could only be assessed in respect of G his foreign possessions or income at one of those four ports, and could not be assessed in any other part of the United Kingdom, although he might have a residence in some other part of the United Kingdom. It was argued for the appellant here that, similarly, the present Sched. D, Misc. Rules, r. 4, which deals with the place of assessment, was exhaustive, H and was confined to persons resident in the United Kingdom, the particular sub-rule applicable being sub-rule (5), which provides that:

> Every other person not hereinbefore described shall be assessable and chargeable in the parish where he resides at the time of the issue of the general notices under

this Act, or where he first comes to reside after the time of the issue of those general notices.

It is said, on behalf of the appellant, that that is the only rule which is applicable to him, and that, as it has been found that he is not A resident within the United Kingdom, he cannot be assessed. The Commissioners have found that the appellant is assessable under the Income Tax Act, 1918, s. 102, and the appellant replies to that finding that, in view of the *Aramayo* decision (1) that section, the forerunner of which does not appear to have been referred to by counsel arguing B before the House of Lords, or by any of the learned Lords who dealt with the case, ought to be read as applicable only to residents in the United Kingdom. Lastly, Mr. Tucker distinguished the case of *Tischler & Co.* v. *Apthorpe* (2), upon which the Commissioners in this case relied, and upon which the Crown relied, on the ground that that was a case C dealing with a person who, though not resident in the United Kingdom, was admittedly exercising a trade within the United Kingdom, and it was said that that distinguished the case of *Tischler & Co.* v. *Apthorpe* (2) from the present case—that the fact that he was exercising a trade within the United Kingdom might be regarded in a sense as equivalent D to residence for the purpose of assessment, and so rendered him liable to assessment, although the basis of the decision in that case was that sect. 41 of the Act of 1842, which is now All Schedules Rules, r. 5, did not, by providing that a person who was not resident might be assessed in the name of his agent, imply that the non-resident himself might not E also be assessed.

It has been pointed out in a number of cases that the words which are used in the Income Tax Acts are not always used in the same sense, and it has been pointed out in *Levene* v. *Inland Revenue Comrs.* (3), and in *Inland Revenue Comrs.* v. *Lysaght* (4), that that is peculiarly so F with reference to the word "residence." It is not necessary for me to express any opinion in this case as to the meaning of the word "residence" in r. 4; but, in my opinion, it is impossible for me to decide this case upon the suggestion made on behalf of the appellant that the decision of the House of Lords in the *Aramayo* case (1) is a decision that r. 4 is G exhaustive and prevents a reference to sect. 102 of the Act of 1918. In my opinion, it is impossible to read the judgment of the House of Lords in that sense, and sect. 102 of the Act of 1918 has therefore got to be dealt with, and, when it is dealt with, and contrasted with Misc. Rules, r. 4 (5), it appears to me clear that sect. 102 cannot be confined to persons H who are resident in the United Kingdom. The words of the section are perfectly general, that if any person shall come into a parish in which he has not been charged to tax, the assessor may give him notice in writing to deliver a declaration, and so on, and the subsection which is in question says that, if, in any case, a person who is, or who resides, in any parish has not been assessed therein, the commissioners may assess him. There is there a clear contrast between a person who is in the parish and a person who resides in the parish. When that is read in conjunction with Misc. Rules, r. 4 (5), it is clear, in my judgment, that persons who are not resident in the United Kingdom are liable to A assessment whenever they come into the United Kingdom. This is in accordance with the decision in *Tischler & Co.* v. *Apthorpe* (2), and it seems to me to be a perfectly logical construction of sect. 102, having regard to the admitted fact that non-residents are chargeable to income tax in respect of certain sources of income. B

I am therefore of opinion that the decision of the Commissioners in this case was right, and the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *William Webb & Sons* (for the appellant); *Solicitor of Inland Revenue* (for the respondent). C

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

CARRUTH *v.* IMPERIAL CHEMICAL INDUSTRIES, LTD. D

[House of Lords (Lord Blanesburgh, Lord Russell of Killowen and Lord Maugham), **November 5, 6, 9, 10, 12, 13, 1936, March 15, 1937.]**

Companies—Reduction and reorganisation of capital—Whether ultra vires—Variation and extinguishment of rights of deferred shareholders—Separate class meeting—Form of directors' circular soliciting proxies—Confirmation of court—Companies Act, 1929 (*c.* 23), *ss.* 55, 56, 57. E

The respondent company, which was incorporated with a capital of £95,000,000 consisting of cumulative preference, ordinary and deferred shares, petitioned the court to sanction a reduction of capital to £89,565,859 by cancellation of half the amount of each of the 21,736,564 F deferred shares of 10*s*. each, and by conversion and consolidation of each four deferred shares into one £1 ordinary share carrying full dividend rights as from Jan. 1, 1935. The scheme, which was submitted by the directors for the purpose of simplifying and strengthening the company's financial structure, was approved by more than the statutory majority at the extraordinary general meeting, and by more than the majority prescribed by the articles of association of the company at each of the G separate class meetings of the ordinary and deferred shareholders. It was provided by the memorandum and articles of association that the special rights or privileges of any class of shareholders should not be varied or extinguished without the approval of a separate class meeting of the shareholders so affected. Apart from the scheme, the company's profits, in terms of the articles, were to be distributed in payment of H (i) a dividend of 7 per cent. per annum on the cumulative preference shares, (ii) a dividend of 7 per cent. per annum on the ordinary shares, and (iii) out of the available balance of profits, (*a*) a further dividend on the ordinary shares, together with (*b*) a dividend on the deferred shares in such a manner that the balance so distributable in respect of the ordinary shares should be as nearly as possible twice the total amount to be distributed in respect of the deferred shares. The board sent to all shareholders a circular which contained detailed information regarding the scheme, but which made no reference to the comparative holdings of the directors in ordinary and deferred shares of the company. Meetings for the purpose of obtaining the shareholders' sanction were con- A vened, and held on May 1, 1935. The first was an extraordinary general meeting of all shareholders, at which the chairman spoke in support of the scheme and announced that, with the approval of the shareholders, he proposed to make that one speech in relation to that meeting and to the two subsequent class meetings of the ordinary shareholders and deferred shareholders respectively, without any further speeches. The resolutions having been defeated on a show of hands, a poll was taken B forthwith, and thereafter two meetings, purporting to be separate class meetings of ordinary shareholders and deferred shareholders, were held. The resolution was duly passed at the meeting of the ordinary shareholders, and it was declared lost on a show of hands at the deferred shareholders' meeting, but was subsequently carried by the requisite majority on a poll being taken. Holders of shares of classes other than C deferred shares were present in the hall during the holding of the class meeting of the deferred shareholders, but there was no evidence that any shareholder other than deferred shareholders either took any part in the conduct of, or voted at, that meeting. The company's petition was opposed by the appellant, on behalf of himself and all other holders of deferred shares, on the ground that, *inter alia*, the reduction of capital was *ultra vires* the company and was not properly sanctioned by the D deferred shareholders, who, under the scheme, were exposed to unfair treatment as a class of shareholders :—

HELD : (i) as the articles of association empowered the company to reduce its share capital in the ways specifically mentioned therein, " or otherwise as may seem expedient," the company thus became entitled to reduce its capital in any way authorised by the Companies Act, 1929.

(ii) the meeting of deferred shareholders was properly convened, the E objection which might have been raised to the presence of holders of shares of another class was waived, the poll was duly demanded, and the extraordinary resolution was duly passed by the requisite majority.

(iii) the circular issued to the shareholders disclosed sufficient information to enable them to judge of the fairness and propriety of the scheme.

(iv) the proposed reduction of capital should be confirmed, as the F scheme for the rearrangement thereof did not operate unfairly in relation to the holders of deferred shares.

Decision of Court of Appeal ([1936] 1 Ch. 587) *affirmed.*

[**EDITORIAL NOTE.** In the present case the House of Lords considers in detail the powers and procedure in respect of the reduction of capital by a company having a very large number of shareholders of different classes. The principal subject of discussion G is the appropriate procedure at a meeting of a class of shareholders, and it is now settled that where such a meeting is conducted in a manner to satisfy those present, objection ought not to be taken subsequently. Thus, if deferred shareholders think they cannot properly discuss their position while ordinary shareholders are present, they must object at the meeting, and failure to make audible objection will be treated as a waiver.

H AS TO PROCEEDINGS AT MEETINGS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 358-360, paras. 586-588 ; and FOR CASES, see DIGEST, Vol. 9, pp. 569-571, Nos. 3773-3797.]

Cases referred to :

(1) *Poole* v. *National Bank of China, Ltd.*, [1907] A.C. 229 ; 9 Digest 149, *842* ; **76 L.J. Ch. 458 ; 96 L.T. 889.**

(2) *British & American Trustee & Finance Corpn.* v. *Couper*, [1894] A.C. 399 ; 9 Digest 149, *840* ; 63 L.J. Ch. 425 ; 70 L.T. 882.

(3) *Re Quebrada Railway, Land & Copper Co.* (1889), 40 Ch.D. 363 ; 9 Digest 162, *943* ; 58 L.J. Ch. 332 ; 60 L.T. 482.

(4) *Cook* v. *Deeks*, [1916] 1 A.C. 554 ; 9 Digest 572, *3803* ; 85 L.J.P.C. 161 ; 114 L.T. 636. A

(5) *Re English, Scottish & Australian Chartered Bank*, [1893] 3 Ch. 385 ; 10 Digest 1058, *7410* ; 62 L.J. Ch. 825 ; 69 L.T. 268.

Appeal (with leave granted by order of the House of Lords) from an order of the Court of Appeal (Lord Wright, M.R., Romer, L.J., and Clauson, J.) affirming an order of Eve, J., confirming, on a petition B presented by the respondent company, the scheme for the reduction of the company's capital, and approving a minute varying the deferred shareholders' existing rights and privileges.

H. J. Wallington, K.C., *B. B. Stenham* and *Sir Lucas Tooth* for the appellant. C

Gavin T. Simonds, K.C., *Lionel L. Cohen, K.C.*, and *Cecil W. Turner* for the respondent company.

Lord Blanesburgh : My Lords, I have had the advantage of reading in print the opinion which my noble and learned friend Lord D Maugham has prepared, and I am glad to be permitted by him to base all that now follows upon the detailed account he gives of the complicated facts and circumstances concerning this company, its constitution, its scheme of capital reorganisation, and the meetings of shareholders convened to consider it, all brought under review on the appeal. It E will, as a result, be unnecessary for me to burden your Lordships by travelling over that ground again, and any additions I may be tempted to make to my noble friend's narrative will be made for no other purpose than to accentuate my own point of view.

This was an appeal by a deferred shareholder in the company, seeking F to have the approval of the House withheld from a reduction of the company's paid-up deferred share capital. The appellant did not, however, really stand alone. He voiced the opposition to the scheme of many other deferred shareholders, while not strictly representing them at the hearing. Even so, he must have realised that very heavy G upon him was the burden of the appeal. Agreeing, with the utmost frankness, that the scheme of reduction which he contested had been promulgated in perfect good faith, he was faced by the fact that, to say nothing of its having been apparently approved by the prescribed majorities of shareholders, it had on this petition been confirmed H successively by Eve, J., and by the Court of Appeal. Nor was the burden lightened when it was recalled that, by the time the appeal reached this House for hearing, more than 18 months had elapsed since the reduction resolution had been passed, and that, during an interval

so prolonged, the multitude of ordinary and deferred shareholders in the company had been encouraged by the approval of successive courts to act in relation to their shares as if the scheme had gone through. Mr. Gavin Simonds, indeed, on behalf of the company, influenced, I do not
A doubt, by such considerations as these, strongly contended that an order confirming a reduction resolution, being a discretionary order, would not, although technically open to appeal, be reviewed either by the Court of Appeal or by this House unless it were made plain that the learned judge of first instance, confirming the reduction, had seriously
B misdirected himself either in fact or in law. There were, as will be seen later, questions of law raised by this appeal to which this objection was irrelevant. But, while I hesitate to subscribe in general terms to a view so broadly stated, I would say, at once, that, had the appeal raised no issue beyond those dealt with and disposed of concurrently
C and in the exercise of their discretion by the learned judge and by the Court of Appeal, I would have been slow to advise the House to intervene, whatever might have been my own view of this reduction, had I been considering it in a court of first instance. But that was not the case here, as I saw it. The course of proceedings in this House had left to
D your Lordships for solution a different and a more difficult problem than any presented either to EVE, J., or to the Court of Appeal, a problem upon which neither court had been called upon to pronounce. Difficulties affecting the reduction, some of them substantial difficulties, had not before been ventilated as they were in this House, while the most far-
E reaching criticism of all, the criticism which called in question what I may term the legality of the reduction resolution in so far as it threw upon the deferred shares exclusively the burden of a reduction where no loss of capital had been sustained, was in effective form suggested by one of your Lordships during the argument in this House, and was then
F only and for the first time duly considered.

My Lords, on full reflection, I came to be of the opinion that that criticism was well-founded, that the assumption, ultimately made on all sides, that, under the company's constitution, this particular reduction fell first and exclusively upon the deferred shares was mistaken, and that,
G in the circumstances, it lay upon the petitioners, in the absence of a class consent, not as I thought forthcoming, to establish affirmatively that the reduction in its present form was fair and equitable to the deferred shareholders. It was only because I was judicially so satisfied that I was ready to concur, and did concur, in the order of the House
H which in effect confirmed the reduction. It may well be possible to reach the same conclusion by other and easier ways. But, for me, so soon as I was satisfied that the incidence of the reduction should not, under the articles, have fallen primarily upon the deferred shares, there was no other road open than that by which I have travelled if in the

course of the journey jettison was not to be made of certain principles in relation to class resolutions which I hold to be valuable.

Before proceeding further, I would dispose of a contention of the appellant, which stood apart, and is conveniently considered separately. The reduction, the appellant urged, was *ultra vires* the company, as being unauthorised by its articles of association. Based as the reduction was upon the principle of *Poole* v. *National Bank of China, Ltd.* (1), he could not successfully contend that it was not authorised by statute. He maintained, however, that it was a reduction beyond the purview of art. 44. No capital, he pointed out, was being paid off: none which had been lost or was unrepresented by available assets was being cancelled: no liability on shares was being reduced. What *genus*, he asked, could be named wide enough to embrace within it each of these specified methods and at the same time include this present form of reduction under the words " or otherwise " of the article? The answer was not, I thought, difficult if one had to be found. This reduction, with those specified, shared the characteristic that each was authorised by statute, and that, I thought, was enough. Clauson, J., in the Court of Appeal, states the position in simple terms. The company took power by art. 44, he says, to reduce its capital in any way in which it was under the statute authorised so to do. I entirely agreed with the learned judge. This contention, therefore, as it seemed to me, failed.

Let me next say a word about this scheme of capital reorganisation, of which the reduction was an essential part. It was a scheme promulgated by the directors in the general interests of the company, as was on all hands recognised, and in circumstances and for purposes fully described by Clauson, J., in his judgment. In embryo, the scheme had its beginning in the memorandum of Dr. Coates of Jan. 25, 1933. In its details, it necessarily became elaborate and complicated, but, described in terms of its purpose and result, it was in origin, and it remained throughout its course, a scheme of marked simplicity, notable mainly for its magnitude. As a result of it, there were to be no longer any deferred shares in the company: the holders of these shares were to become holders of ordinary shares representing one-half in nominal value of their previous holding in deferred shares. In other words, they were to find themselves possessed of one fully paid ordinary share of £1 for every four of their fully paid deferred shares of 10*s*. each. This involved a reduction or cancellation in some form of 5*s*. paid up on every deferred share, an aggregate reduction of £5,434,541, of paid up deferred capital. But none of that capital had been lost: it remained intact. The company had been and was highly prosperous. No longer credited to the deferred shareholders, by whom in meal or in malt the capital had been provided, it had to be credited somewhere else, and by the scheme it was transferred to the credit of a capital reserve account, created on terms which, so long as certain new regulations remained unaltered, ensured that it would not be returned as dividend to any shareholder. To this provision, which, as I thought, had received far less attention than it deserved, I will return later.

The great problem in relation to the scheme had been to equate in terms of value a deferred and an ordinary share in this company, two things which, with their widely divergent rights, explained by my noble and learned friend, were, in that respect, almost incommensurable. The proportion of four to one finally adopted in the scheme was an adjustment based not upon any valuation of the respective rights attached to the shares but upon a comparison of the market values of each over a period of years, modified or corrected in result by the special knowledge of the directors, including Dr. Coates, whose opinion, at the date of his memorandum, and throughout, I think, was that a proportion of four to one, if unfavourable in any direction, was so to the ordinary shares rather than to the deferred. He shared the opinion, held, it would seem, by the governing directors, that the market price of the deferred, relatively to that of the ordinary, shares had been as a rule too indulgent to the deferred : some adjustment in this respect was not therefore out of place, and some adjustment, albeit very slight, was made.

Now, from the date of its promulgation, the substantial opposition to the scheme came from the deferred shareholders, although the ordinary shareholders were not unanimous in its favour. By the deferred, it was excepted to on many grounds, that, for instance, it was ill-timed and premature, propounded before the permanent relation in which the deferred shares were to stand to the ordinary was in sight. Ultimately, however, the real contest with the appellant and his associates became one as to the fairness to the deferred shares of this proportion of four to one so reached. A proportion of two to one would have been welcomed by the appellant's party ; a proportion of three to one might have been accepted, albeit reluctantly : the proportion of four to one could not, it was asserted, be justified, and it had not been, as the result of the elaborate evidence adduced from both sides.

On the other hand, a proportion of five to one was the claim of a few ordinary shareholders—a claim not without some impartial support from Dr. Coates. These conflicting demands had been composed by the adoption of the four to one proportion, a proportion to be made effective, as has been seen, by the reduction of 5*s.*, or 50 per cent., of the nominal value of every deferred share, and at this point it is perhaps helpful to emphasise the essential inter-connection under a scheme in this form between the amount of the reduction of the deferred shares and the number of ordinary shares under the scheme to be received by the deferred shareholder in exchange. If one ordinary share for every five deferred was to be received, the reduction must have been 6*s.* on every deferred share: if the proportion were fixed at four to one, the reduction, as we have seen, was 5*s.*: if three to one, the reduction must have been 3*s.* 4*d.* only: if two-and-a-half to one, or five to two, the reduction would have been no more than 2*s.* per share, and, if two to one had been made the fixed proportion, the ideal of the deferred shareholder, then there needed to be, and there would have been, no reduction at all, and no application to the court would have been called for. In other words, the reduction, where it was necessary, had to be such that the *reduced* deferred shares could, in accordance with the pre-arranged proportion, be amalgamated with the ordinary shares pound for pound. It is perhaps well to bear this essential inter-connection in mind, because the only judicial confirmation asked for by the company's petition was a confirmation of the reduction necessarily involved in its scheme. No confirmation of the scheme as a whole was either appropriate or craved. Any objection, therefore, taken by the appellant to the order appealed from had, if it was to have effect, to be a valid objection to the reduction, as such. Unless this limitation were borne in mind, there was a real risk, I felt, that error might supervene in disposing of the appeal, for the reason that the principles applied by the court when dealing with reduction petitions are in many respects individual and special—particularly if the reduction in question be one which is not in accordance with what I may call the " law " of the articles, like the present reduction, as I hope presently to show. This is not to say, of course, that the fairness or otherwise of the proportion fixed by the scheme was not open to discussion on this petition. It was completely so open, but strictly perhaps in the form of an objection to the extent of the reduction one way or the other. For, as the number of ordinary shares to be received in respect of reduced deferred shares was dependent on the extent of the reduction, its amount was as vital to an ordinary as it was to a deferred shareholder, although from quite opposite points of view. From that of the opposing ordinary shareholder, the reduction, to be fair, should have been greater, while any less reduction than that proposed would be a further injury to his class. To the deferred shareholder, on the other hand, any greater reduction would be a further injury. In other words, the acceptance of the reduction in point of amount meant, to a critical ordinary shareholder, an acceptance of an amount which he had claimed should be greater, and, to the deferred shareholder, the submission to an amount which he had claimed should be less. It was right, therefore—even if it was not, under the articles, necessary—that both classes, and in identical terms, should have been separately asked to approve the reduction in point of amount. This they were in effect asked to do, and, at all events, did, if they did no more, by the extraordinary resolutions later to be referred to.

Now, it was almost as a matter of course that the burden of the reduction was thrown upon the deferred shares exclusively. Having regard to relative values, it was essential, if the scheme was to work at all, that, ultimately, any necessary reduction should fall upon the deferred shares only. But, if these shares were not, under the articles, liable to bear the entire burden, its imposition upon them by the scheme would naturally be, in point of amount, a question of terms, to be negotiated between the two classes of shares. But no such negotiation took place, for the reason, as I opine, that, on the question of the proper incidence of the reduction, there was not supposed to be anything to negotiate about. The company's view as to the position of the deferred shares had apparently become clear. It was assumed, naturally enough, perhaps, although, I now believe, erroneously, that, so soon as the proportions, and with them the reduction amount, had been fixed, the burden of the reduction, as a matter of law no less than as a matter of business, fell without more upon the deferred shares, and on them alone. It was, I thought, plain that, in the view of the company, the only thing that really mattered was the proportion in which the ordinary and deferred shares were to be taken and given, and the fairness or otherwise of that proportion—fraud of any kind being out of the question—was a matter for the shareholders, in their different classes, to decide, and for no one else. Up to this point, no approval of the court was required, and everything after it was mere machinery to give the amalgamation in that fixed proportion full effect. The alterations of the articles, the extraordinary resolutions at separate meetings, the necessary reduction of 50 per cent. of paid-up deferred capital, these were all of them mere incidents in the procedure by which the deferred shares of the company were to become amalgamated with its ordinary shares in the predetermined proportion. The only difference between the reduction and these other incidents was that the final effectiveness of the reduction was dependent upon its being confirmed by the court. It was, however, merely the "last step," the "final step"—it was so regarded by the company and it was so described by CLAUSON, J., in the Court of Appeal, who accepted, as will be seen, without discussion, the view that the reduction "lawfully" fell upon the deferred shares exclusively. That this was the view of the directors became, I thought, clear by two governing pronouncements of theirs. The first was the chairman's speech, commending the scheme to the shareholders, at the extraordinary general meeting of the company, held on May 1, 1935, the second was the directors' circular of Apr. 6, 1935.

Referring to criticisms of the scheme which had been received from shareholders, the chairman, in the course of his speech at the meeting, said :

> Some shareholders appear to regard the reduction of capital as a central point of the board's proposals, and suggest that, if it is necessary, sacrifice should be made

> equally by all classes of shareholders, and not borne by the deferred shareholders alone. In our case, this reduction of the issued capital of the company is not the central point of the board's proposals, for it does not arise because of any loss of shareholders' money, or because the company is not prosperous, but as a consequence of the scheme providing for the substituted shares ranking *pari passu* with the existing ordinary shares, whereas at present the deferred shares rank after the ordinary shares.

There is no ambiguity in these words. They describe the scheme in its business sense. A deferred shareholder is, under it, receiving in ordinary shares of the company shares equal in value to his deferred shares *unreduced* : from his point of view, therefore, the reduction of his deferred shares, so far from being a central point, is merely one of the steps necessary to secure for him, in exchange for his old deferred shares, his proposed proportion of new ordinary shares higher in ranking than his old shares—the pith and marrow of the scheme.

In the same sense, although less direct, are the references to the reduction contained in the directors' circular. There are, I think, only two of these, and, as they are brief, I will quote them :

> Reduction of the Company's Share Capital.
>
> The board's proposals involve a reduction of the company's share capital to the extent of one half of the present nominal amount of the issued deferred shares, i.e., £5,434,141, and it will therefore be necessary to obtain the confirmation of the High Court, before the proposals, if carried by the shareholders, can become operative
>
> * * *
>
> Proceedings Involved in Carrying the Above Proposals into Effect.
>
> 2. A class meeting of the ordinary shareholders at which they will be asked to pass a similar extraordinary resolution approving of the proposed reorganisation and reduction of the company's share capital in so far as these proposals amount to a variation of the rights and privileges attached to the ordinary shares.
>
> 3. A class meeting of the deferred shareholders at which they will be asked to pass an extraordinary resolution approving of the proposed reorganisation and reduction of the company's share capital in so far as these proposals amount to a variation of the rights and privileges attached to the deferred shares.

The arresting thing about these statements is that the two class meetings are described in terms identical ; one does not find there the remotest suggestion that the reduction was other than a reduction in the normal course, or that, in relation to its legality, there was any difference at all between the deferred and the ordinary shares to the disadvantage of the deferred. But, if any doubt remained on this point, it was dispelled by the course of the proceedings on this reduction petition both before Eve, J., and before the Court of Appeal.

The assumption of the petition being that the incidence of the reduction rightly fell upon the deferred shares, where it was placed by the special resolution, the opposing deferred shareholders apparently, after suggesting the contrary view, did not persist in their criticism. In the result, the company's assumption as to its proper incidence was accepted by the learned judge, and it became the basis of his order on the petition, and later the basis also of the order of the Court of Appeal.

Eve, J., says, in his judgment:

> Nor was it ever seriously argued that the burden of the proposed reduction was not rightfully imposed on the shares standing last on the rota for dividend distribution.

To that question, so settled, he does not again recur, and it was not revived in the Court of Appeal. So, too, the explanation of the duty of the court in considering whether or not it should confirm a proposed reduction of capital there given by Clauson, J., is clearly an explanation of the duty of the court when the reduction in question is what, for brevity, I would now venture to term a regular reduction. It was, I think, clearly the learned judge's assumption that this was one. On that footing, there was no suggestion, nor necessity for the suggestion, that the reduction had only become regular as a result of the extraordinary resolution passed at the so-called separate meeting of the deferred shareholders to which reference will presently be made.

The effect of the definite finding of Eve, J., that the reduction was regular, apart from any such extraordinary resolution, is made plain in his judgment. Having stated that the shareholders' were themselves the best judges of the fairness of the scheme of which they had approved by the necessary majorities, the learned judge proceeds:

> As soon as the court is satisfied that the resolution has been accepted by the company and by those who are affected by it, and there is no suggestion of any misrepresentation or misconduct on the part of the company, the petitioners are entitled to the order.

Was, then, the assumption justified, on which the orders both of Eve, J., and of the Court of Appeal were based? Was this reduction in law or result a regular reduction? If it was not, how far is the petition of the company to have it confirmed thereby prejudiced? If, again, it was not, can the company now claim the benefit of that last statement of Eve, J.? As I saw them, these were the questions which demanded an answer.

My Lords, although the answer to the question whether this reduction was regular does not lie upon the surface, and although it is not surprising that the question was never seriously raised until its possibility was suggested by one of your Lordships, still, on examination, it became, I thought, clear that no other than a negative answer to the question could be returned. The position is this. While, as has been seen, there is contained in cl. 44 of this company's articles a detailed power to reduce capital, there is not to be found in that, or in any other, article direct provision as to the incidence of any reduction thereby authorised. All that in this connexion can be gathered from art. 44 itself is that the proper incidence of every reduction there specified cannot be the same, so varied are the results of the different forms of reduction mentioned: again, art. 71 makes it clear that there may be a reduction of the company's capital which will affect a class of shares in a way not authorised by the articles. If the articles are examined for answer to the question whether this was such a reduction, it will be found that, except in the case where the reduction is proposed because capital has been lost or is unrepresented by available assets, no justification is therein, even by implication, disclosed for throwing any reduction exclusively upon the A deferred shares. The implication that in that one case it may be so thrown, arises, not, perhaps, as EVE, J., seems to have thought, from art. 113, but from art. 4, which, in a winding up, provides for the return of their capital, first, to the preference shares, and, next, to the ordinary, and, lastly, to the deferred shares; and, as no surplus assets are available B for return to the deferred shareholders until the prior claims of the holders of the preference shares and of the ordinary shares, in respect of the amounts paid up thereon, have been met in full, it may properly be implied—it is perhaps a matter of necessary implication in the absence of any provision elsewhere to the contrary—that, when capital C is lost, and in consequence reduced, while the company is a going concern, the reduction should follow the same order. But in no other case is there room for any such implication, and here there has been no loss of capital. As to the proper incidence of such a reduction as the present, no hint escapes the articles. Nor is that surprising. This reduction, D as has been said, is based on the authority of *Poole* v. *National Bank of China, Ltd.* (1). But there is, your Lordships were told, no reported case in which that authority has since been invoked, and the difficulties involved in its application are well understood. They were dwelt upon by LORD WRENBURY in each edition of his work subsequently edited E by himself. It is not surprising, therefore, that the articles here contain no provision, either express or implied, whereby the incidence of a reduction in character well nigh unique is even indicated. Which is the class of shares in this company to be charged with a reduction so exotic that it merely cancels capital credited to a share in which its holder F is solely interested in order that the same capital may be transferred to a credit in which he is concerned only fractionally? That is the question, and, the reduction having been held to be authorised by the Act, the answer must be found in the application to the problem of the appropriate general principle—and that principle must, I apprehend, G be that in this company the reduction should be suffered rateably by all three classes of shares therein, following, strangely enough, the suggestion of his correspondents referred to by the chairman in his speech. The truth is that a reduction, when no loss has been sustained, is in this company a reduction against the incidence of which no share H is protected by any other. From the brunt of such a reduction there is no escape, even for the preference shares. In this respect, their position as against all shares is not to be distinguished from the position of the ordinary shares as against the deferred.

Here, then, was a difficulty interposed in the way of this reduction which, in my judgment, had to be displaced in some way before it would have been proper to confirm it. As the result of the mistaken assumption, no heed had been paid to the question whether the reduction A thrown exclusively on the deferred shares was, as a separate incident, in accord or not with the proper burden of these shares, in contrast with the other shares in the company. As the result of the same assumption, no reference to this question was made, nor had it to be made, in the directors' circular to the shareholders. More important still, the B reduction had now become, not a formal last step in the scheme, but an essential first step, one not, perhaps, likely to be taken by or expected from a three-fourths majority of deferred shareholders, now fully conscious of their key position and their rights in this respect, except as part of a scheme which was, shall we say, not unfavourable to their class. C Finally—to take one concrete instance—as the result of the same assumption, no attention had been given to the question whether, if the legal position of the deferred shares was being overborne—as on the present hypothesis it had to be if any scheme of amalgamation was in this company to work—the particular sacrifice called for from them of their D £5,434,541 transferred to capital reserve might not properly have been diminished so as to carry with it as a necessary consequence some proportion of ordinary shares more favourable to them than one of 4 to 1.

The result of all this, if it were right, was, as I saw it, that *in hoc statu*, this reduction could not be confirmed, unless, on the principle of *British* E *& American Trustee & Finance Corporation* v. *Couper* (2), the company had affirmatively established that the reduction, although not in accord with the legal rights of the deferred shares, was, nevertheless, in the return received by these shares under the scheme, fair and equitable to their holders, or unless it could be shown that the reduction had been F made regular as a result of the extraordinary resolution passed at the meeting of the deferred shareholders on May 1, 1935.

Mr. Gavin Simonds, for the company, did not accept, but he did not seriously dispute, the proposition that the reduction *pure and simple* was not in accord with the legal rights of the deferred shareholders under G the articles. But he insisted that this was one entire scheme, and that the reduction, although, for statutory reasons, it had to be segregated from the other provisions of the scheme, and be brought separately before the court for confirmation, must, nevertheless, be judged by the result to the deferred shareholders of the whole scheme. His main H contention, however—and he urged it with great force and insistence—was that the reduction had become quite regular by the extraordinary resolution of the deferred shareholders consenting to it. That resolution had, under the articles, made the reduction a matter of contract between all the shareholders, and had the same effect as if the articles had contained a clause that this particular reduction should fall exclusively upon the deferred shares. The appeal must be dealt with on that footing. Such was his contention.

My Lords, merely for convenience of immediate reference, I set forth now the terms of the extraordinary resolution propounded for the con- A
sideration of the deferred shareholders. Once again, as in the directors' circular in relation to the two class meetings, the resolution, *mutatis mutandis*, is in terms identical with that propounded to and passed by the class meeting of ordinary shareholders, and set forth in my noble friend's judgment. The deferred resolution, so far as presently relevant, B
is as follows :

> That this meeting of the holders of the deferred shares in the capital of the company hereby consents on behalf of all such holders to the arrangements for the reduction and reorganisation of the capital of the company (including the amalgamation of the ordinary and reduced deferred shares into one uniform class of ordinary shares) . . . and sanctions the variation of the rights and privileges attached to C
> the deferred shares in the capital of the company and the arrangements and transactions which are expressed to be effected or authorised by the said resolutions or are involved therein to the intent that on such resolutions respectively taking effect they may be valid and effectual and binding on all the holders of the deferred shares.

The relevant consent there given is, it will be seen, a consent "to the arrangements for the reduction . . . of the capital of the company," D
and nothing more.

Now, had that resolution been intended by the directors, when they propounded it, to record, and had it, on its true construction, actually represented, a consent by the deferred shareholders to a reduction of their shares, which, in the language of art. 71, was "not otherwise E
authorised by these articles," I would have agreed with Mr. Simonds that, when passed in accordance with the provisions of that article, the resolution would have had the effect attributed to it by him.

But, my Lords, while I express the conclusion with real diffidence, because I know that it may not be reached by either of your Lordships, F
I feel so satisfied that the resolution did not have that effect, and could not have been intended to have it, that I feel it to be my duty to give expression to that conviction, if merely for the sake of the principle which underlies it, namely, that only by the clearest words and in full knowledge of their rights will a class be held bound by a resolution which, G
it is suggested, modifies or extinguishes these rights. I need only refer to *Re Quebrada Railway, Land & Copper Co.* (3) for an example of the strictness with which the court in relation to reduction rights applies this principle.

These considerations are apt in relation to this resolution. If the H
only reduction then being proponded was, in respect of its incidence, one which was believed by the directors to be entirely regular, if I may again for brevity's sake use that word, then no consent of the deferred shareholders by extraordinary resolution was required to make it so.

Such a consent was not a thing to be gratuitously asked for. A request for it might well have determined the fate of the whole resolution, as, rightly or wrongly, suggesting a differential treatment of the deferred shares. It would certainly have made it thereafter impossible for the class resolutions of the ordinary and deferred shareholders to be identical in terms, a distinct addition to the attractions of the scheme. That the directors were not, in their belief, asking any consent from the deferred shareholders to a reduction of their shares not otherwise authorised by the articles is, to my mind, crystal clear, in the light of the facts and circumstances already detailed, disclosing their then attitude to this reduction. Nothing, I make bold to say, was at this time further from their minds than the idea that this reduction, once it was fixed in amount, was otherwise than completely normal in every aspect of it. Any belief that it was otherwise was negatived by the statements regarding it contained in the board's circular, by the explanation of the incidence of the reduction given in the chairman's speech, by the foundation on which the reduction petition was based, and by the company's attitude on this subject before EVE, J., leading him to the conclusion as to the proper incidence of the reduction which I have quoted from his judgment. As a result, I find it impossible to read this resolution as a conscious invitation to the deferred shareholders to consent to this reduction as any other than a regular reduction, unless at the same time I am prepared to deny to the chairman's speech and to the directors' circular—I say nothing more of the company's attitude on the petition—those qualities of candour, frankness and impartiality which, by common consent, are the outstanding characteristics of both. That, my Lords, I refuse to do.

But what is the true construction of the words of the resolution on this subject of reduction, apart from any question of intention ?

For this purpose, the resolution must be read in connection with the special resolution, which, it was assumed, would immediately before have been passed by the shareholders in general meeting : and, next, in connection with art. 71, from which the extraordinary resolution derives its power and effect.

When associated with the special resolution, it is seen that " the rights and privileges " referred to in the extraordinary resolution have particular, if not exclusive, reference to the " rights and privileges " specified in para. 3 (2) of the special resolution, and these are not concerned with the incidence of any reduction. As to art. 71, it provides, as will be seen, for the consent being given by extraordinary resolution at a class meeting, *inter alia* :

> (1) To the amalgamation into one class of the shares of any two or more classes ; and (2) to any scheme for the reduction of the company's capital affecting the class of shares in a manner not otherwise authorised by these articles.

Now, if these two provisions are transferred to the text of the extraordinary resolution, it is found that, without any compelling necessity, and clearly for certainty, only the words with reference to amalgamation are textually reproduced in the resolution: but from it, in relation to reduction, any reference to the emphatic words of art. 71 is, with equal A
significance, altogether omitted. Upon this, my Lords, treating the matter as one of construction only, the suggestion must be that the emphatic words of art. 71, although not expressed, are to be implied in the extraordinary resolution. That is to say, there are to be deemed inserted there, after the words "capital of the company," some such B
words as these: "notwithstanding in regard to the reduction that it affects this class of deferred shares in a manner not otherwise authorised by the company's articles of association and including" etc. Now, passing by, for the moment, the possibility of implying any such words in this resolution, I presume that, if capable of being implied C
there, the words are, by parity of reasoning, capable, *mutatis mutandis*, of being implied also in the ordinary shareholders' resolution. But such further implication is demonstrably inadmissible. So far as the ordinary shares are concerned, the incidence of this reduction—one suffered by the deferred shares alone—touches them no more than it touches the D
preference shares: and, with regard to these, not only was no consent asked for, but also it was stated in the directors' circular, and quite correctly, that the rights of the preference shares were entirely unaffected by the board's proposals. If the question be now considered on what I may call its merits, equally inadmissible, although for a different E
reason, is the suggestion that any such words should be implied in the deferred shareholders' resolution. Such an implication would at once run counter to the published official statements with reference to the reduction and the other matters already detailed, all of them completely inconsistent with the suggested implication, which is thereby shown F
to be impossible. In other words, the implication of the words in the ordinary shareholders' resolution would introduce absurdity, and, in the deferred shareholders', discrepancy.

But, my Lords, perhaps a sufficient reason against resorting here to implications for purposes of construction is that the meaning of both G
resolutions on this subject of reduction is sufficiently clear without making any implications at all. What, let it be asked, is the aspect of this reduction—a necessary part of a larger scheme—which, while common to both ordinary and deferred shares, leaves the preference shares quite unaffected? The answer is, as I have already explained, H
its amount. The effect on this subject of the two resolutions, when duly passed, was, in my judgment, that the shareholders, both ordinary and deferred, became consenting parties to a reduction of £5,434,541, or of 5*s.* on each deferred share, no more and no less, and, on this head, they

consented to nothing else. In particular, no consent from the deferred shareholders to the incidence of this reduction being laid exclusively upon their shares was either given or asked for: and for the reason that, by a mistaken assumption, no such consent was considered to be A necessary. Accordingly, no confirmation of that reduction could be given unless the court—and now this House—was able to avow itself, on the evidence, judicially satisfied that this reduction, not in accordance with the company's articles, was, in its result, fair and equitable to the deferred shareholders: *British & American Trustee & Finance* B *Corpn.* v. *Couper* (2).

Here was a very different problem from that with which either EVE, J., or the Court of Appeal had to deal. The right of the company to an order confirming the reduction enunciated by the learned judge applied to what he conceived to be a regular reduction: it was not C applicable to one no longer regular, the vital distinction being that the learned judge and the Court of Appeal were dealing with a reduction which was described as being a last step—almost a formal step—in an elaborate scheme: your Lordships were now called upon to deal with a reduction which I have termed a first and essential step in the scheme D —a step which the deferred shareholders would not by any court be forced to take except upon terms affirmatively shown to be fair and just to themselves. Can the terms in this instance properly be so described? That was the question.

My Lords, I very anxiously considered it. It was not an easy question E to answer. Had it arisen before EVE, J., very shortly after the passing of the reduction resolution, the safest answer adopting in principle the *Quebrada* case (3) would have followed a further separate meeting of the deferred shareholders duly summoned to consider a resolution couched in unambiguous language. But to direct such a meeting to be convened F after an interval of over eighteen months would not have been just to the other interests in the company, and would have been an indulgence to the appellant's party to which they were in no way entitled, seeing that the new aspect of the case which called for such a meeting, if ever it had been seen by them, clearly had been ignored after the first hearing G of the petition. No application that a second meeting of deferred shareholders should be directed was made by the respondent company. The company was evidently content that the question with the appellant should be settled on existing materials. The question therefore had to be answered judicially on these materials only.

H Now, my Lords, in dealing with that question it had been, I thought, quite clearly demonstrated that the scheme was conceived in and enured to the benefit of the company, and was a scheme to which, if its terms were fair to each class affected, the directors were entitled to call for the support of all classes of shareholders.

In viewing the position of the deferred shareholders on the footing that their strict legal rights under the articles had been superseded, I did not consider that, in the circumstances, any advantage they might originally have possessed by the fact that their consent to any reduction was, in effect, essential ought now to be taken into account. They had lost in this last phase any initial advantage of that type. Accordingly, as I thought, the reduction might, in the result, be held to be fair to them if the ordinary share, which under the scheme they were to receive in exchange, had been shown to be the fair equivalent of every four of their unreduced deferred shares. On this aspect of the case, I did feel the difficulty that, in fixing that proportion, no allowance appeared to have been made for the advantage accruing to the old ordinary shareholders from the transfer to capital reserve of the £5,434,541, theretofore credited to the deferred shares alone. But, on consideration, it appeared to me that this item, large as it was, ought not finally to weigh in the balance against the final, independent, and highly instructed opinions of Sir Albert Wyon and Sir William McLintock, that the scheme was, in their judgment, entirely fair to the deferred shareholders. I did not ignore other circumstances leading to the same result. But their testimony, entirely disinterested, I feel I might properly accept. Subject, therefore, to the question whether the extraordinary resolutions at the class meetings had been duly passed at separate meetings properly so called, I reached the conclusion that the reduction might be confirmed.

That question so reserved raises an issue of wide general importance. It would, I think, be unfortunate indeed if the procedure adopted in this instance were to go forth approved by this House as procedure to be followed or adapted in similar circumstances in future. Eve, J., has said, of the three last meetings, of May 1, 1935, that they were organized with remarkable skill, and as an arrangement designed to consult to the utmost the convenience of the shareholders likely to attend. I agree. But the price paid at the end of the day, in my judgment, was that anything valuable and distinctive in a separate class meeting—and there were two of these—was thereby sacrificed.

My Lords, had the order of procedure foreshadowed in the notices convening the meetings been, in any true sense, realised, no objection, technical or substantial, would have now been open. The form of notice seemed to presuppose that there had to be three specific meetings; the first, an extraordinary general meeting consisting of all shareholders in the company—preference, ordinary and deferred—at which the scheme in all its details, as affecting the company generally, would be submitted for approval by special resolution: the second, a meeting of the ordinary shareholders only, at which the scheme, as affecting their particular class interests, would be submitted to them separately, for approval by extraordinary resolution: and the third, a corresponding meeting of deferred shareholders only, similarly convened to approve of the scheme as specially affecting their class interests in the sense already discussed. These meetings were convened for 10.45 a.m., 11 a.m., and 11.15 a.m., respectively, or so soon thereafter as the immediately preceding meeting A should be concluded. But, on the day itself, no attempt was made to separate the shareholders alone entitled to be present at either class meeting from the whole body of shareholders summoned for, entitled to be present at and to take part in, the general meeting. These did so assemble at the appointed hour, to the number of about 1,600, and, B after the show of hands on the resolutions, and a poll demanded by the chairman to be taken immediately, they were informed that their voting papers on the poll would be collected at the doors after the close of the final, deferred shareholders' meeting. In other words, all present were invited to remain seated as they were until the business of the last of the C meetings, which only a fraction of the assembly was entitled to attend, had concluded. This invitation, taken in connection with an announcement at the commencement made by the chairman before beginning his speech, was an intimation that the period of waiting would not be prolonged. Doubtless, therefore, very few shareholders left before the end. D The announcement referred to was the death knell of a separate meeting in any deliberative sense.

After stating that the general meeting would be followed by the class meetings, to each of which an extraordinary resolution would be submitted, the chairman proceeded :

E
> I propose, with your approval, to make one speech in relation to these three meetings, and therefore to take the vote at the two subsequent class meetings of the ordinary shareholders and the deferred shareholders respectively without any further speeches.

Everything followed according to that plan. No speeches except at F the general meeting were made by anybody. An unsuccessful attempt on the part of a deferred shareholder to speak after the deferred extraordinary resolution had been read out by the chairman to the so-called deferred separate meeting was made, but, as described by CLAUSON, J., it was made :

> G with so little insistence that it cannot be treated as affecting in any degree the regularity of the chairman's proceeding to put the resolution to the vote.

At the general meeting, a confused discussion followed the chairman's speech, during which in illogical sequence the issues suitable for discussion by the shareholders generally, as well as those more or less appropriate H to the ordinary and deferred shareholders separately, were ventilated by individual shareholders. Then all discussion ceased and it was never again renewed. The proceedings at each separate meeting, if such it can be called with the whole general body of shareholders remaining in their places, consisted solely in the chairman reading the extraordinary resolution, then calling for a show of hands, thereupon, whether the result was for or against the resolution, demanding a poll to be taken at once, and that was all.

Now, my Lords, in the above circumstances I ask myself when did either separate class meeting meet, if it ever met at all? The business of each meeting certainly commenced with the chairman's speech to the general meeting. He said so. But, if the class meetings then commenced, they did so before the time for which they were convened, probably two hours before. It must also, on that view, be taken that there were one general and two separate meetings proceeding simultaneously, under one chairman. If, however, the meeting, say, of the deferred shareholders, did not commence until after the proceedings of the ordinary class meeting had concluded—and this is the view of the company—then it was a meeting at which nothing in fact took place, and nothing was intended or arranged to take place, except that the resolution should be read, a show of hands asked for, with neither explanation given nor discussion invited, and then a poll demanded in writing to be taken at once. The separate meeting, on this hypothesis, consisted in a resolution read, a show of hands asked for, and a poll demanded. Is this the position to which a deferred shareholder, attending that meeting at the appointed time, and not earlier, may properly be relegated? It seems so. But, when it is remembered that all this took place in the presence of the great bulk of the shareholders of all classes originally assembled, it seems to be impossible to hold that any meeting on that day was a separate class meeting in any sense of the words not wholly inappropriate. A far more accurate description of the relevant proceedings of the day, regarded objectively, would be that they consisted of one general meeting and two separate polls. Let it be agreed that the result of each of the two separate polls was accurate in every particular. Still, it is a separate meeting and not a separate poll that is required by this company's memorandum of association, and there is a wealth of meaning in the distinction.

But, nevertheless, it is, doubtless, because of the accuracy of the result of the polls—the final deliverance—that the procedure adopted is justified, and it is at this very point, as it seems to me, that one essential defect in it is disclosed.

For, if I must condescend upon the question what essential condition of a separate meeting was on this occasion broken, I would say that one such breach consisted in this, that the meeting was so held that there could not be a reliable show of hands—an essential preliminary basis for all subsequent procedure, including the demand for and the taking of the poll. It is true that the chairman at the deferred meeting said that only deferred shareholders were to hold up their hands. No one, however, can say, the chairman, perhaps, least of all, whether all of the shareholders present, not being deferred shareholders, were obedient to his command. It is said, both by the learned judge and by CLAUSON, J., that no wrong voting is shown, and doubtless there was none so far as the poll is concerned, but it would need an indefinite number of affidavits, many hundreds, I presume, to establish the same negative fact in relation to the show of hands. It has not been shown that there was then any wrong voting: no more can be said, and that is not, I suggest, enough. A show of hands is the constitutional method of declaring the will of a meeting. It stands as the resolution of the meeting, unless the declaration of the chairman that the resolution is thereby carried or lost is subsequently displaced by the result of a poll thereafter duly demanded and held. From the very nature of the case, there can, I suggest, be no valid demand for a poll unless there has been a valid show of hands, and that there was a valid show of hands at this so-called separate meeting it is impossible to affirm. The explanation of all that happened in this respect on May 1, 1935, doubtless is that the show of hands, in view of the chairman's intention to demand a poll, whatever its result, was regarded as in this case no more than an empty ceremony, of no significance, whereas it did remain unqualified the common-law expression of the meeting's will, and had to be respected accordingly.

My Lords, CLAUSON, J., in his judgment, asks whether, if it met together, the meeting of the deferred shareholders was not a good separate meeting of the class as he puts it:

> merely because some strangers to whose presence nobody, in fact, objects, are within the same four walls.

The same question might be asked, and presumably would receive the same negative answer, in relation to the meeting of the ordinary shareholders.

My Lords, with all respect I cannot recognise in the question an adequate description of the situation, and the danger of accepting the test as applicable to what really happened is that, by that acceptance, every element of value in a class meeting is lost. The opportunity afforded to the class of discussing its own affairs, undisturbed by opposing or conflicting class interests, is the modest protection against possible oppression offered by a class meeting. How weak that protection often is, owing to conflicting interests within the class itself, is only too well known and is illustrated, perhaps, in this case. But the protection is worth preserving *faute de mieux*. I can only hope with my noble and learned friend opposite that the result of this case will be that the procedure adopted in this instance on this occasion will not be, in like circumstances, repeated. My own opinion, however, was, if the question had been open on this appeal, that the deferred shareholders' meeting —it alone happens to be attacked—was not a separate meeting within the meaning of this company's memorandum of association, and that, apart from waiver, it could not be so regarded. Your Lordships, I believe, support the resolution then passed because you find, in the proceedings of the meeting as proved, sufficient evidence that every non-compliance with essential conditions was duly waived by those deferred shareholders who were present. Merely because of my fear that the acceptance of the evidence to that effect, such as it was, might be invoked in other cases to justify even further departure from essential conditions, I preferred to support the resolution on another ground not open to this objection.

On this petition both the extraordinary resolutions which are said to have been passed on May 1, 1935, must, I think, be taken to have been duly passed, for the reason that the regularity of the meetings at which they were so passed is not on this petition, as is the reduction resolution directly in issue, and because no steps have been taken, nor any threatened, to question it, either by application under sect. 61 of the Act, now too late, or by action properly constituted for that purpose. In the absence of any such proceedings, the evidence filed proving the passing of the resolutions must, I think, on this petition, be accepted. It is sufficient to establish the only presently relevant fact, viz., that there will be provided for the deferred shareholders everything that, under the scheme, they are to receive in return for their reduced share capital. It must therefore, I think, be concluded that the extraordinary resolution of the deferred shareholders is, on this petition, entitled to full effect, according to its tenor, and I have dealt with it above on that footing.

In the view which I have taken of this case, I need hardly say that with the order made by the House as to the costs of the appeal I was in very complete agreement. Had the case presented itself to the learned judge as it was presented here, I cannot doubt that he would have allowed one set of costs to the dissentient deferred shareholders appearing before him, and it may even be that the Court of Appeal, had they found it necessary to call upon the respondent company, might even have varied his order as to costs, especially if it had been brought to their attention that the deferred shareholders were almost invited by the president of the company and the chairman to place their views before the court at the hearing of the petition which was then foreshadowed. It would, however, be out of the question that this House, dismissing the appeal, should interfere with an order as to costs that had been the subject of a double discretion. Nor could the House well order a successful respondent on a second appeal to pay the appellant's costs of that appeal. But the respondent company's own costs of the appeal were within your Lordships' normal discretion, and it was well and to some extent a recognition of the service rendered by the appellant, that the company should be left to bear its own costs of an appeal in which the appellant has been of real assistance to the House.

My Lords, as I was examining the statute for the purposes of this opinion, I chanced upon a matter, of real importance to all concerned in these matters, which was apparently overlooked in this case. The question in no way affects the appeal, because it was neither raised nor argued by the appellant. I raise it only in the general interest.

Reading in the record the account of the extraordinary general meeting of the company on May 1, 1935, I noticed that the chairman, on the failure of the special resolution to be carried on a show of hands, is reported to have said:

> I . . . give written notice in pursuance of art. 59 of the company's articles of association that I demand a poll and I direct in pursuance of art. 60 that the poll shall be taken forthwith.

The allegation on this subject in para. 18 of the reduction petition is to the same effect. Now, I am not suggesting that that demand was irregular. It has not been challenged, and I am not suggesting that its sufficiency could not have been established, if it had been. On that I say nothing. But the form of demand indicates that an important change in the law on this subject, introduced by the Companies Act, 1928, and brought into force by the Companies Act, 1929, is not yet fully appreciated by the profession, and I draw attention to the effect of the change by way of warning to all concerned in the administration of companies. Since the passing of that Act, the procedure governing the demand of a poll, when, at any meeting, an extraordinary or a special resolution has, on a show of hands, been carried or lost, has become statutory, and, except to the extent referred to in the section, is no longer, as before, governed exclusively by the articles of association of the company concerned, whatever these may be.

Sect. 117 of the Act of 1929 contains the provisions as to extraordinary and special resolutions, which, like the special reduction resolution here, are statutory. Sect. 117 (4) is as follows:

> At any meeting at which an extraordinary resolution or a special resolution is submitted to be passed a poll shall be taken to be effectively demanded, if demanded (*a*) by such number of members for the time being entitled under the articles to vote at the meeting as may be specified in the articles, so, however, that it shall not in any case be necessary for more than five members to make the demand; or (*b*) if no provision is made by the articles with respect to the right to demand the poll, by three members so entitled or by one member or two members so entitled, if that member holds or those two members together hold not less than 15 per cent. of the paid-up share capital of the company.

The provisions of the subsection are, it will be seen, very definite. The chairman of a meeting has no special privilege as such. If he is not a member—and in the respondent company the chairman need not necessarily be a member (art. 82)—he has in this matter under the section no status at all: it may one day be an interesting subject of discussion, whether a single member, holding, say, one share, may, in a company, however great, demand a poll under sect. 117 (4) (*a*). All of which shows how dangerous it may be to ignore these statutory provisions. If regard be had only to the articles, there is always a risk that the result of the poll irregularly demanded may, if challenged, be held to be otiose. A The Act, I would add, deals only with extraordinary or special resolutions which are statutory. It does not, unless incorporated in articles by reference, apply to conventional extraordinary resolutions such as were here referred to in art. 72.

B

LORD RUSSELL OF KILLOWEN: My Lords, having had the opportunity of reading and considering the opinion of my noble and learned friend LORD MAUGHAM (with which I agree), I feel justified not only in dispensing with any recital of the relevant facts (of these I will assume the House to be fully seised), but also, while making some additional C observations of my own, in confining them within narrow limits.

The question which has given me the chief anxiety in this case is the question whether a separate meeting of the deferred shareholders, within the meaning of those words, was held. That the meeting was validly convened there can, in my opinion, be no doubt. The only suggestion D to the contrary contained in the appellant's case is that a shareholder who held deferred shares but no ordinary shares would have no knowledge of the hour for which the class meeting of the ordinary shareholders had been summoned. For myself, I never could, nor can I now, appreciate this point, in view of the fact that the meeting of the deferred E shareholders was summoned for a specified hour, though with an intimation that the actual commencement of the meeting would, if need be, await the conclusion of the meeting of the ordinary shareholders. A further point was raised for the first time in this House, to the effect that the notice convening the meeting was an insufficient notice, because F neither it, nor the resolution set out therein, referred to or covered a:

> reduction of the company's capital affecting the class of shares in a manner not otherwise authorised by these articles.

The relevant words are quoted from art. 71 of the articles of association. I will assume in his favour that it was open to the appellant, in a case G like this, to raise such a point for the first time here, though I doubt whether it was; but there is, in my opinion, nothing in the point. The notice in question embodies the series of resolutions appended to the notice concerning the extraordinary general meeting, and these make quite plain the nature of the reduction which was proposed, and which H was merely incidental to the main purpose, viz., the rearrangement of capital by the conversion of deferred shares into ordinary shares, one ordinary share of £1 being substituted for four deferred shares of 10*s*. each.

The meeting having been properly convened, can it be said that the circumstances attending its holding were such as to invalidate its acts, or, in other words, such as to justify us in holding that there was no resolution of the deferred shareholders ? I have come to the conclusion
A that the answer should be in the negative. There are many matters relating to the conduct of a meeting which lie entirely in the hands of those persons who are present and constitute the meeting. Thus, it rests with the meeting to decide whether notices, resolutions, minutes, accounts, and such like, shall be read to the meeting or be taken as
B read ; whether representatives of the Press, or any other persons not qualified to be summoned to the meeting, shall be permitted to be present, or, if present, shall be permitted to remain ; whether and when discussion shall be terminated and a vote taken ; whether the meeting shall be adjourned. In all these matters, and they are only instances, the
C meeting decides, and, if necessary, a vote must be taken to ascertain the wishes of the majority. If no objection is taken by any constituent of the meeting, the meeting must be taken to be assenting to the course adopted. It is not a case, as was suggested in argument, of those present at a meeting waiving rights of those who have elected not to attend ;
D it is a case of those who have elected to attend regulating the conduct of the meeting, a question in which those who have chosen to stay away have no voice. I am, however, far from assenting to the view that all that is necessary to constitute a valid resolution by a separate class of shareholders, or a valid separate meeting of a class of shareholders, is
E that a separate vote of the class be taken, in such circumstances as to ensure that all members of the class shall have an opportunity of voting, and that no one who is not a member of the class shall vote. *Prima facie* a separate meeting of a class should be a meeting attended only by members of the class, in order that the discussion of the matters
F which the meeting has to consider may be carried on unhampered by the presence of others who are not interested to view those matters from the same angle as that of the class, and, if the presence of outsiders was retained in spite of the ascertained wish of the constituents of the meeting for their exclusion, it would not, I think, be possible to say that a separate
G meeting of the class had been duly held. In the present case, however, the deferred shareholders present, with knowledge that there were many in the room who held no deferred shares, and that it was proposed that no further discussion should take place, but that a vote on the resolution should be taken, raised no objection, or at all events no audible
H objection, of any kind. In these circumstances, they must be taken to have assented to the meeting being so conducted, and the resolution was accordingly a valid extraordinary resolution, passed at a meeting of the deferred shareholders, within the meaning of art. 71. I would like to add that in my opinion the question of convenience or inconveni-

ence should not enter into consideration. Those responsible for convening a series of class meetings may find it the more prudent course to summon such meetings at longer intervals, or in different rooms, or even on different dates. The inconvenience and extra expense involved are an unfortunate result of the modern phenomenon of colossal A companies with phalanxes of shareholders.

As regards the contention of the appellants that there was no power in the company to reduce its capital except by paying off what was termed in argument "redundant capital," and that the reduction here proposed was, therefore, *ultra vires*, I need only say that I agree with the B views of Eve, J., and those of the Court of Appeal, viz., that, upon the true construction of art. 44, the company had power to reduce its capital in any way authorised by the Companies Act, 1929.

The appellants, however, contended that the court should not have confirmed the reduction of capital, because the circular issued by the C directors to the shareholders was, by reason both of what it contained and of what it omitted, of such a nature that the holders of deferred shares were not placed in a position which enabled them properly to judge and vote upon the board's proposals. It must be borne in mind that, throughout these proceedings, the objecting shareholders have D emphatically, even ostentatiously, disclaimed any hint or suggestion against the integrity or good faith of the directors. Nor has any holder of deferred shares come forward to say that he was in any degree wrongly influenced or misled by the circular. Having carefully considered the various matters in respect of which the circular was criticised before E this House, I have no hesitation in agreeing with the views of Eve, J., and those of the Court of Appeal, viz., that no refusal to confirm the reduction resolution could properly be based upon criticism of the circular.

In the final resort, it was urged by the appellants that the reduction F of capital should not be confirmed because the scheme for the rearrangement of the company's capital (in which, be it observed, the reduction was only an incident) operated unfairly to the holders of deferred shares.

The Court of Appeal disposed of this contention by saying that the G question whether it was to the advantage of a class to accept a particular modification of its rights was eminently a question of which the shareholders were much better judges than the court, and that nothing had been placed before the court which would justify an overruling of the shareholders' decision. I would rather put the matter thus, in view of H the large number of votes in favour of the scheme given, at the meeting of deferred shareholders, by persons who also held ordinary shares—that, in the present case, the court should itself decide the question, upon the evidence before it, and that, judging the question of fairness or unfairness upon the evidence in the case, both affidavit evidence and oral evidence, I am satisfied (no matter where the onus originally lay) that the scheme for rearrangement of the company's capital is one which is fair to both classes, both the holders of deferred shares and the holders A of ordinary shares.

In the result, I agree that the appeal was rightly dismissed, and, in the special circumstances of the case, without costs.

I desire to keep open the question whether it is competent for an individual shareholder to appeal on behalf of others as well as himself, B and to represent them on the hearing of the appeal, or whether it is not necessary that anyone who wishes to be represented on the hearing of an appeal should be joined as an active appellant, with all the risk of liability which attaches to such an activity.

C LORD MAUGHAM: My Lords, the company was incorporated on Dec. 7, 1926, under the Companies Acts, 1908 to 1917, for the purpose of acquiring and holding the whole or any portion of the shares, debentures, debenture stock, and other interests of and in Brunner Mond & Co., Ltd., Nobel Industries, Ltd., United Alkali Co., Ltd., and British D Dyestuffs Corpn., Ltd., and any other companies engaged, concerned, or interested in any of certain trades or businesses which the company was formed to carry on, and to promote the beneficial co-operation thereof, to carry on business as manufacturers of and dealers in chemicals of all kinds, dyes, dyestuffs, paints, varnishes, drugs and other pharmaceutical E and toilet preparations, and other objects set forth in the memorandum of association thereof.

The initial nominal share capital of the company was £65,000,000, divided into 47,320,000 shares of £1 each and 35,360,000 shares of 10*s.* each. Cl. 6 of the memorandum of association of the company provides, F *inter alia*, that the company may issue any shares of the original or new capital with any preference or priority in the payment of dividends or the distribution of assets or otherwise over any other shares, whether deferred, ordinary or preference, and whether issued or not, but so that, unless otherwise provided by the terms of issue of any shares, any G preferential or other special rights for the time being annexed to any special class of shares shall not be affected or abrogated without the sanction of a separate meeting of the holders of shares of the class held, pursuant to the articles registered with the said memorandum of association.

H Art. 113 of the articles of association of the company provides as follows:

> Subject to the rights of the holders of any shares other than the ordinary and deferred shares and the original preference shares that may be issued upon special conditions, the profits of the company which the company shall in accordance with

> art. 114 determine to distribute by way of dividend in respect of each financial year of the company shall be applied as follows:
>
> First: To or towards the payment to the holders of the cumulative preference shares of a cumulative preferential dividend at the rate of 7 per cent. per annum on the amount for the time being paid up or credited as paid up on the preference shares; and Secondly: To or towards the payment to the holders of the ordinary shares of a non-cumulative dividend for the year at the rate of 7 per cent. per annum on the amount paid up or credited as paid up thereon.
>
> The balance of profits remaining available for distribution shall be distributed as follows: (*a*) a further dividend on the amount paid up or credited as paid up on the ordinary shares, together with (*b*) a dividend on the amount paid up or credited as paid up on the deferred shares, in such a manner that the total amount of such balance to be so distributed in respect of the ordinary shares shall be as nearly as possible twice the total amount to be distributed in respect of the deferred shares, the dividend in the case of each class being calculated to the nearest one-quarter per cent. and fractions ignored.

Art. 4 of the company's articles of association provides as follows:

> In the event of the winding up of the company, the assets of the company available for distribution shall be applied, first in paying to the holders of the cumulative preference shares the amounts paid on such shares together with a sum equivalent to any arrears of dividends, whether declared or undeclared, down to the commencement of the winding up, and interest at the rate of 7 per cent. per annum from the commencement of the winding up to the date of payment; secondly, in paying to the holders of the ordinary shares the amounts paid on such shares; thirdly, in paying to the holders of the deferred shares the amounts paid on such shares. Any surplus remaining shall be distributed amongst the holders of the ordinary and deferred shares in the ratio of two-thirds to the holders of the ordinary shares and one-third to the holders of the deferred shares upon the amounts paid up on their shares respectively.

Arts. 62 and 66 of the company's articles of association provide as follows:

> 62. Subject to any special terms as to voting upon which any shares may be issued, or may for the time being be held, every member shall upon a show of hands have one vote and upon a poll one vote in respect of each ten preference shares one vote in respect of each ordinary and one vote in respect of each two deferred shares held by him.
>
> 66. No member shall be entitled to vote at any meeting held after the expiration of three months from the registration of the company (other than the statutory meeting or any adjournment thereof) in respect of any share that he has acquired by transfer unless he has been registered as the holder of the share in respect of which he claims to vote for at least three months previously to the time of holding the meeting at which he proposes to vote.

The company's articles of association contain the following provisions as to increase, consolidation and reduction of capital and conversion of shares into stock:

> 36. The board may, with the sanction of the company previously given in general meeting, convert any paid-up shares into stock, and may also, with such sanction as aforesaid, re-convert such stock into paid-up shares of any denomination.
>
> 40. The company may in general meeting consolidate its shares, or any of them into shares of a larger amount.
>
> 42. The board may, with the sanction of a general meeting of the company, from time to time increase the capital of the company by the issue of new shares.
>
> 44. The company may by special resolution reduce its capital by paying off capital, cancelling capital which has been lost or is unrepresented by available assets, reducing the liability on the shares, or otherwise, as may seem expedient, or it may by ordinary resolution cancel shares not taken or agreed to be taken by any

person. Capital may be paid off upon the footing that it may be called up again or otherwise.

Arts. 71 and 72 of the company's articles of association are important, and provide as follows:

> 71. The holders of any class of shares may at any time and from time to time, and whether before or during liquidation, by an extraordinary resolution passed at a meeting of such holders, consent on behalf of all the holders of shares of the class to the issue or creation of any shares ranking equally therewith, or having any priority thereto, or to the abandonment of any preference or priority, or of any accrued dividend or dividends, or the reduction for any time or permanently of the dividends payable thereon, or to the amalgamation into one class of the shares of any two or more classes, or to the subdivision of shares of one class into shares of different classes, or any alterations in these articles varying or taking away any rights or privileges attached to shares of the class, or to any scheme for the reduction of the company's capital affecting the class of shares in a manner not otherwise authorised by these articles, or to any scheme for the distribution (though not in accordance with legal rights) of assets in money or in kind in or before liquidation, or to any contract for the sale of the whole or any part of the company's property or business determining the way in which as between the several classes of shareholders the purchase consideration shall be distributed, and generally consent to any alteration, contract, compromise, transaction or arrangement which the persons voting thereon could if *sui juris* and holding all the shares of the class consent to or enter into, and such resolution shall be binding upon all the holders of shares of the class.
>
> 72. Any meeting for the purpose of the last preceding clause shall be convened and conducted in all respects as nearly as possible in the same way as an extraordinary general meeting of the company; provided that no member, not being a director, shall be entitled to notice thereof or to attend thereat, unless he be a holder of shares of the class intended to be affected by the resolution, and that no vote shall be given except in respect of a share of that class, and that the quorum at any such meeting shall (subject to the provision as to an adjourned meeting hereinbefore contained) be members or corporation representatives holding or representing by proxy one-tenth of the issued shares of that class, and that at any such meeting immediately upon a declaration of the result of the show of hands a poll may be demanded in writing by the chairman or by any five members or corporation representatives holding one-tenth of the issued shares of that class present in person or by proxy and entitled to vote at the meeting.

Shortly after the incorporation of the company, the chairmen of the four merging companies, with the approval of the board of the company, sent to their respective shareholders an invitation to exchange their shares of various classes in the merging companies for fully paid shares of various classes in the company, and this exchange was duly carried out. The company then commenced to carry on business, and it has traded with great success. On May 31, 1928, the capital of the company was increased to £75,000,000 by the creation of 20,000,000 new shares of 10*s.* each, and on Apr. 18, 1929, the capital was further increased to £95,000,000 by the creation of 40,000,000 new shares of 10*s.* each.

During the year 1928, the company made an issue of 3,363,855 ordinary shares of £1 each at 33*s.* per share, and 2,242,570 deferred shares of 10*s.* each at par, and during the year 1929 the company made an issue of 4,410,597 7 per cent. preference shares of £1 each at 23*s.* per share, and 6,016,857 ordinary shares of £1 each at 33*s.* 6*d.* per share, and certain additional shares of all classes have from time to time been issued by the company. At the date on which the meetings to approve the proposed capital reduction and reorganisation referred to below were convened, the capital of the company was as follows:

Description	*Authorised Capital*	*Issued Capital*	*Unissued Capital*
7 per cent. cumulative preference shares of £1 each	£22,727,000	£22,723,229	£3,771
Ordinary shares of £1 each ..	£43,767,355	£43,756,659	£10,696
Deferred shares of 10*s.* each ..	£10,872,645	£10,868,282 (21,736,564 shares)	£4,363 (8,726 shares)
Unclassified shares of £1 each ..	£15,133,000	—	£15,133,000
Unclassified shares of 10*s.* each ..	£2,500,000	—	£2,500,000 (5,000,000 shares)
	£95,000,000	£77,348,170	£17,651,830

The number of shareholders of the company of all classes has at all material times been in excess of 180,000. At the date of the relevant meetings, there were over 63,000 shareholders who held both ordinary and deferred shares, compared with 65,000 shareholders holding ordinary shares only, and 17,000 shareholders holding deferred shares only.

After a careful and prolonged consideration of the position, the board of directors in the month of Apr., 1935, proposed terms of reorganisation of the company's capital in which a reduction of the capital from £95,000,000 to £89,565,859 was an integral part. Each £2 of deferred share capital was to be converted into £1 of ordinary share capital, the capital as a whole (apart from the preference share capital which was not affected by the scheme) being unified into one class of ordinary share capital. One half of the deferred share capital amounting in round figures to five and a half million pounds (more exactly, £5,434,141) was thus to be taken away from the holders of the deferred shares, and was to be dealt with by a reduction of capital which required the confirmation of the court under the Companies Act, 1929, s. 55. It is the confirmation of this reduction which is the subject involved in the present appeal.

On Apr. 6, 1935, the secretary of the company sent to the shareholders a circular explaining in detail the board's proposals. In the same envelope the secretary enclosed the following documents or notices, namely: (*a*) the annual report of the company for the year 1934, with which was incorporated the financial statistical record of the company set out in tabular form, year by year, from the date of its incorporation; (*b*) the notice convening the eighth ordinary general meeting of the company to be held at the Central Hall, Westminster, London, S.W.1, on May 1, 1935, at 10.30 a.m., and an extraordinary general meeting of the company to be held at the same place on the same date at 10.45 a.m., or so soon thereafter as the business of the ordinary general meeting has been concluded; (*c*) the notice convening the ordinary and extraordinary general meetings set out the ordinary business to be transacted at the ordinary general meeting, and that, as special business, it was proposed to consider, and, if thought fit, pass, the following resolution as a special resolution :

> That on June 30, 1936, or, if before that date the reduction and re-organisation of capital proposed to be effected by the resolutions appended to the notice of an extraordinary general meeting, to be held at the close of this meeting, shall have become effective, then, on the date on which the same shall become effective, all the shares in the capital of the company of each class, then issued and outstanding and fully paid up, be converted into stock of the same class, and that all shares of any class subsequently issued shall, as and when the same shall have been fully paid up, become and be converted into stock of that class.

The said notice further set out that, at the extraordinary general meeting, it was proposed to consider, and, if thought fit, pass, the following resolutions as special resolutions :

> 1. That the capital of the company be reduced from £95,000,000, divided into 22,727,000 preference shares of £1 each, 43,767,355 ordinary shares of £1 each, 21,745,290 deferred shares of 10*s.* each, 15,133,000 unclassified shares of £1 each and 5,000,000 unclassified shares of 10*s.* each to £89,565,859 divided into 22,727,000 preference shares of £1 each, 43,767,355 ordinary shares of £1 each, 21,736,564 deferred shares of 5*s.* each, 8,726 deferred shares of 10*s.* each, 15,133,000 unclassified shares of £1 each and 5,000,000 unclassified shares of 10*s.* each and that such reduction be effected by cancelling paid up capital to the extent of 5*s.* per share on each of the 21,736,564 deferred shares which have been issued and are fully paid up and by reducing the nominal amount of each of such issued deferred shares from 10*s.* to 5*s.*
>
> 2. That upon the said reduction of capital being confirmed by the court and becoming operative : (i) the 8,726 deferred shares of 10*s.* each, at present unissued, shall be consolidated into 4,363 shares of £1 each and such £1 shares shall be regarded as forming part of the company's unclassified shares ; (ii) the 5,000,000 unclassified shares of 10*s.* each shall be consolidated into 2,500,000 unclassified shares of £1 each ; (iii) the existing rights and privileges attached to the said 43,767,355 ordinary shares of £1 each and to the 21,736,564 deferred shares of 5*s.* each resulting from the said reduction shall be varied by the amalgamation (as from and after the close of the year 1934) of the said ordinary shares and the said reduced deferred shares into one class of ordinary shares and by the extinguishment of all special rights or privileges attached to the shares of those respective classes so that the said ordinary shares and the said deferred shares shall as from Jan. 1, 1935, become and be and be regarded as forming one class of ordinary shares ranking *pari passu* for purposes of dividend and return of capital and entitling the holders thereof on a poll to one vote for every £1 in nominal value of such shares held by them respectively and that all such shares be thenceforth termed ordinary shares ; (iv) the capital of the company shall be increased to its former amount of £95,000,000 by the creation of 5,434,141 additional unclassified shares of £1 each.
>
> 3. That if by reason of the aforesaid reduction of capital and the conversion of fully paid shares into stock any members of the company become entitled to holdings of ordinary stock which are not an exact multiple of £1 the directors be authorised and empowered to sell so much of the said respective holdings as shall be required to reduce them to an exact multiple of £1 for the best price they can reasonably obtain and to divide the net proceeds of sale amongst the persons entitled to the amounts of stock so sold in their due proportions, with power to nominate some person to transfer any stock so sold to the purchaser thereof and to register the purchaser as the holder thereof.

Further special resolutions, approving consequential alterations in the company's articles of association, to become operative on the court confirming the reduction and reorganization of capital involved in the special resolutions set out above, were also included in the body of the said notice, but are not material for the purposes of the questions arising on this appeal.

(*d*) Notice convening a separate meeting of the holders of the ordinary shares, to be held at the Central Hall, Westminster, on May 1, 1935, at 11.0 a.m., or so soon thereafter as the extraordinary general meeting convened for the same day and place had been concluded for the purpose of considering, and, if thought fit, passing, with or without modification, the following resolution as an extraordinary resolution, binding on all the holders of ordinary shares, pursuant to cl. 71 of the respondent company's articles of association, viz. :

> That this meeting of the holders of the ordinary shares in the capital of the company hereby consents on behalf of all such holders to the arrangements for the reduction and re-organisation of the capital of the company (including the amalgamation of the ordinary and reduced deferred shares into one uniform class of ordinary shares) which are embodied in the series of resolutions appended to the notice dated Apr. 6, 1935, convening an extraordinary general meeting of the company held on this date, a print of which resolutions is signed by the chairman for the purposes of identification, and sanctions the variation of the rights and privileges attached to the ordinary shares in the capital of the company and the arrangements and transactions which are expressed to be effected or authorised by the said resolutions or are involved therein, to the intent that on such resolutions respectively taking effect they may be valid and effectual and may be binding on all the holders of the said ordinary shares.

(*e*) Notice convening a separate meeting of the holders of the deferred shares to be held at the Central Hall, Westminster, on May 1, 1935, at 11.15 a.m., or so soon thereafter as the meeting of the ordinary shareholders convened for the same day and place had been concluded, for the purpose of considering, and, if thought fit, passing, with or without modification, as an extraordinary resolution, a resolution similar in terms, *mutatis mutandis*, to the resolution last above set out.

All shareholders received combined admission and voting cards, and forms of proxy enabling them to record their votes by proxy, or to attend the meetings convened for May 1, 1935, and to record their votes personally at the meetings at which they were entitled to vote.

In view of the fact that shareholders might hold only one class of shares or more than one class of shares in various combinations, four separate types of admission and voting cards and forms of proxy were adopted, but each shareholder received only one of such cards, according to the category in which he fell : (i) in cases where a shareholder held only preference shares, he received a proxy form for use at the extraordinary general meeting only, with a blue form of voting card for use at that meeting ; (ii) in cases where a shareholder held preference and ordinary shares, or ordinary shares only, he received proxy forms for use at the extraordinary general meeting and the class meeting of the ordinary shareholders, with a blue form of voting card for use at the extraordinary general meeting and a pink form of voting card for use at the class meeting of the ordinary shareholders ; (iii) in cases where a

shareholder held preference and deferred shares or deferred shares only, he received proxy forms for use at the extraordinary general meeting and the class meeting of the deferred shareholders, together with a blue form of voting card for use at the extraordinary general meeting and a
A green form of voting card for use at the class meeting of the deferred shareh[illegible] cases where a shareholder held preference, ordinary and deferred shares, or ordinary and deferred shares only, he received proxy forms for use at the extraordinary general meeting and at the respective class meetings of the ordinary and deferred shareholders,
B together with a blue form of voting card for use at the extraordinary general meeting, a pink form of voting card for use at the class meeting of the ordinary shareholders and a green form of voting card for use at the class meeting of the deferred shareholders.

The course of the proceedings at the various meetings held on May 1,
C 1935, was as follows: At the ordinary general meeting there were about 1,600 shareholders of all classes personally present at the time when the proceedings opened at 10.30 a.m. by the secretary reading the notice convening the meeting. The chairman delivered a speech containing a comprehensive review of the company's activities during the past
D financial year, a print of which was handed to all shareholders on their entering the hall. The usual resolutions approving the accounts, re-electing directors and appointing auditors, together with the special resolution relating to the conversion of the issued and fully paid shares into stock, were duly passed on a show of hands. Shareholders who
E desired to ask any questions were asked by the chairman to come to the rostrum immediately under the board's table, so that every one could hear their questions. Certain questions were thereupon asked by shareholders, and answered by the chairman. One shareholder who attempted to criticise the proposed capital reorganisation was informed by the
F chairman that that was a matter for the next meeting.

At the extraordinary general meeting which followed, the proceedings were started by the chairman delivering to the shareholders a further speech, which related solely to the capital reorganisation proposals, a print of such speech having been handed to all shareholders on their
G entering the hall. The chairman prefaced his speech by stating that, in view of the notice convening the extraordinary general meeting having been sent to all shareholders, he would, with their permission, take it as read. Nobody present objected to this proposal. Quite early in his speech the chairman stated:

> H The extraordinary general meeting of all the shareholders will be followed by two class meetings, namely, first a class meeting of the ordinary shareholders, and, second, a class meeting of the deferred shareholders. At the class meetings, these two classes of shareholders will be asked in turn to vote upon an extraordinary resolution approving of the proposed reorganisation and reduction of the company's share capital in so far as those proposals amount to a variation of the rights and privileges attached to the ordinary shares and to the deferred shares respectively.

I propose, with your approval, to make one speech in relation to these three meetings, and, therefore, to take the vote at the two subsequent class meetings of the ordinary shareholders and the deferred shareholders, respectively, without any further speeches.

No objection was taken to the chairman's proposal.

The chairman in his speech elaborated the points made by the board's A
circular of Apr. 6, 1935, and explained in detail the reasons which had led the board to lay its proposals before the shareholders, and he stated that, in the view of the board, they were advantageous to the company as a whole, and in the interests of all classes of shareholders. The chairman also dealt with certain criticisms of the scheme which had B
been received by the board in the interval which had elapsed between the despatch of the board's circular and notices and the date of the meetings, and stated that Sir William McLintock and Sir Albert Wyon, principal partners in the company's two firms of auditors, were both satisfied that the proposals were fair and reasonable and in the interests C
of the company. The chairman concluded by moving the special resolutions set out in the notice convening the meeting, and asked that, as it was a very lengthy document, it might be taken as read. Nobody objected to this course.

The shareholders were given an opportunity, before the resolutions D
were put formally to the vote, of coming to the rostrum and of asking questions. Twenty shareholders in turn came up to the rostrum and expressed their views on the board's proposals. The great majority of the speeches was made by holders of deferred shares, who were either averse to any proposal to consolidate the ordinary and deferred shares E
into one class or suggested that the ratio of conversion was unfair towards the deferred shareholders, but there was also a speech by a shareholder who criticised the proposals from the point of view of the ordinary shareholders.

After all shareholders who desired to address the meeting had spoken, F
the chairman put the resolutions to the vote. The resolutions having been defeated on a show of hands, the chairman, purporting to act in pursuance of the power vested in him under the company's articles of association, demanded a poll, and directed that it should be taken forthwith. The chairman referred those present to the voting cards on the G
back of their tickets of admission, and directed them to sign the portion coloured blue, and to specify whether they were for or against the resolutions. The chairman, having said that the voting cards would be collected at the door at the conclusion of the class meeting of the deferred shareholders, declared the meeting adjourned until 5.30 p.m., when H
the result of the poll would be announced.

The class meeting of the holders of ordinary shares followed. The chairman stated that he had already covered the business of this meeting in his speech at the preceding extraordinary general meeting, and that he

did not propose to make another speech. Nobody objected to this procedure. He moved, as an extraordinary resolution, the resolution set out in the notice convening the meeting, and this was seconded. Nobody present having shown any inclination to raise any further
A questions, or to address the meeting, the chairman then put the resolution to the meeting, pointing out that only those shareholders present whose voting cards had a pink portion could vote. The resolution was put to the meeting, and was declared to be carried by the necessary majority as an extraordinary resolution, but the chairman gave written notice,
B in pursuance of art. 72 of the articles, demanding a poll, and directed that it should be taken forthwith. The chairman having said that the voting cards would be collected at the door at the conclusion of the class meeting of the deferred shareholders, declared the meeting adjourned until 5.30 p.m., when the result of the poll would be announced.

C The class meeting of the holders of deferred shares followed, and the same course was taken. The chairman, after pointing out that only those shareholders present whose voting cards had a green portion could vote, then put the resolution to those shareholders. The resolution was declared to have been lost, on a show of hands, and the chairman, there-
D upon, in accordance with his rights under art. 72, demanded a poll, and directed that this should be taken forthwith. The chairman indicated that those shareholders present who were entitled to vote were to sign the green portion of their admission and voting cards in the appropriate way. He then declared the meeting adjourned until 5.30 p.m., when
E the result of the poll would be announced, and stated that that concluded all the business to be transacted, pending the announcement of the polls, and he invited the shareholders to return, for this purpose, at 5.30 p.m. In concluding, the chairman requested the shareholders, on leaving, to hand their admission and voting cards to the company's officials at the
F doors, in order that all votes, either for or against, might be accounted for.

It is admitted that holders of shares of classes other than deferred shares were in the hall during the class meeting of the deferred shareholders, but no shareholders (other than deferred shareholders) took any part in the conduct of the class meeting of the deferred shareholders.
G The deferred shareholders present at this class meeting were free to confer together or ventilate their views or address the meeting, but, the matter having been discussed at some length at the preceding extraordinary general meeting (mainly by deferred shareholders present at that meeting), none of them showed any desire to do so.

H As EVE, J., observed, in his judgment, the proceedings were conducted in such a manner as to satisfy those present, and no objection was taken, by any of the shareholders present at either of the class meetings, to the physical presence in the hall, during the conduct of such meeting, of holders of shares of a class other than that affected.

An affidavit was indeed filed on behalf of the opponents of the scheme, in which the deponent, Mr. Sidney Lee, stated that, as a holder of 100 deferred shares, he was present at the meetings, and that, immediately prior to the chairman commencing the section of the proceedings which dealt with the deferred shareholders' proposed resolutions, he rose and asked the chairman to request all ordinary and preference shareholders to leave the hall, so that only deferred shareholders would remain for the consideration of the deferred shareholders' proposed resolutions, and that the chairman took no notice whatever of his request, and went on with the proceedings. There is no record in the shorthand transcript of the proceedings at the various meetings of any such statement having been made by Mr. Lee, and his observations were in fact not heard by the chairman. His request seems not to have been supported by any other deferred shareholders, and, in my opinion, this inaudible protest must be disregarded in considering the validity of the meetings.

The extraordinary general meeting, and the class meetings of the ordinary and deferred shareholders, were resumed at 5.30 p.m., on the same day, when about 100 shareholders attended to hear the results of the polls, and at such adjourned meetings the chairman announced the result of the polling and declared that the resolutions laid before the extraordinary general meeting had been duly carried as special resolutions, and that those before the respective class meetings of the holders of ordinary and deferred shares had been duly carried as extraordinary resolutions.

Subsequently to the announcement of the result of the polls, the board of the company subjected the figures to a detailed re-check and scrutiny, and it was found that, owing to the haste with which the calculations had been made, there were certain errors in the figures originally announced, which did not, however, affect the results. The revised figures of the polling at the three meetings in question were as follows :

	For.		Against.	
	Votes.	%	Votes.	%
Extraordinary general meeting	22,803,402	91·44	2,135,971	8·56
Class meetings—				
Ordinary shareholders	18,663,383	94·26	1,136,163	5·74
Deferred shareholders	3,722,414	77·26	1,095,688	22·74

On May 2, 1935, the company presented its petition to the Chancery Division of the High Court of Justice praying for confirmation of the capital reduction involved in the special resolutions passed at the extraordinary general meeting.

On May 21, 1935, Mr. Registrar Stiebel made an order dispensing with an inquiry as to the creditors of the company, and directing that the petition should be placed in the list for hearing before Eve, J., on June 24, 1935.

The petition came on for hearing before Eve, J., on July 25, 26 and 30, and Nov. 5, 6, 8 and 13, 1935, when numerous affidavits which had been filed in support of and in opposition to the scheme were read, and many of the deponents were cross-examined at considerable length. On Nov. 13, 1935, Eve, J., stated that he proposed to state at once the conclusion at which he had arrived, and to leave to some later period the delivery of his judgment. He stated that he was satisfied that it was the duty of the court in this case to confirm the resolutions which had been passed, and that he did so, and approved of the minute which had been proposed. The opponents asked for their costs of appearing on the petition, but Eve, J., stated that he saw no particular reason why he should not leave those who had opposed the scheme to pay the costs which they had incurred in so doing, and he accordingly made no order as to their costs.

On Dec. 20, 1935, Eve, J., delivered his reserved judgment, in which he gave his reasons for confirming the reduction of capital. In the course of his judgment, he pointed out that the proposed reduction of £5,434,141 arose, not because any capital had been lost, or was unrepresented by available assets, or because it was proposed to repay paid up capital to the shareholders, but because it was proposed to reduce the nominal value of the deferred shares from 10*s.* to 5*s.* each, as an integral part of a scheme for the simplification of the company's capital account, by readjusting the respective rights of the ordinary and deferred shareholders and amalgamating these two classes of shares into one class. He observed that the main question on which the shareholders were divided was how many deferred shares were to be given in exchange for one ordinary share. The opinion of those deferred shareholders who supported the opinion that the exchange ought to have been on a more liberal basis than 4 to 1 was founded to a large extent on the assertion that the company had been gradually accumulating large reserves of undisclosed and undistributed profits. After indicating that the evidence filed on the petition disposed absolutely of any suggestion that there existed undisclosed reserve funds, he summed up the contention of the opposing shareholders on the fairness of the scheme by saying that, whilst opinions might well differ as to the relative value of the ordinary and deferred shares, this was a point which was more likely to be solved satisfactorily by the shareholders than by the court, and that the shareholders, including the deferred shareholders, having by very substantial majorities decided that the bargain was acceptable, it was quite impossible for him, in the face of such majorities, to say that it ought not to be accepted.

With regard to the board's circular explaining the scheme, Eve, J., said that, in his opinion, the circular was so composed as to convey to the recipients not only all the information necessary to enable them to realise what the proposals of the board were, but also the grounds on which the policy underlying the proposals was based, and that no one had come forward to say that he did not understand the circular, or was A misled thereby. EVE, J., said that he did not accept the view that it was incumbent on the directors in their circular to disclose their respective holdings of ordinary and deferred shares, and that no want of good faith, coercion or overreaching on the part of the company, its directors or other agents had been suggested. With regard to the proceedings B at the meetings, EVE, J., said that at each of them the proceedings were conducted so as to satisfy those present. It was not suggested that anybody voted in the wrong class, indeed he thought that the contrary was proved, and it was impossible, in the circumstances, to hold that the bodily presence, in the room where the meetings were held, of persons C who belonged to other classes invalidated the meeting.

My Lords, I have thought it necessary to state the facts in some detail, because the questions which arise on the appeal are not without some novelty and difficulty. On the one hand, the reduction of capital which the court was asked to confirm was one of those very unusual reductions D in which no paid-up share capital had been lost or was unrepresented by available assets, and no paid-up share capital was being paid off as being in excess of the wants of the company. On the other hand, the class meetings of the holders of ordinary and of deferred shares respectively were not separate meetings in the usual meaning of the word "separate," E but meetings of all the shareholders together, at which the votes of the holders of the two classes were separately counted. The course taken as regards these meetings was one which required careful consideration; such a course appears never to have had the approval of the court on any previous occasion. It should also be observed that the extra- F ordinary resolutions purporting to modify the rights of the holders of the ordinary and deferred shares respectively, based, as they were, on arts. 71 and 72 of the articles of association, did not require the approval or confirmation of the court. Their validity might have been challenged by an application under the Companies Act, 1929, s. 61. That section, G however, requires the application to be made within seven days after the date of the resolution, and to be supported by not less than 15 per cent. of the issued shares of the class concerned—conditions with which it is often impossible to comply. In the absence of such an application, shareholders who wish to attack such a resolution may no doubt com- H mence an action for the purpose. On an application under the section, the minority shareholders have to satisfy the court that the variation of rights "would unfairly prejudice the shareholders of the class represented by the applicant." It would seem that, if an action is brought, the plaintiffs would have to prove at least that the majority has unfairly oppressed the minority. It may be that the onus and the evidence in support in the two cases would not be very different. When, however, as in the present case, neither course has been taken, it is difficult to A see how the validity of the resolutions (if duly passed) can be disputed, for the shareholder's vote is a right of property, and *prima facie* may be exercised by a shareholder as he thinks fit in his own interest. However, the appellant was permitted to challenge the validity of the resolutions altering rights on the petition for reduction of capital. There were, no B doubt, strong reasons of convenience in allowing that to be done, and, in the circumstances, I am content to accept that course as being a regular one. It must, however, be borne in mind that the appellant is in a different position, in attacking the extraordinary resolution altering the rights of the deferred shares, from his position as appearing to oppose C a petition to confirm the reduction of capital. It was part of the bargain under which he held his deferred shares that their rights might lawfully be altered under art. 71, and, if the extraordinary resolution above set forth was passed by the requisite majority, and he could not establish that the resolution involved an oppression of the minority (see *Cook* v. D *Deeks* (4), and cases there cited), the court would have no power to interfere. On the other hand, on the application under sect. 55 of the Act to confirm the reduction, the court, whether or not the petition is opposed, has a duty to consider whether the proposed reduction is a fair or an unfair one.

E Three main points were urged on behalf of the appellant. First, it was contended that the reduction of capital was *ultra vires* the company, since art. 44 did not empower the company to reduce its capital by cancelling the five and a half million of deferred share capital merely for the purpose of a reorganisation of capital. This argument involved F a strangely limited meaning being given to the words "or otherwise as may seem expedient" in the article. I agree with Eve, J., and the Court of Appeal in thinking that the company, by art. 44, took power to reduce its capital in any way authorised by the Companies Act, 1929. Ever since the decision of this House in *Poole* v. *National Bank of China,* G *Ltd.* (1), it has been clear that such a reduction as the one proposed was not unlawful (apart from the question of fairness), and the language of sect. 55 of the Act of 1929 recognises the correctness of that decision.

The second objection is as to the class meetings. Art. 71 requires the H assent of the shareholders of each class by an extraordinary resolution, passed at a meeting of such class. Such a meeting is referred to in cl. 6 of the memorandum as "a separate meeting of the holders of shares of the class." It was contended, on behalf of the appellant, that, in the circumstances above detailed, there was no separate meeting of the holders of the deferred shares, nor was there a separate meeting of the holders of the ordinary shares and, if that contention were held correct, the whole scheme would become inoperative. I will say at once that on this point I cannot view the matter from exactly the same angle as did the Court of Appeal. The argument from convenience is not a strong one in a case where the rights of persons may be altered to their prejudice if certain definite things are done. In such a case, the doing of the things, generally speaking, is a condition upon the performance of which the rights may be altered. The question, therefore, is whether there were in fact separate meetings of the two classes. According to the ordinary notions of commercial men and investors, a meeting (to take that case) of deferred shareholders, in a hall where there is an equal or greater number of holders of ordinary shares, would not be described as a separate meeting of deferred shareholders, even if the ordinary shareholders were told by the chairman that they must neither speak nor vote. It is not difficult to imagine a case where the presence of a number of persons with conflicting interests would render it impossible for members of the class adequately to discuss the matter from their point of view. Meetings of members of companies are not always conducted in an orderly fashion. There is often a hubbub of sound which drowns a speech which might otherwise have a great effect. Members of another class, by merely indulging in coughs, or groans, or neighbourly conversation, might seriously prejudice speakers who were supporting a view which did not commend itself to that class. Other objections will readily occur to anyone who knows how meetings of this kind are frequently conducted. In my opinion, the better and the wiser course is to make provision for the holding of truly separate meetings, in the ordinary way, even at the risk of some inconvenience. It does not, however, follow, in the circumstances of this case, that the extraordinary resolutions were void. It is necessary, in the first place, to distinguish between the summoning of a meeting and its conduct when the shareholders meet. In the present case, I can see no ground for the suggestion that separate meetings of the ordinary and deferred shareholders were not duly summoned. As regards the conduct of such a meeting, that is a matter largely in the hands of the chairman, with the assent of the persons properly present. Just as documents which have to be presented to a meeting can be taken as read, and just as a meeting can decide either that an untiring speaker shall be no longer heard, or that a much debated question shall be put to the vote without further discussion, so, in my opinion, the holders of deferred shares were entitled to waive the objection to the presence of strangers, including holders of ordinary shares, and, if they chose to do so, it would not, I think, be open to anyone to assert that the meeting was not being properly held within the meaning of art. 71. To this the important fact should be added that the chairman was in a position to demand a poll, that he had already determined to do so, and that he held sufficient proxies to carry the resolution. In such a case, the speeches and the voting, on a show of hands, become little more than formalities; all that is necessary is that there should be a class meeting, duly constituted, at which a poll can properly be demanded. The conclusion at which I arrive is that, in the circumstances, the meeting of deferred shareholders was properly convened, that the objection which might have been raised to the presence of holders of shares of another class was waived, that the poll was duly demanded and that the extraordinary resolution was passed by the requisite majority. It might have been better if the chairman had told the holders of deferred shares that the matter of the exclusion of others rested with them, and if he had invited an expression of their views; but, in the circumstances, and in the absence of any audible protest, I think he was justified in taking their assent for granted.

The third point taken was that the court ought not to have confirmed the reduction, having regard to the contents of, and the omissions from, the circular issued by the directors, and the unfairness of the scheme as a whole to the holders of deferred shares. As regards the circular, I entirely agree with the way in which CLAUSON, J., in delivering the judgment of the Court of Appeal, has dealt with this point, and I need not repeat what he said. It is indeed difficult to see that the criticism of the circular can have any real weight when it is remembered, first, that counsel for the appellant has, with equal candour and fairness, explained in each tribunal that he was making no attack whatever on the directors, and was admitting their complete good faith, and, secondly, that no single holder of deferred shares has come forward to state on affidavit that he had been in the least misled by the circular. For my part, I think the directors were well advised in not adding to the voluminous documents which the secretary sent to the shareholders on Apr. 6, 1935. The salient and most important of the facts necessary to enable a deferred shareholder to form a judgment on the scheme were, in my view, stated clearly and fairly in the circular.

The question as to the fairness of the reduction, coupled with the scheme as a whole, is not, I think, quite so easy to deal with, for the following reason. Both EVE, J., and the Court of Appeal seem to have laid considerable stress on the well known proposition, laid down in *Re English, Scottish & Australian Chartered Bank* (5), at p. 409, and often followed, that shareholders acting honestly are usually much better judges of what is to their commercial advantage than the court can be. I do not intend to throw the smallest doubt on this general proposition, which I have had occasion on several occasions to repeat, but I doubt very much whether it is of great value as a guide when it is proved that the majority of the class has voted, or may have voted, in the way it did, because of its interests as shareholders of another class. If the court is satisfied that the deferred shareholders in this case:

> considered the matter from a proper point of view, that is, with a view to the interests of the class to which they belong and are empowered to bind, the court ought to be slow to differ from them. A

(I am here citing from the judgment of LINDLEY, L.J., in the case cited, and from the same page.) But it is strongly argued for the appellant that an analysis of the figures as to voting shows that so many persons, holders of deferred shares and of no ordinary shares, were opposed to the scheme, that an inference should be drawn that the majority in favour B of the scheme could not have considered the matter with a view to the interests of holders of deferred shares only. There is weight in this contention, and I have thought it necessary to pay little attention to the majority on the poll in favour of the scheme in considering whether it is a fair one. C

In the first place, I will repeat that the onus is on those who say the scheme, so far as alteration of rights is concerned, is unfair, for the reason that the deferred shareholders have consented to it, under art. 71, and those who contend that the interests of the minority are being unfairly overridden by persons with other and conflicting interest must D prove it. A passage from BUCKLEY ON THE COMPANIES ACTS, 11th Edn., p. 121, is no doubt a correct statement:

> Where the memorandum or articles contain a clause empowering a specified majority of the holders of any class of shares to sanction modifications of the rights of the shares of that class, any scheme for reduction which is sanctioned in accord- E ance with such clause by the classes adversely affected thereby is *prima facie* a reduction in accordance with the legal rights of the shareholders.

I will add that the cancellation of the five and a half millions of deferred share capital seems to me to be part of the bargain approved by the deferred shareholders under art. 71, and I think is not a subject for F separate consideration.

Secondly, I think the fairness or unfairness of the scheme as a whole, including the reduction, is not a matter for the discretion of the learned judge in a technical sense, but is a matter to be decided on the evidence. The question in this case depends on the view which should be taken as G to the future commercial success of the company. We are not entitled to substitute our own views for those of the directors and experts who have given evidence. Considerable importance should be attached to the unanimous opinion of the directors, whose good faith, I repeat, is not in question, and, having regard to their standing and position, I think H little weight can be given to the circumstance that their combined holdings are predominantly in ordinary shares. I am also impressed by the fairness and candour with which the experts called on behalf of the company gave their evidence.

Thirdly, it is important to note the nature of the question which arose. As Clauson, J., observed:

> The matter for consideration is a comparison of two types of shares, first a share which carries with it no revenue until the amount to be distributed in dividend passes a certain definite point, and when that point is passed, carries by way of revenue a rapidly increasing proportion (relative to paid up capital) of the fund divided, and, second, a share which carries revenue up to the definite point without competition from any other class, and from that point carries by way of revenue a rapidly diminishing proportion (relative to paid up capital) of the fund divided. The comparison is made in order to fix a rate at which the share of more speculative character is to be exchanged for a share of the less speculative character. Whether an individual holder of an ordinary or a deferred share approves the rate suggested will depend on the estimate which he forms of the relative prospects of the two classes of share, in view of the particular circumstances of the company's business.

The question, then, for us, is whether, upon the evidence, we ought to come to the conclusion that the future of the company, dependent as it is on a hundred contingencies and chances, is such that deferred shareholders are being unfairly treated for the benefit of ordinary shareholders, in that the terms on which the deferred shares are to be converted into ordinary shares ought to be more favourable to the former than on the basis of four deferred shares for each ordinary share. I have anxiously considered the whole of the evidence that was put before us on this point, considering it altogether apart from the actual result of the poll, and I am quite unable to come to any such conclusion. I see no unfairness in the terms of proposed conversion; certainly none has been established on the evidence. This point, therefore, also fails.

As regards costs, it may be pointed out that not only is this a case where very large sums are involved, but it is also one, as I have already said, where there are questions of novelty, and of some difficulty. A judge hearing such a petition under the Companies Act, 1929, s. 55, is generally not unwilling to have the objections to it argued by experienced counsel, and to allow the opponents their costs. The learned judge, however, thought fit to take the stricter course. We could not interfere with his discretion, but, in all the circumstances, I readily agreed with the course which commended itself to your Lordships, namely, to dismiss the appeal without costs.

Appeal dismissed without costs.

Solicitors: *Nordon & Co.* (for the appellant); *William Morris* (for the respondent company).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

MILLER *v.* CECIL FILM, LTD.

[Chancery Division (Bennett, J.), **March 4, 5, 9, 10, 11, 12, 15, 1937.]**

Copyright—Infringement—Film—Song—Authorship wrongly stated—Screen credit.

The defendants had purchased a song lyric from the plaintiff, the author of the song. In a film they ascribed the authorship of the song to a third party:—

Held: there was an implied contract that the defendants would not give screen credit to anyone other than author of the song and the plaintiff was entitled to damages.

[EDITORIAL NOTE. The principle allowing damages for loss of publicity was extended to screen credit in *Tolnay* v. *Criterion Film Productions, Ltd.*, [1936] 2 All E.R. 1625. In that case there was a contract to give screen credit to the authors. In the present case there was no such contract, but it is held that there is an implied contract that screen credit shall not be given to a third person. The present case, however, does not decide that there is an implied contract that an author shall receive screen credit.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 10, p. 132, para. 169; and for Cases, see DIGEST, Vol. 17, p. 104, No. 181, and Supp.]

Case referred to:

(1) *Dahl* v. *Nelson, Donkin & Co.* (1881), 6 App. Cas. 38; 41 Digest 517, *3471*; 50 L.J. Ch. 411; 44 L.T. 381.

Action for damages for infringement of copyright. The first defendant had shown a film which included a song partly composed by the plaintiff, and the authorship of it had been ascribed to the defendant Vivian Ellis. The first defendant had purchased the lyric of the song from the plaintiff, and by way of defence pleaded that the payment made was in full satisfaction of all the plaintiff's rights in the song.

R. F. Roxburgh, K.C., and *L. J. Solley* for the plaintiff.

D. Ll. Jenkins for the defendants, Cecil Film, Ltd.

K. E. Shelley and *P. J. S. Bevan* for the defendants, the Victoria Music Publishing Co., Ltd., and Vivian Ellis.

J. F. Bowyer for the defendant, Val Guest.

Bennett, J.: [His Lordship dealt with the other issues in the case.] There is yet another point upon which Mr. Roxburgh relies, by which the plaintiff is entitled to say that there was an infringement by Cecil Film, Ltd., of the plaintiff's copyright. On the film, in giving what is called "screen credit," that is, stating who is the author of the lyric, the defendant company, Cecil Film, Ltd., did not state that the plaintiff was the author. The name given as that of the author of the song was Vivian Ellis. It is put in this way. The plaintiff licenses or authorises the defendant company, Cecil Film, Ltd., to use his literary material in the production of its film, conditionally upon its not saying, when it uses it, that somebody else is the author of his work. The argument is that that is a term which ought to be implied in the contract between the plaintiff and Cecil Film, Ltd., at the time when they orally agreed that Cecil Film, Ltd., should have the right to use the plaintiff's literary work A in the production of its film. I come to the conclusion that that argument is right as a matter of principle. There is no authority, apparently, upon that point at all. I cannot myself think that, supposing, when they were making the bargain as to the right of Cecil Film, Ltd., to use the plaintiff's literary work in the production of the film, it had occurred either B to Mr. Felmar, who was acting on behalf of Cecil Film, Ltd., or to the plaintiff, what should be done to attribute the authorship of this film to anybody—both of them would have agreed that they could not possibly attribute the authorship of the plaintiff's work to a third person. If the matter in question had arisen between the plaintiff C and Mr. Felmar I feel sure that they would have agreed, not perhaps that screen credit would have been given to the plaintiff, but that screen credit would not be given to anybody else. Basing my view upon the passage in the speech of LORD WATSON in the case of *Dahl* v. *Nelson, Donkin & Co.* (1), at p. 59, which Mr. Roxburgh cited to me, I find that D it was a condition precedent that the right of the defendant company, Cecil Film, Ltd., to use the plaintiff's lyric was that it should not give screen credit to anybody else. It follows from that, the company having given screen credit to the defendant Ellis, that there has been an infringement of copyright. I propose to award the plaintiff some sum by way E of damages. I have to ascertain in the best way I can to what sum the plaintiff is entitled for the defendant company, Cecil Film, Ltd., having represented that the lyric was written by Vivian Ellis. I think that £25 will amply compensate the plaintiff.

Solicitors: *Matthew Trackman & Co.* (for the plaintiff); *Maxwell,* F *Batley & Co.* (for the defendant, Cecil Film, Ltd.); *Gery & Brooks* (for the defendants, the Victoria Music Publishing Co. and Vivian Ellis); *S. Myers & Son* (for the defendant, Val Guest).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re CUTHBERT COOPER & SONS, LTD.

[Chancery Division (Simonds, J.), **March 15, 16, 1937.**]

Companies—Winding up—Private company—Transfer of shares—Directors' power to refuse registration—Decease of shareholder—Refusal to register transfer to executors—Grounds for winding up.

By the articles of association of a private limited company, the directors in their absolute and uncontrolled discretion might decline to register any transfer of shares, including fully paid shares, without assigning any reason therefor. C. C. and his two elder sons were the original and sole directors of the company, C. C. holding half the shares and the sons holding the remaining shares. C. C. died, having by his will appointed his three younger sons to be his executors, and bequeathed his shares to them. In a petition presented by the younger sons for the winding up of the company it was alleged that the elder sons, who continued the sole directors of the company, had consistently refused to register the younger sons as shareholders or to assign any reason for such refusal, that the younger sons had been improperly dismissed from their employment with the company, and that the directors had refused to supply the younger sons with copies of the balance sheet for the year ending June 30, 1936 :—

Held : although, if the allegations were true, the younger sons might have some grounds of action against the directors, in the absence of evidence of the improper exercise by the directors of their discretion, there were no just and equitable grounds upon which the company ought to be wound up.

[**EDITORIAL NOTE.** The directors of a private company are given very wide powers in its affairs and the articles usually make it very difficult to exercise any effective control over them. It is quite common for such a company to be purely a family concern as in the present case and the judgment herein explores the rather drastic remedy of applying for the winding up of the company upon the grounds that it is just and equitable so to do.

As to "Just and Equitable," see HALSBURY, Hailsham Edn., Vol. 5, pp. 545-548, para. 885 ; and for Cases, see DIGEST, Vol. 10, pp. 821-828, Nos. 5353-5398.]

Cases referred to :

(1) *Re Yenidje Tobacco Co., Ltd.*, [1916] 2 Ch. 426 ; 10 Digest 826, *5388* ; 86 L.J. Ch. 1 ; 115 L.T. 530.

(2) *Re Davis & Collett, Ltd.*, [1935] Ch. 693 ; Digest Supp. ; 104 L.J. Ch. 340 ; 153 L.T. 329.

(3) *Re Norwich Yarn Co.* (1850), 12 Beav. 366 : 10 Digest 820, *5338* ; 14 L.T.O.S. 345.

(4) *Harris* v. *Harris, Ltd.*, [1936] S.C. 183 ; Digest Supp.

Petition to wind up Cuthbert Cooper & Sons, Ltd.

C. E. Harman, K.C., and *Cecil W. Turner* for the petitioners.

D. Ll. Jenkins for the respondent company.

Harman, K.C. : If this company were a partnership there could be no doubt at all that the court would make an order for dissolution. The executors of a deceased partner could not be excluded from a knowledge of the accounts. In a case of this kind partnership principles apply. All the terms which would justify the dissolution of a partnership are a proper test to apply in deciding whether a company may be wound up. In the present case, the petitioners have been refused access to the balance sheet and they have no knowledge at all as to what is happening. The petitioners hold one-half of the shares of the company and yet they A have not the slightest supervision over its affairs. They do not know whether the company is making a profit or not. [Counsel referred to *Re Yenidje Tobacco Co.* (1) and *Re Davis & Collett, Ltd.* (2).]

Jenkins : It may be that the representatives of a deceased shareholder are contributories. They are not members of the company, but are B merely personal representatives of a deceased shareholder, with only such rights and claims to become members as the articles conferred upon them. The cases already cited to the court were cases in which there was deadlock and there was friction amongst the members, and the court came to the conclusion that the business could not be carried on within C the framework of the company, and therefore winding up was appropriate. To say that the court will apply partnership principles does not mean that the court will disregard the constitution of a company any more than the court would disregard the articles of partnership in a partnership case. The analogy soon breaks down. In the present case, D the directors have done no more than they were strictly entitled to do under the articles of association. There is nothing to show that the directors were acting with any ulterior motive and the directors cannot be called upon to give reasons for their decisions.

Harman, K.C., in reply : I must go behind the strictly lawful position E and ask the court to exercise the equitable jurisdiction of the court. There is no necessity for any allegation of fraud. Breach of duty is sufficient. It cannot be right that the petitioners should have their money invested in this company and not be able to know how its affairs are being conducted. In a partnership, the representatives of a deceased F partner would have a right to see the accounts. [Counsel referred to *Harris* v. *Harris, Ltd.* (4).]

SIMONDS, J. : This is a case of an unusual character. The petition is to wind up a company called Cuthbert Cooper & Sons, Ltd. The G company was incorporated in Aug., 1913, with a share capital of £10,000 divided into 10,000 shares of £1 each. The company was formed by Mr. Cuthbert Cooper and his two elder sons, who were the first directors. The share capital was originally allotted as to 5,000 shares to the father and the remaining 5,000 shares to the two elder sons. The father's H shares remained in his possession until his death. He died in Aug., 1930, and by his will, which was made in 1927 and proved shortly after his death, he appointed his three younger sons to be his executors and bequeathed his 5,000 shares in the company to them. It is necessary to look at the articles of association to see what were the rights of the executors on the death of their father. This was a private company which contained rather strange conditions with regard to the transfer of shares. Art. 26 provided that the directors in their absolute and uncontrolled discretion might decline to register any transfer of shares, including fully paid shares, without assigning any reason therefor. A That applied to the devolution of shares on the death of a holder as well as to a transfer *inter vivos*. The directors had a power of absolute veto. The two elder sons remained sole directors at all material times after their father's death. In the event of the directors refusing to register a transfer, this course was open to the executors of a deceased holder. B They were in a position, if they thought fit, without being put upon the register to receive dividends and to have rights in a winding up to such a return as their testator would have been entitled to, but to no other rights. If they were not satisfied with that position, they were thrown back upon the provisions of the articles, which enabled them to transfer C their shares. That is, if they could find a member of the company who would purchase them, but, if not, they had to employ the somewhat elaborate machinery in the articles, and, if no member of the company took up the notice, they were in a position to sell to an outsider, subject to the fact that the directors might exercise their veto. That was the D position in which the executors found themselves by reason of the bargain entered into by their testator. It has been pressed upon me that I am to be guided by the principles laid down by the Court of Appeal in *Re Yenidje Tobacco Co., Ltd.* (1) and followed recently by Crossman, J., in *Re Davis & Collett, Ltd.* (2). But whether it be a E matter of articles of association or articles of partnership the rights of the parties are determined by those articles, and the question whether it is right for me to apply the principles of partnership to the question of dissolution, depends upon what are the contractual rights of the parties as determined by the articles of association in this case. F Accordingly, when I come to consider the allegation in the petition I must have regard to the rights of the parties as determined by the bargain into which they have entered. The three younger sons registered the probate of the testator in the books of the company and the directors have consistently refused to register the G younger sons as members of the company. I shall assume, without deciding, that the executor of a deceased shareholder holding fully paid shares is a contributory within the meaning of the Companies Act, 1929, and is authorised to present a petition to wind up. There is some authority for this in *Re Norwich Yarn Co.* (3). The executors, as con- H tributories, bring this petition, as they have not been registered as members. For the purpose of determining whether the petition shall be granted or not, it is necessary for me to look at the allegations in the petition. The first grievance under which the petitioners labour and which is made a ground for asking me to exercise the jurisdiction of the court, on the footing that it is just and equitable to wind up the company, is that the directors have consistently refused to register the petitioners as members. For the purpose of exercising this jurisdiction I will not A assume that the directors' discretion has been improperly exercised. There is no sort of proof before this court that it has been improperly exercised. Nor will I assume that the petitioners could not get the appropriate remedy in the proper proceedings, which would be by motion to rectify, or by action in the ordinary way in the Chancery Division. B But on a petition I will not exercise my jurisdiction to order the winding up on that ground, on the footing that it is for that reason just and equitable.

The next allegation is that the petitioners, having been employed by the company, were summarily dismissed on a certain date in 1936. That C is no ground either taken by itself or in connection with other facts. If they have been improperly dismissed they can seek relief in the appropriate manner. Then, it is said that the directors have refused to supply the petitioners with copies of the balance sheet for the year ending June 30, 1936. But the directors were under no contractual D duty to supply copies. The directors thought fit not to supply a copy of the balance sheet to the petitioners for the year 1936. I can see no reason in that for winding up the company. In para. 9 a number of allegations are made with regard to the salaries which the directors have received. No doubt they were masters of the situation, and allegations E are made that they have paid themselves certain salaries and bonuses, but there is no allegation, still less proof, that the salaries and bonuses were excessive. I should be travelling altogether outside the allegations in the petition if I allowed counsel to allege anything in the nature of ill-faith at all. Mr. Harman asked that the case should stand over for the F cross-examination of the deponents. That was objected to by Mr. Jenkins on the ground that it would injure the company if the petition remained on the file longer than necessary. It appeared to me to be plain that the matter must be confined to the allegations in the petition and I could not allow Mr. Harman to go outside it and cross-examine G the witnesses upon matters which were not of substantive allegation in the petition. The matter rests upon the petition and such evidence as I have heard. Para. 9 contains a number of allegations which do not appear to afford any ground for winding up the company. There is a suggestion that the petitioners, being relegated to their rights H under the articles of serving sale notices, may suffer because the dividends have been reduced, and it is the dividends which determine the price. The dividend has been reduced but there is no allegation, much less proof, that the dividend has been unduly reduced to the prejudice of the rights of the petitioners. I hold upon the facts that the petition is misconceived, I should be travelling outside the limits within which cases have been decided before, if I held that it was just and equitable to wind up this company, and I therefore dismiss the petition with costs.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. Shelley Barker & Son*, Sheffield (for the petitioners); *Biddle, Thorne, Welsford & Gait*, agents for *Wake, Smith & Fielding*, Sheffield (for the company).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

MORTON *v.* MORTON, DALY AND McNAUGHT.

[Probate, Divorce and Admiralty Division (Sir Boyd Merriman, P.) **March 11, 12, 1937.**]

Divorce—Evidence—Cross-examination of respondent—Denial by respondent limited to charge of adultery with one co-respondent—Cross-examination restricted to charge specifically denied—Evidence Further Amendment Act, 1869 (*c.* 68), *s.* 3—*Supreme Court of Judicature (Consolidation) Act,* 1925 (*c.* 49), *s.* 198.

The petitioner made out a *prima facie* case of adultery against the respondent and one co-respondent. As to the other co-respondent the only evidence consisted of admissions by him, which were not evidence against the respondent. The respondent's evidence in chief was restricted to a denial of the adultery with the first co-respondent:—

Held: the respondent could not be cross-examined as to the alleged adultery with the second co-respondent, and such cross-examination ought to have been limited strictly to the particular adultery which the respondent had denied.

Brown v. *Brown and Paget* (1) *not followed.*

[EDITORIAL NOTE. Text-writers have taken it for granted that the 1925 Act did not alter the position arising from the decision in *Brown* v. *Brown and Paget* (1), whereby counsel for the petitioner was at liberty to cross-examine upon any adultery appearing upon the pleadings. The present case shows that such is not the view of the divorce judges at the present time, and that they take the view that such cross-examination is restricted to the adultery concerning which questions are put to the party in examination in chief. The point was touched upon in the recent case of *Pelster* v. *Pelster and Samuel*, [1936] 3 All E.R. 783; Digest Supp., but was not there so fully and finally dealt with as it is here.

As to Protection of Persons accused of Adultery, see HALSBURY, Hailsham Edn., Vol. 10, pp. 735, 736, para. 1138; and for Cases, see DIGEST, Vol. 27, pp. 430-432, Nos. 4383-4403.]

Case referred to:

(1) *Brown* v. *Brown & Paget* (1874), L.R. 3 P. & D. 198; 27 Digest 431, *4398*; 43 L.J. P. & M. 33; 30 L.T. 767.

(2) *Allen* v. *Allen & Bell*, [1894] P. 248; 27 Digest 493, *5257*; 63 L. J. P. 120; 70 L.T. 783.

Petition for dissolution, brought by the husband, charging the wife with adultery with two named co-respondents and a man unknown. The only matter calling for report was the limit set to the cross-examination of the respondent after she had denied adultery in the witness-box, her denial having been restricted to the charges made against her with the co-respondent, Daly.

The Evidence Further Amendment Act, 1869, s. 3, enacted :

A The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding : Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

B

This section was repealed, so far as proceedings in the High Court are concerned, by the Supreme Court of Judicature (Consolidation) Act, 1925, and the section is reproduced in sect. 198 of that Act, with slight differences in wording, as follows :

C The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery

D The petitioner made out a *prima facie* case of adultery against both the respondent and the co-respondent Daly. As to the co-respondent McNaught, the evidence against him consisted solely of confessions admissible against him only. There was no evidence on this charge against the respondent. The respondent was called to disprove E the adultery. She was asked as to, and denied, adultery with Daly. His Lordship then intimated that, as she had been asked no questions as to the alleged adultery with McNaught, she could not be cross-examined thereon.

L. F. Sturge, for the petitioner : The respondent can be cross-examined F as to all charges upon the pleadings : *Brown* v. *Brown and Paget* (1) ; and see RAYDEN AND MORTIMER ON DIVORCE, 3rd Edn., p. 276, para. 44. That authority is precisely in point, and has not been overruled.

SIR BOYD MERRIMAN, P. : That case was decided under the Evidence Further Amendment Act, 1869, s. 3. The wording is changed in the G Supreme Court of Judicature (Consolidation) Act, 1925, s. 198 [His Lordship also referred to *Allen* v. *Allen and Bell* (2).]

Sturge : The Act of 1925 was a consolidation Act, and would not be intended to alter the law.

J. F. Alexander for the respondent.

H The co-respondent, Daly, in person.

SIR BOYD MERRIMAN, P. : This is a case which, for several reasons, has caused me some anxiety, and I am very much obliged to counsel on both sides for putting the case so clearly before me.

It is a charge by a young husband against a young wife. The parties were only married in Oct., 1932, at the ages of 23 and 22 respectively. The husband charges the wife with adultery with two named co-respondents and with one person unknown. As regards the co-respondents who are named, the position is this: one of them, a young man named A
McNaught, has neither entered an appearance nor filed an answer, and, consequently, by the ordinary rules, he is debarred from taking any part in the proceedings. He has, of course, at any moment only to ask for leave to appear, and enter an appearance, in order that he may defend himself, but he has not done so. But he has been in court for B
the greater part of the trial, and it was evidently originally intended to call him as a witness against the wife, but that was not done, for reasons which will appear in a moment. The other named co-respondent has appeared and filed an answer, has been here to defend himself, and has given evidence on his own behalf. The wife appears by counsel, and has C
also given evidence, and called a witness. This is a case in which I thought it right—indeed, I always do, almost without exception—to allow either respondent the opportunity of cross-examining the other respondent on the evidence which was given.

Now, I am going to deal with the curious situation—curious, but perfectly D
logical—which has arisen with regard to the co-respondent McNaught. With regard to him, there is evidence, not merely of the husband but of the solicitor's managing clerk, of an unqualified, detailed and explicit confession of adultery with the wife, on a date when, admittedly, that particular co-respondent was staying in the home of this young couple, E
and on an occasion when he failed to leave the house at the same time as the husband left it in the morning. According to his own story, he was still in bed in a room in which the bath was contained, and the wife came in in her nightdress, and, having bathed the baby, in effect seduced the co-respondent. The effect of the story is that it was all really her F
prompting, though that was not said in so many words. But whether that is so or not is irrelevant; he committed adultery. It weighed on his mind, and, when he heard of these proceedings, he came and told the husband so. He was then taken by the husband to the solicitor, who took his proof in a perfectly correct way. The solicitor's managing G
clerk warned him of the situation into which he was leading himself, that he would inevitably be made a co-respondent. It was explained to him exactly what the legal position was, perfectly correctly; the whole thing was done with scrupulous fairness, and the young man repeated in detail the whole of this story. I have not the slightest hesitation in H
believing it as against the co-respondent. But I have had occasion more than once to explain to juries, and I must now explain to myself, what the law on this subject is: adultery, like any other charge which is made, is one which has to be proved, and proved on evidence, and that

means evidence which is admissible against a particular party. Neither of those two confessions, made first to the husband and secondly to the solicitor's clerk, was any evidence whatever against the wife, though they both were evidence against the co-respondent himself. In order to
A make them evidence against the wife, the husband could have called, after a proper warning given to him, the co-respondent as a witness against the wife. He did not do so. He explained he did not do so because, when he was served with the *subpœna*, the co-respondent called the husband a swine, and other unpleasant names, and made it quite clear that
B he would go back on what he had said. Well, that may or may not be a good reason for not calling him. There are, of course, steps that can be taken, in certain circumstances, with regard to witnesses, if the court is satisfied they are being recalcitrant; in other words, to treat them as hostile witnesses. It is an extreme course, and one which anybody
C might well shrink from taking with regard to a man who is himself accused, and, needless to say, if any such course was proposed, I should have had to warn the man very clearly indeed that he was under no necessity, if he wished not to do so, to expose himself to that position. But still, it was not an absolutely insuperable difficulty in certain
D circumstances. However, counsel for the husband decided not to call him, and by that decision the case with regard to McNaught rests in this way: I am obliged to find, as I do, and as I should be obliged to direct a jury to do, that there is no evidence that the wife has committed adultery with the co-respondent, but that there is evidence that the
E co-respondent has committed adultery with the wife. It is perfectly logical; that decision does not mean that what was in effect the same fact was committed by one person, but not committed by another; it means it is proved against one, but it is not proved against the other. That is the basis on which the law of England is administered; cases are decided
F upon proof and not upon suspicion and hearsay evidence. Whatever the result may be, as regards the co-respondent, so far as that charge is concerned, it is impossible for me to pronounce a decree upon it as against the wife.

With this position about the co-respondent McNaught very clearly
G in mind, it was quite plain, at the end of the husband's case, that there was no evidence against the wife on that charge, and Mr. Sturge quite freely admitted that was so. When the wife's counsel, having dealt with the case between her and Daly, was proceeding to examine her with regard to McNaught, I thought it right to call his attention
H to the position as it then was. It was intimated, however, that an attempt might be made to cross-examine the wife, whether or not she gave any evidence about that particular charge. I intimated quite plainly what view I should take of any such attempt, and I repeat that which I have said in many cases before: in my view, the statute, sect. 198 of the Act

of 1925 (which permits, not for the first time in the history of statute law, a husband and wife to give evidence in divorce proceedings), when it provides that no witness, whether a party to the proceedings or not, shall be liable to be asked, or bound to answer, any questions tending to show that he or she has been guilty of adultery, unless he or she has A
already given evidence in the same proceedings in disproof of the alleged adultery, means that, unless and until the husband or wife, as the case may be, has denied the adultery with regard to which the cross-examination is to be directed, there is no right to cross-examine with regard to that particular adultery. In this case, as I have already pointed out, B
there is a general charge of adultery ; there is a charge of adultery against one co-respondent, and there is a charge of adultery against another co-respondent. At the time this question arose, the only evidence the wife had given was a denial of her adultery with Daly. Now, the rules are quite explicit that, if it is intended to allege adultery, and there is C
a known co-respondent, that co-respondent must be named, served, and given an opportunity of appearing and defending the proceedings. On the wording of the present statute, whatever may have been decided on the wording of any earlier statute, I take the view—which I say deliberately I know is shared by the other judges of this division—that the D
alleged adultery means adultery with the particular co-respondent. If the party has given evidence denying adultery in general, then, of course, cross-examination may be directed to that general denial, but, so long as the denial is limited to a denial of adultery with a particular co-respondent, in my opinion, under the present statute, the respondent does not expose E
himself or herself to cross-examination with regard to adultery with another co-respondent, although that adultery is pleaded. I mention that because it was as the result of the discussion on this point that the wife was in fact never asked any questions dealing with her adultery with McNaught, nor was she asked any question denying adultery F
generally ; she dealt only with the specific charge of adultery with Daly.

[His Lordship made a finding of adultery against the respondent and the co-respondent Daly, and pronounced a decree *nisi* thereon.]

Solicitors : *Andrew, Purves, Sutton & Creery* (for the petitioner) ; G
Lawrence Dennis & Co. (for the respondent).

[*Reported by* J. F. Compton Miller, Esq., *Barrister-at-Law.*]

H

DOWN (INSPECTOR OF TAXES) *v.* COMPSTON.

[KING'S BENCH DIVISION (Lawrence, J.), **March 18, 1937.**]

Income Tax—Profits from employment or vocation—Professional golfer—Bets on private games—Gratuities—Organisation—Income Tax Act, 1918 (*c.* 40), *Sched. D, Case II.*

The respondent, a professional golfer, had, in addition to his other activities, for a number of years habitually engaged in private games of golf for bets of varying amounts. The respondent was assessed under Sched. D, to include, *inter alia*, the balance of gains over losses arising out of the bets made on such games, on the ground that the winnings made could not accurately be called mere betting receipts, but were profits arising out of his vocation as a professional golfer :—

HELD : the respondent's winnings did not arise from his employment or vocation, and they were not analogous to gratuities for services rendered, nor was there any organisation to support the view that the respondent was carrying on a business of betting. The assessment ought, therefore, to be discharged.

[EDITORIAL NOTE. It would appear that the balance of betting gains and losses is only assessable to tax when there is an organisation, so that it may be said that the betting is carried on systematically as a commercial undertaking. The present case is a further authority that there must be a business organisation.

AS TO ASSESSMENT OF SPECULATIVE TRANSACTIONS, see HALSBURY, Hailsham Edn., Vol. 17, p. 101, para. 194 ; and FOR CASES, see DIGEST, Vol. 28, p. 22, Nos. 113-116.]

Cases referred to :

(1) *Blakiston* v. *Cooper*, [1909] A.C. 104 ; 28 Digest 86, *495* ; 78 L.J. K.B. 135 ; 100 L.T. 51 ; 5 Tax Cas. 347.

(2) *Graham* v. *Green*, [1925] 2 K.B. 37 ; 28 Digest 22, *116* ; 94 L.J. K.B. 494 ; 133 L.T. 367 ; 9 Tax Cas. 309.

APPEAL by way of case stated from a decision of the Income Tax Commissioners for the Kingston and Elmbridge Division discharging an additional assessment of £1,000 made upon the respondent under the Income Tax Act, 1918, Sched. D, for the year ended Apr. 5, 1928, to include, *inter alia*, the balance of gains over losses arising out of the playing of private games of golf played by the respondent against others on the issue of which bets were made by the players.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the appellant.

Raymond Needham, K.C., and *J. S. Scrimgeour* for the respondent.

LAWRENCE, J. : The only provision of the Income Tax Acts to which my attention has been drawn in this case is the rule applicable to Sched. D, Case II, which provides :

> The tax shall extend to every employment by retainer in any character whatever, whether such retainer shall be annual or for a longer or shorter period, and to all profits and earnings of whatever value arising from employments.

The question is whether the winnings which the respondent makes upon bets on golf matches arise out of his employment or vocation as a golf professional. The case states that he has made substantial sums of money during a number of years by making bets in private games of golf which he has played during those years. The argument for the Crown is, as I understand it, that there is in this case the vocation of A a golf professional, and that the winnings on bets on golf matches played by a golf professional are in the course of his vocation as a golf professional, and arise out of that vocation, and that therefore it is not necessary to find that there are so many transactions, or such an organisation of these betting transactions as to constitute a separate employ- B ment or vocation in itself; but it is said that, as the respondent has the vocation of a golf professional, the winnings which he makes in these matches occur in the course of, and arise out of, that vocation, and are therefore taxable, just as much as the Easter offerings of a clergyman or the gratuities of a waiter. On the other hand, on behalf of the C respondent it is contended that the winnings of the respondent do not in any true sense arise out of his vocation; they arise from the bets, and not from his vocation as a professional golfer; his vocation as a professional golfer merely affords the opportunity for making the bets, and does not give rise in any proper sense to the winnings from the D bets. It was pointed out by Mr. Needham, on behalf of the respondent, that the argument for the Crown would have to go the length of saying that every receipt which was in any way connected with an employment or vocation would be taxable, and, as an illustration, he gave the possible case of a ship's officer making wagers upon the run of the ship for the E day. He contended that such a wager as that would be as closely connected with the ship's officer's employment or vocation as are the bets which the respondent makes upon his private games of golf. Mr. Needham also contended that these winnings cannot be properly looked at as gratuities for the service of the respondent in playing with the F people with whom he plays these private games, and he drew my attention to *Blakiston* v. *Cooper* (1), where LORD LOREBURN, L.C., said, at p. 355:

> Where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of G money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present.

Mr. Needham suggested that that was the true rule in this matter, that H it is right to look to see whether the alleged gratuity is substantially in respect of the services rendered. He contended that the very disparity between the ordinary fee which would be paid for a professional playing a round of golf and the sums won upon these bets emphasised the distinction between a gratuity for services rendered and bets such as these. I may add that the distinction is still further emphasised by the possibility of the bets involving losses. Mr. Needham also contended that, apart from the analogy between these bets and gratuities for services rendered, A it was impossible for the Crown to sustain its argument on the view, which is suggested in the argument before the commissioners, that the respondent organised his effort in the acquisition of money through the exploitation of his skill and reputation as a professional golfer, and he contended that there was no more organisation by the respondent B than there was in *Graham* v. *Green* (2) by the person involved in that case, who made his living out of backing horses.

I am in agreement with the argument which has been presented for the respondent, and with the decision of the commissioners in this case, and I hold that the winnings of the respondent did not arise from his C employment or vocation, and that they are in no way analogous to gratuities for services rendered. Lastly, if it is necessary to look to the question of organisation, I hold that there was no organisation in this case which would support the view that the respondent was carrying on a business of betting on these private games of golf. For these D reasons, I am of opinion that the appeal must be dismissed, with costs.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellant); *Wallington, Fabian & Co.* (for the respondent).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

E

LEVER BROTHERS, LTD. *v.* KNEALE.

F [COURT OF APPEAL (Slesser and Greene, L.JJ.), **April 6, 1937.**]

Practice—Jurisdiction—Court of Appeal—Appeal from judge at chambers in King's Bench Division—Matters of practice and procedure—Order for committal—R.S.C., Ord. 54, *r.* 23.

The defendant in a libel action had been restrained by injunction from publishing the libels complained of. He disobeyed the order of G the court, and an order was made for his committal. On appeal to the Court of Appeal, the question was raised as to the court's jurisdiction to hear the appeal:—

HELD: this was a question of practice or procedure, and appeal, therefore, lay under R.S.C., Ord. 54, r. 23, to the Court of Appeal.

[EDITORIAL NOTE. It has been the practice to treat every order made in H chambers in the course of or in connection with a cause or matter pending in the High Court as a matter of practice or procedure. It is considered essential that there should be a matter or proceeding *pending* in the High Court and the point of the present decision is that after the granting of an injunction the matter is still pending and therefore the enforcement of the injunction is a matter of practice or procedure.

As to Appeals from Judge at Chambers, see HALSBURY, 1st Edn., Vol. 23, Practice, pp. 132, 133, paras. 233, 234; and for Cases, see DIGEST, Practice, pp. 706-708, Nos. 3005-3029. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 1075–1077.]

Cases referred to:

(1) *Haxby* v. *Wood Advertising Agency, Ltd.* (1913), 109 L.T. 946; Digest, Practice, 706, *3011*.

(2) *Poyser* v. *Minors* (1881), 7 Q.B.D. 329; 13 Digest 505, *562*; 50 L.J. Q.B. 555; 45 L.T. 33.

(3) *Watson* v. *Petts*, [1899] 1 Q.B. 54; Digest, Practice, 708, *3024*; 67 L.J. Q.B. 970; 79 L.T. 330.

(4) *Re Marchant, Ex p. Frary* (*Frarey*), [1908] 1 K.B. 998; Digest, Practice, 706, *3010*; 77 L.J. K.B. 695; 98 L.T. 823.

(5) *Ex p. Lancaster Sheriff, Ex p. Gosling* (1895), *Times* Newsp. Feb. 11.

(6) *Yonge* v. *Toynbee*, [1910] 1 K.B. 215; Digest, Practice, 706, *3012*; 79 L.J. K.B. 208; 102 L.T. 57.

(7) *Simbro Trading Co., Ltd.* v. *Posograph* (*Parent*) *Corpn., Ltd.*, [1929] 2 K.B. 266; Digest, Practice, 707, *3019*; 98 L.J. K.B. 631; 141 L.T. 395.

Appeal from an order of Finlay, J., dated Mar. 5, 1937. The facts are fully set out in the judgments.

The appellant appeared in person.

R. Moelwyn Hughes, for the respondent company: A preliminary point arises, namely, has this court jurisdiction to hear this appeal, or should it have been made to a divisional court? Under R.S.C., Ord. 54, r. 23, appeal from a decision of a judge at chambers in the King's Bench Division lies to the divisional court, except in cases of practice or procedure. Is an order to commit a question of practice or procedure? There is no case precisely in point. [Counsel referred to *Haxby* v. *Wood Advertising Agency, Ltd.* (1), *Watson* v. *Petts* (3), *Re Marchant, Ex p. Frary* (4), *Ex parte Sheriff of Lancaster* (5), *Poyser* v. *Minors* (2), *Yonge* v. *Toynbee* (6), *Simbro Trading Co., Ltd.* v. *Posograph* (*Parent*) *Corpn., Ltd.* (7), and Halsbury's Laws of England, Hailsham Edn., Vol. 7, p. 54, para. 77.]

Slesser, L.J.: This is an appeal by Mr. Bagnall from an order of Finlay, J., dated Mar. 5, 1937, ordering his committal because of disobedience of an order of Branson, J., made on Nov. 9, 1932, in an action for libel, by Lever Brothers and others, in which they claimed an injunction to restrain Mr. Bagnall and another and their servants or agents from writing, printing and circulating, distributing or otherwise publishing the libels complained of. It being said that that order had been disobeyed, an order for committal was made by Finlay, J. On that, Mr. Bagnall appeals to this court, and a preliminary objection is taken by the respondent company that, under the provisions of R.S.C., Ord. 54, r. 23, this court has no jurisdiction to hear the appeal. That rule, dealing with appeals from masters and proceedings in chambers, is in the following terms :

> In the King's Bench Division, except in matters of practice and procedure, the appeal from a decision of a judge at chambers shall be to a divisional court.

A It is said that this is not such a matter of practice and procedure, and, therefore, the appeal ought to lie to the divisional court, and not to this court. In my opinion, however, that contention is ill-founded. I think that this case is one of practice or procedure. It is to be observed that the problem which has arisen in certain cases to which our attention B has been called, namely, the problem of whether the matter arises out of a cause different from that which was originally instituted, does not strictly arise : for example, in *Haxby* v. *Wood Advertising Agency, Ltd.* (1), where the obligation had been imposed upon a firm of solicitors to pay certain costs, and an order was made by the judge at chambers C that the plaintiff should be at liberty to issue a writ of attachment against H., being a solicitor, on the ground that he had not complied with the order for the payment of costs, it was held that an appeal was not a matter of practice or procedure. The reason was that the proceeding against the solicitor in that case did not strictly arise as a matter of D practice or procedure out of the original proceedings, but was an obligation imposed upon the solicitor to pay costs, enforced by the inherent jurisdiction of the court itself. The same observation may be made of several other cases, which it is not necessary here to discuss, because, in the present case, it is clear beyond question that the very injunction E which was here granted was the subject of relief which was sought by the plaintiff in the action, and it was a disobedience of that very injunction ordered in that action which, it is said, led to this order for committal.

In the circumstances, the only matter that remains is this. After an order for an injunction has been made, and there is a disobedience of it, F followed by a committal, is that order for committal a part of the practice or procedure ? In my opinion, it clearly is. I think the matter is stated sufficiently in *Poyser* v. *Minors* (2), where LUSH, L.J., with the approval of BAGGALLAY, L.J., says, at p. 333, speaking of the words "practice and procedure," which arise under the County Courts Act, 1856, G s. 32, which authorises county court judges, with the approval of the Lord Chancellor, to frame rules and orders for regulating the practice of the courts and forms of procedure therein :

> "Practice" in its larger sense—the sense in which it was obviously used in that Act, like "procedure" which is used in the Judicature Acts, denotes the mode of H proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the court is to administer the machinery as distinguished from its product. "Practice," and "procedure," as applied to this subject, I take to be convertible terms.

The language of the section which I read, in the Act of 1856, is not exactly the same as that of the order we have here to consider, but I think the definition of "practice" which is there stated is one which properly can be applied here, and I ask myself, therefore, whether, within the meaning of those observations of Lush, L.J., this order for committal is not a mode of proceeding by which a legal right is enforced. It appears to me clearly that it is so. It was argued by Mr. Hughes A that, in so far as an order for injunction has once been made, the court is, so to speak, *functus officio*, and whatever is done thereafter is not a practice or proceeding in the same subject matter as that in which the injunction was. That, I think, is erroneous. The court retains jurisdiction to deal with its orders by way of prohibition, such B as injunction, or by way of ordering some specific thing to be done, as in the case of an order for specific performance, and by consent of the parties, or for sufficient reason, the court has always jurisdiction to deal with those orders which otherwise limit the liberty of a person to do what he will, or order him to do that which he otherwise might not do. C I think the court retains seisin of the whole matter, and, it being a matter of practice or procedure, it falls directly within R.S.C., Ord. 54, r. 23, and, therefore, it being a matter of practice or procedure, an appeal lies to this court.

D

Greene, L.J.: I agree that this preliminary objection fails. As the matter is of some importance, I will add my own reasons in one or two words.

The granting of injunctions came, of course, from the courts of equity and the remedies which the courts of equity gave were specific remedies E which were enforced *in personam.* That was the essence of the equitable remedy by injunction, whether mandatory or prohibitory. When a court of equity made an order prohibiting the defendant from doing an act, or ordering him to do an act, it was not *functus* in the action. It existed to give not merely a paper remedy, but an effective remedy, and F it was there to see that its order was obeyed. If the successful plaintiff found that the order of the court was disobeyed, he came back to the court to get that supplementary relief which would make the order effective, and he did that by applying for whatever was appropriate, committal in the case of an injunction, and attachment in the case of an G affirmative order to do an act. In either case, the court was merely enforcing the order it had given by the procedure of committal or attachment—that is to say, execution *in personam* peculiar to the court of equity.

Mr. Hughes contended that the action was, so to speak, dead, as soon H as the order was made at the trial, and that the subsequent application for committal, or for leave to issue a writ of attachment, as the case may be, was something in the nature of a new proceeding springing up in the light of the contempt. I am quite unable to regard the matter in that light. It appears to me that the judgment, so long as it is not complied with, is still open, and the action is still pending, in the sense that the successful plaintiff can come back to the court and obtain the particular remedy which, by the procedure of the court of equity, is appropriate to the case. It is perfectly clear, I think, when one considers the case of an affirmative order, because, in that case, if there is no time specified in the order for the doing of the act, the plaintiff must come back to the court—at any rate, it is the practice in the Chancery Division —and obtain a supplementary order, called a four-day order, limiting the time within which the act has to be done. Nobody could say that that was not a matter of practice and procedure, yet it is an order which is made after the trial of the action and after the rights of the parties have been determined upon that trial. An order having been made to do the act, and it not having been complied with, a four-day order is next asked for. The four-day order is then disregarded by the defendant, and the next step is to come to the court and to ask for leave to issue a writ of attachment. I am quite unable to see how it can be said that either of those two steps is anything but a matter of procedure for enforcing, by the appropriate means, the particular equitable remedy given.

Solicitors: *Pritchard, Englefield & Co.*, agents for *Simpson, North, Harley & Co.*, Liverpool (for the respondent company).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Re WAXED PAPERS, LTD.

[COURT OF APPEAL (Slesser and Romer, L.JJ., and Luxmoore, J.), **April 19, 20, 1937.**]

Companies—Meetings—Proxies—Proxy-holder—Extent of rights of voting—Proxy to act at the meeting and to vote for scheme of arrangement—Amendment to defer consideration of scheme—Voting.

At a meeting to consider a scheme of arrangement a number of shareholders had appointed proxies "to act for me at the meeting . . . for the purpose of considering and, if thought fit, approving, with or without modification, the proposed scheme of arrangement . . . and at such meeting or at any adjournment thereof to vote for me and in my name" either for or against the scheme. At the meeting a shareholder moved an amendment to the resolution approving the scheme that the consideration of the scheme should be deferred until after the publication of the accounts for the year. Upon a show of hands there was a majority in favour of the amendment, but the chairman demanded a poll, and using the proxies given to him, secured a majority to defeat the amendment:—

HELD: the form of proxy did not restrict the holder of the proxy, so far as voting was concerned, to voting either for or against the scheme of arrangement, and the chairman was entitled to use the proxies which he held to vote upon the amendment.

Decision of BENNETT, J. ([1937] 2 All E.R. 117), *affirmed.*

[**EDITORIAL NOTE.** Proxies are purely the creatures of the articles of association of a company, since there is no common law right to vote in this way. The decision in this case is therefore purely the construction of the proxy, but, as it is in a fairly common form and the point taken is a general one, the case is of wide interest.

As to Proxies, see HALSBURY, Hailsham Edn., Vol. 5, pp. 364, 365, para. 592; and pp. 792, 793, para. 1362; and for Cases, see DIGEST, Vol. 9, pp. 575-577, Nos. 3825-3849.]

Appeal from a judgment of Bennett, J., given on Mar. 2, 1937, and reported in [1937] 2 All E.R. 117. The facts appear from the judgments. The report is confined to the question arising upon the power given by the proxy.

H. A. H. Christie, K.C., and *Sir Hugh Lucas Tooth* for the appellants, opponents of the scheme: The proxy is in a special form, and gives power to vote in a particular way, for or against the scheme of arrangement. The power does not extend to voting on such a question as the adjournment of the meeting, which is a question to be determined by those personally present.

Lionel L. Cohen, K.C., and *P. J. Sykes* for the respondents, the petitioners, were not called upon.

Slesser, L.J.: [His Lordship referred to the circumstances by reason of which it had been decided that there should be a scheme of arrangement under the Companies Act, 1929, s. 153.] Application was made to the court to order, and the court did order, meetings of the respective classes of members, namely, the preferential shareholders and the ordinary shareholders, which meetings were duly held. At the meeting of preference shareholders, as appears from the report of the scrutineers, there was carried a resolution approving a certain scheme. It is that scheme, which Bennett, J., under the section has sanctioned, which is now the subject of the present appeal.

Before the questions of the fairness of the scheme or the right to sanction the scheme are considered, there is a preliminary matter to be considered. It is said by Mr. Christie that, in the circumstances of the case, the statutory requirements of the section have not been carried out. Sect. 153 (2) provides:

> If a majority in number representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement—

and so on. It is said, in circumstances which I will mention in a moment, that the use of the proxies in this case has been improper, and that there really is in law no scheme properly approved before the court for the court to sanction. We are told that the proxies which were to be used were in the common form approved by the court. They were used in this case, because it became necessary, in the opinion of those conducting the meeting, in the circumstances, to include the proxy votes.

What happened at the meeting was that a Mr. Thomas, who objected to the scheme, moved an amendment, to the effect that further consideration of the scheme should be adjourned. There being a majority for the adjournment, on a show of hands, upon that amendment being put to the meeting, the question of using the proxies arose, and a vote was taken including the proxies. As I understand it, it is said that the power, which admittedly is given by a mandator to the holder of the proxy, as his agent, to vote either for or against the scheme, does not extend to voting for or against an adjournment, and, as the motion for an adjournment was put in the form of an amendment before the substantive resolution that the scheme be or be not approved, it is said that, in so far as that vote was invalid, in so far as it included the proxies, that invalidated any substantive resolution based upon the rejection of the amendment.

In my opinion, it is not necessary to consider the exact numbers, though they appear in the scrutineers' report, which voted for or against this amendment, including the proxies; it is sufficient to say that, when the proxies were included, there was a very large majority against the amendment to defer a decision on the matter.

The result of that was that, the amendment being defeated, the substantive resolution was put to the meeting, and, with the votes including the proxies (and that vote is not impeached on that matter; it is agreed that the proxies were fully entitled to be considered on the substantive resolution), there was a very large majority, described by the judge as overwhelming, in favour of the scheme.

In my opinion, when one considers the section and the form of the proxy, it is quite impossible to say that the proxy does not extend to authorise the holder of the proxy to vote on a motion for an adjournment, and that it was wrong that the proxies should be included in arriving at the result of the voting on such a motion for an adjournment.

The judge has come to the conclusion that there is:

> nothing in the language of the instrument itself to restrict the holder of the proxy, as far as voting is concerned, to voting either for or against a particular scheme which it is the purpose of the meeting to decide. It seems to me that the language is such as will enable him to vote upon any incidental matter or question that may arise that might need to be decided in the course of the meeting before the meeting comes to consider the main purpose for which it was convened. In my judgment, the technical objection to the use by the chairman of the proxies to vote upon the motion for deferring consideration of the question fails, because, in my judgment, the language of the proxy is such as to enable the holder of it to use it for voting upon such a resolution.

Respectfully, I entirely agree with the view which the judge has taken.

In the first place, when the proxy is considered, it is seen that the undersigned authorises someone else:

> to act [for him] at the meeting . . . and at such meeting . . . to vote [for or against] the said scheme, either with or without modification as . . . proxy may approve.

To my mind, to vote for an amendment proposing the adjournment of the scheme for a short or a long period is in effect to vote against the scheme, as propounded at the meeting, and persons who wish to vote for the scheme, when they are authorised to use proxies for that purpose, may very properly, in voting for a scheme, oppose by proxy, as well as by their own votes, a suggestion which will have the effect of preventing the scheme, which is being put before the meeting, being approved with or without modification at that meeting. A

I think that such a view is entirely consistent with the section itself, because the section says that, if a majority:

> representing three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement— B

that shall, if sanctioned by the court, be binding. Therefore, that seems to me to contemplate that they may agree to the arrangement, and, if the matter is to be adjourned, they are not at the meeting agreeing to the arrangement. It seems to me that this is merely incidental or ancillary to arriving at a final result just as much as it would be if the scheme itself C were to be modified. Moreover, it is provided that they may approve, with or without modification, the proposed scheme at the meeting or at any adjournment thereof; so that it must be conceded that, once the meeting is adjourned, the proxy could be used to vote upon the substantive resolution at the adjournment. It seems to me altogether D artificial, unreal, and unjustified either by the proxy or by the section, to say that, in such a case, the proxy whose vote is held by the person to whom the proxy has been given cannot vote on the question of adjournment as well as at the adjournment itself. That point, therefore, fails.

E

ROMER, L.J.: The first question is as to whether the holder of a proxy in the form which was given in this case was entitled, at the meeting for which the proxy was given, to vote in favour of or against, as the case may be, a proposal to adjourn the meeting. I quite agree that, where a proxy is given to vote in favour of a scheme, with or without F modification, "at such meeting or at any adjournment thereof," the power is necessarily implied in the proxy to vote for or against any motion for adjournment of that meeting; but, further than that, the proxy is instructed, in the particular cases with which we are dealing, to vote in favour of the scheme. Whether or not he is entitled to vote on a G proposal to adjourn the meeting cannot possibly depend upon the motive of the persons putting forward the motion for an adjournment; nor can it depend upon the effect of that motion, if carried, on the scheme. We are, therefore, entitled to consider the matter as though this were a motion, as it well might be, which would have the effect of destroying H altogether the scheme which the directors put forward. In the course of the argument, I instanced a possibility in which that might happen: Litigation is pending, and the parties to the litigation are told that, if it goes on, it may go to the House of Lords, with great expense to one or other or both of the parties, and with all the attendant uncertainty of the law to be considered ; a proposal is put forward, before ever the case has come into court, to compromise the legal proceedings on certain terms ; if, at a meeting of shareholders called to consider the advisability of compromising that litigation, the proposal is put forward, on the part of one of the parties to the compromise, to adjourn the meeting until the case has been decided in the court of first instance, obviously the effect of such an adjournment would be to destroy the scheme altogether, because, when the matter has been decided by a judge of first instance, the party who has won before him will require rather better terms than he was willing to settle for before ever he got that decision in his favour. That is perfectly plain. Here the directors say : We believe that the profits for the year ending Dec. 31, 1936, will be in excess of £25,000. How much in excess of it is doubtful. The parties, without waiting to ascertain the precise degree, are willing to compromise. They take their chance. The profits may be largely in excess of £25,000 ; they may be only a very small amount in excess ; but to move that the meeting be adjourned until the exact amount of profit has been ascertained seems to me to go to the very root of the compromise. In my opinion, it was clearly within the power of these proxies to vote as they did against this motion for an adjournment of the meeting.

LUXMOORE, J. : I agree, and have nothing to add.

Appeal dismissed with costs.

Solicitors : *Nordon & Co.* (for the appellants) ; *Leonard Tubbs & Co.* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* DICKINSON AND BARON.

[KING'S BENCH DIVISION (Lawrence, J.), **March 23, 24, 1937.**]

Estate Duty—Aggregation—Settlement—Accumulation of interest during life of settlor—Accumulations to form part of settled fund—Finance Act, 1894 (*c.* 30), *s.* 4.

By a settlement, made in 1924, trustees were to stand possessed of a fund upon trust during the period of 21 years if the settlor should so long live to accumulate the income of the settled fund at compound interest by way of accretion to the settled fund and after the expiration of the said period or the death of the settlor (whichever should first happen) to pay the income of the settled fund to the settlor's daughter during her life and after her death to stand possessed of the settled fund upon certain trusts in favour of her children and if there should be no children in trust for such person or persons as the daughter should by will appoint and in default of and subject to such appointment for her statutory next of kin. The trustees duly accumulated the income of the settled fund until the settlor's death in 1932. It being admitted that the accumulations of income were property passing on the death of the settlor within the Finance Act, 1894, s. 1, the question arose as to whether for the purpose of determining the rate of estate duty to be paid on the death of the settlor the accumulations ought to be aggregated with the other property passing on the death of the settlor or ought to be treated as an estate by itself:—

Held: the settlor had an interest in the accumulations within the Finance Act, 1894, s. 4, and they ought accordingly to be aggregated with the other property passing on his death.

[EDITORIAL NOTE. There has always been some uncertainty as to the meaning of the phrase "property in which the deceased never had an interest." It has A been held that a contingent interest and a power to dispose of an interest which will come into being after his death is such an interest. The general view is that property that the deceased has voluntarily settled is within the phrase and liable to aggregation and the present decision extends that view to accumulations of the income from such property.

As to Property in which Deceased never had an Interest, see HALSBURY, B Hailsham Edn., Vol. 13, p. 261, para. 262; and for Cases, see DIGEST, Vol. 21, pp. 22, 23, Nos. 127-129.]

Cases referred to:

(1) *A.-G.* v. *Pearson*, [1924] 2 K.B. 375; 21 Digest 15, *75*.

(2) *A.-G.* v. *Quixley* (1929), 98 L.J.K.B. 652; Digest Supp.; 141 L.T. 288. C

(3) *Re Thorley, Thorley* v. *Massam*, [1891] 2 Ch. 613; 21 Digest 52, *345*; 60 L.J. Ch. 537; 64 L.T. 515.

(4) *A.-G.* v. *Lloyds Bank, Ltd.*, [1935] A.C. 382; Digest Supp.; 104 L.J.K.B. 523; 152 L.T. 577.

Information to have it determined *inter alia* whether the accumulations, D which arose in the lifetime of the settlor, of the income of property subject to a settlement dated Oct. 8, 1924, ought to be aggregated with the other property passing on the death of the settlor or ought to be treated as an estate by itself for the purposes of the Finance Act, 1894.

By the settlement dated Oct. 8, 1924, the defendants were to stand E possessed of a fund upon trust during the period of 21 years if the settlor should so long live to accumulate the income of the settled fund at compound interest by way of accretion to the settled fund and after the expiration of the said period or the death of the settlor (whichever should first happen) to pay the income of the settled fund to the settlor's F daughter during her life and after her death to stand possessed of the settled fund upon certain trusts in favour of her children and if there should be no children in trust for such person or persons as the daughter should by will appoint and in default of and subject to such appointment for her statutory next of kin. From the date of the settlement G until the death of the settlor on Nov. 30, 1932, the defendants duly accumulated the income of the settled fund. The Inland Revenue Commissioners contended that for the purpose of determining the rate of estate duty to be paid on the death of the settlor the settled fund (including the accumulations) ought to be aggregated so as to form one H estate with the other property which passed upon the death of the settlor. The defendants contended that the accumulations should not be aggregated, but ought to be treated as an estate by itself, on the ground that they were property in which the settlor "never had an interest" within the Finance Act, 1894, s. 4.

The Finance Act, 1894, s. 4, provides:

> For determining the rate of estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which estate duty is leviable shall be aggregated so as to form one estate, and the duty shall be levied at the proper graduated rate on the principal value thereof: Provided that any property so passing, in which the deceased never had an interest shall not be aggregated with any other property but shall be an estate by itself, and the estate duty shall be levied at the proper graduated rate on the principal value thereof.

The Attorney-General (*Sir Donald Somervell, K.C.*), and *J. H. Stamp* for the informant.

Fergus D. Morton, K.C., and *A. Andrewes Uthwatt* for the defendants.

LAWRENCE, J.: The only question argued before me was whether the deceased ever had an interest, within the meaning of the Finance Act, 1894, s. 4, in the accumulations of income settled by him under a deed of Oct. 8, 1924. It was admitted by Mr. Fergus Morton, on behalf of the appellant, that these accumulations of income were property passing on the death of the deceased within the meaning of sect. 1, and I decide the case upon the footing of that admission.

It was contended on behalf of the Crown that every owner of property has an interest, within the meaning of sect. 4, in the fruits of his property, because it is inherent in ownership that the owner can dispose of both the property and its fruits, and can therefore realise the benefit of the fruits before they come into existence; and reliance was placed upon *A.-G.* v. *Pearson* (1), at p. 388, *A.-G.* v. *Quixley* (2), and *Re Thorley, Thorley* v. *Massam* (3).

On behalf of the defendants, it was contended that those cases were not decided upon sect. 4, and are in any event distinguishable from the present—*Pearson's* case (1) because the settlor there reserved an ultimate trust to himself, *Quixley's* case (2) because the testator there was competent to dispose of the gratuity up to the time of her death, and *Thorley's* case (3) because it was a decision upon legacy duty. It was further argued that the fact that the then Attorney-General had conceded the very point now argued in the case of *A.-G.* v. *Lloyds Bank, Ltd.* (4), and that the late Mr. Austen-Cartmell had taken the same view in his work on the Finance Acts (5th Edn., p. 51) indicated that the question must be of doubt, and ought, therefore, to be answered in favour of the taxpayer.

In my judgment, however, the contention of the Crown is right in principle, and is supported by the reasoning in *Thorley's* case (3). *Thorley's* case (3) is an authority for the proposition that the bequest of an annual sum out of the future profits of a business bequeathed by the testator is liable to legacy duty under the Stamp Duties Act, 1845, s. 4, because such sums, although only to arise in the future, were part of the testator's estate; and, in my opinion, it is impossible to say that a man has no interest within the Finance Act, 1894, s. 4, in what is part of his estate. I agree with the reasoning of that decision, and on principle

I am of opinion that the fruits of property are so far inherent in the property that the owner of the property has, by virtue of his ownership, a beneficial interest in the fruits of the property. In realising or disposing of the property he is realising or disposing of its capacity to produce fruits. It follows that the testator in the present case had a beneficial interest in the accumulations of the income of the stocks and shares in A
question when he settled them, and they must be aggregated with his other property, since it is clear that an interest within the meaning of sect. 4 includes a beneficial interest.

Being of this opinion, I see nothing in the concession of the then Attorney-General in *A.-G.* v. *Lloyds Bank, Ltd.* (4), or in the suggested B
view of Mr. Austen-Cartmell, to prevent my acting upon my own opinion.

Solicitors : *Solicitor of Inland Revenue* (for the informant) ; *Littledale & Lefroy*, agents for *Southern, Ritchie & Southern*, Burnley (for the defendants). C

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

THE TRUSTEES OF SIR HAROLD A. WERNHER'S CHARITABLE TRUST *v.* INLAND REVENUE COMMISSIONERS D

[King's Bench Division (Lawrence, J.), **March 18, 19, 1937.**]

Income Tax—Exemption—Money expended for charitable purposes only—Land conveyed to trustees as recreation ground for employees of a limited company—Money expended on recreational facilities—Income Tax Act, E
1918 (*c.* 40), *s.* 37 (1) (*b*).

Certain land was conveyed to trustees to be held upon trust to permit the same to be used as a playing field and recreation ground (*a*) for the benefit of all persons for the time being employed by a named company and (*b*) if the land should no longer be required for such purpose then for the inhabitants of the borough in which the land was situated. A F
trust, which had been formed for purposes which were admittedly charitable, spent a sum of money in putting up pavilions and laying out a bowling green and tennis courts on the land. The trust claimed repayment of income tax on the sum so expended on the ground that the use of the land was charitable and that the money was applied for charitable purposes only within the Income Tax Act, 1918, s. 37 (1) (*b*) :— G

Held : the money was not expended for charitable purposes only.

[EDITORIAL NOTE. A purpose which benefits the inhabitants of a particular locality is, in general, a charitable purpose in law. It is, it will be noticed, open to anyone to become an inhabitant of the locality ; but it is not open to them to become employees of a particular firm. The latter are subject to the selection H
of the principals of the firm, and it is for this reason that a purpose benefiting the employees of a limited company is held not to be charitable in the legal sense of that word.

As to Charitable Purposes, see HALSBURY, Hailsham Edn., Vol. 17, pp. 310-314, paras. 617-621 ; and for Cases, see DIGEST, Vol. 28, p. 83, Nos. 470-476 and Supp.]

Cases referred to:

(1) *Re Good, Harington* v. *Watts,* [1905], 2 Ch. 60; 8 Digest 258, *197*; 74 L.J. Ch. 512; 92 L.T. 796.

(2) *Re Gray, Todd* v. *Taylor,* [1925] Ch. 362; Digest Supp.; 94 L.J. Ch. 430; 133 L.T. 630.

(3) *Re Hadden, Public Trustee* v. *More,* [1932] 1 Ch. 133; Digest Supp.; 101 L.J. Ch. 52; 146 L.T. 190.

(4) *Goodman* v. *Saltash Corpn.* (1882), 7 App. Cas. 633; 8 Digest 327, *1099*; 52 L.J. Q.B. 193; 48 L.T. 239.

(5) *Re Christchurch Inclosure Act* (1888), 38 Ch.D. 520; 8 Digest 289, *658*; 57 L.J. Ch. 564; 58 L.T. 827.

(6) *Re Mellody, Brandwood* v. *Haden,* [1918] 1 Ch. 228; 8 Digest 247, *70*; 87 L.J. Ch. 185; 118 L.T. 155.

(7) *Re Drummond, Ashworth* v. *Drummond,* [1914] 2 Ch. 90; 8 Digest 244, *28*; 83 L.J. Ch. 817; 111 L.T. 156.

APPEAL by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts dismissing an appeal from a decision of the Inland Revenue Commissioners, who had refused a claim by the appellants to repayment of income tax on a sum of £3,561 12*s.* 11*d.* on the ground that this sum had not been expended by the appellants on charitable purposes only within the Income Tax Act, 1918, s. 37 (1) (*b*).

Sir Harold A. Wernher's Charitable Trust was founded under two deeds dated July 16, 1926, and July 22, 1927, for purposes which were admittedly charitable. Electrolux, Ltd., which employed over 1,400 people in Luton, by deed dated Jan. 28, 1933, conveyed certain land next to its factory to the National Playing Fields Association to be held by the Association in trust:

> to permit the same to be used in perpetuity as a playing field and recreation ground (*a*) for the benefit of all persons who for the time being are employed by the company under the management and direction of the managers, and (*b*) if the said property shall no longer be required for the use and benefit of such persons as aforesaid then for the benefit of the inhabitants of the borough of Luton and/or of the parish of Leagrave under the management and direction of such person or persons or corporation or public body as the National Association may appoint.

Sir Harold A. Wernher's Trust spent £3,561 12*s.* 11*d.* in putting up pavilions and laying out a bowling green and tennis courts on the land in question and the appellants, the trustees of the Trust, claimed repayment of income tax on the sum so expended. The land in question was used by the employees of Electrolux, Ltd., and their families, the general public being admitted only by invitation and not by right to watch matches and to play matches against the employees. Recreational facilities to the full capacity of the land were afforded by such user.

The Income Tax Act, 1918, s. 37 (1), provides:

> Exemption shall be granted . . . (*b*) from tax under Sched. C in respect of any interest, annuities, dividends, or shares of annuities, and from tax under Sched. D, in respect of any yearly interest or other annual payment forming part of the income of any body of persons or trust established for charitable purposes only, or which, according to the rules or regulations established by Act of Parliament, charter, decree, deed of trust, or will, are applicable to charitable purposes only, and so far as the same are applied to charitable purposes only.

C. R. R. Romer for the appellants.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *Reginald P. Hills* for the respondents.

Lawrence, J.: In this case, certain land was conveyed to the National Playing Fields Association as trustees, to be held for the benefit in the first instance of the employees of Electrolux, Ltd., which had a recreation field at Luton. During 1933, sums of money were expended by the appellants to provide equipment for recreational purposes on this land. The question I have to decide is whether those sums are liable to income tax, or are exempt, as being sums expended for charitable purposes only under the Income Tax Act, 1918, s. 37 (1) (*b*). The Commissioners have held that the purposes are not charitable, and I am in agreement with them.

It has been argued on behalf of the appellants that the recreation ground of a public company like Electrolux, Ltd., is a public purpose, a purpose for the good of the community, on the ground that industry and what may be called the industrial army are just as important to the community at large as the military army. Reliance is placed upon the well known cases as to charitable trusts: *Re Good, Harington* v. *Watts* (1), where it was held that money bequeathed to help in providing a library for a particular regiment in the army, tending as it did to the efficiency of the army, was charitable as being a trust or gift for the benefit of the community at large. Similarly, in *Re Gray, Todd* v. *Taylor* (2), a gift for the support of the Carabiniers was held to be a good charitable gift, on the ground that it benefited the public by benefiting the army. Reliance was also placed upon *Re Hadden, Public Trustee* v. *More* (3), where money was bequeathed for recreation grounds for the public. That was held to be a good charitable trust, on the ground that recreation is good for the public, tending as it does to develop the health of the public. Secondly, it was argued for the appellants that the money in this case has been expended for the benefit of a particular section of the public. Reliance was placed upon *Goodman* v. *Saltash Corpn.* (4), at pp. 642 and 650, a case of freemen of a particular area who were entitled, under a supposed grant, to an oyster-fishery during certain months of the year; *Re Christchurch Inclosure Act* (5), which followed the *Saltash* case (4), and which dealt with a trust for the benefit of free cottagers in the neighbourhood of Christchurch; and, lastly, on this head, upon *Re Mellody, Brandwood* v. *Haden* (6), where a gift was upheld as a charitable trust for the benefit of the school children of a place called Turton.

On the other hand, the Attorney-General contends that the case is really on all fours with *Re Drummond, Ashworth* v. *Drummond* (7), where money was bequeathed for the purpose of contributing to the holiday expenses of workpeople employed in the spinning department of a certain company, in such manner as the majority of the directors in their discretion thought fit. That was held by EVE, J., not to be a good charitable trust.

In my judgment, this case falls to be decided in this court in accordance with the judgment of EVE, J., in *Re Drummond, Ashworth* v. *Drummond* (7), the facts being, in my opinion, indistinguishable. It is perfectly true, A of course, that the physical recreation of the public, and of any particular section of the public, does confer some benefit upon the community. In *Re Hadden, Public Trustee* v. *More* (3), where the trust had been for the provision of a recreation ground for the public, it was held to be a charitable trust. But in *Drummond's* case (7), and in the present B case, the money in question is to be expended, and has been expended, not for the purpose of providing or equipping a recreation ground for the public at large, but for the employees of Electrolux, Ltd., only. The ground upon which *Re Good, Harington* v. *Watts* (1) and *Re Gray, Todd* v. *Taylor* (2) were decided, in my opinion, was that the army was C of such importance to the public that any money which was expended for the benefit of the army was expended in the interests of the community. But that does not apply to the present case, and I think *Re Drummond, Ashworth* v. *Drummond* (7) is a clear authority that that principle cannot be extended to what has been called the industrial army. D If it could be so extended, I am unable to see how it could be limited in any way. It would, it seems to me, be equally true to say that it was in the interests of the public at large that the physical recreation of any individuals should be promoted, as that the physical recreation of employees of a particular company should be promoted.

E On the second head of Mr. Romer's argument, that the employees of Electrolux, Ltd., are a particular section of the public, and that anything done for the benefit of that particular section is a good charity, there seems to me to be a valid distinction between a particular section of the public at large, which arises from their residence in a particular locality, and a F particular section of individuals, which is created by the selection of a public company. The employees of a public company seem to me to be in a position altogether different from that of the freemen of a particular locality, or the cottagers of a particular locality, or the school children of a particular locality. I think, therefore, that the principles of *Goodman* G v. *Saltash Corpn.* (4) and the *Christchurch* case (5) and *Re Mellody, Brandwood* v. *Haden* (6) are inapplicable to the present case. I therefore hold, in accordance with the ruling of the Commissioners, that the money expended in this case was not expended for charitable purposes only.

Appeal dismissed with costs.

H Solicitors: *Devonshire, Wreford-Brown, Hewett, Baggallay & Co.* (for the appellant trustees); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

INLAND REVENUE COMMISSIONERS *v.* LEDGARD.

[King's Bench Division (Lawrence, J.), **March 17, 18, 1937.]**

Income Tax—Sur-tax—Deduction—Purchase price of deceased partner's share in partnership—Capital or annual payment.

By a deed of partnership it was provided, *inter alia*, that the partnership should not be determined as regards the other partners by reason of the death of one partner, and that "the purchase money for the share of a deceased partner . . . shall be a sum equal to one-half of the share of profits for three years commencing from the first day of the month immediately following the death of such partner which would have been payable to such deceased partner had he continued to be a partner during the said period of three years." Upon the death of a partner in June, 1933, sums were paid to his personal representatives on account of the purchase price of his share for the periods July 1, 1933, to Dec. 31, 1933, and for the year ending Dec. 31, 1934. A surviving partner contended that these sums were annual payments and that, in computing his total income for sur-tax purposes for the years ending Apr. 5, 1934 and 1935, he was entitled to deduct his share of the sums so paid :— A B C

Held : payment for the deceased partner's share was to be a lump sum to be paid at the end of the three years period. Such payment was a payment of a capital sum, and the surviving partner was not entitled to make the deduction claimed.

[EDITORIAL NOTE. This case follows the decision in *Dott* v. *Brown* (3), but the two cases are distinguishable upon the facts and by reason of the fact that the revenue authorities were not concerned in the earlier case. The question in both cases is the distinction between an annual payment and a capital sum payable by instalments. D

As to the Nature of such Payments, see HALSBURY, Hailsham Edn., Vol. 17, pp. 180-182, para. 378 ; and for Cases, see DIGEST, Vol. 28, pp. 65-67, Nos. 335-350.]

E

Cases referred to :

(1) *Inland Revenue Comrs.* v. *Ramsay* (1935), 20 Tax Cas. 79 ; Digest Supp ; 154 L.T. 141.

(2) *Chadwick* v. *Pearl Life Insurance Co.*, [1905] 2 K.B. 507 ; 28 Digest 66, *347* ; 74 L.J. K.B. 671 ; 93 L.T. 25.

(3) *Dott* v. *Brown*, [1936] 1 All E.R. 543 ; Digest Supp. ; 154 L.T. 484. F

(4) *Glenboig Union Fire Clay Co.* v. *Inland Revenue Comrs.* (1922), 12 Tax Cas. 427.

Appeal by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts reducing two assessments to sur-tax in the sums of £3,686 and £3,849 for the years ending Apr. 5, 1934 and 1935, respectively, made upon the respondent, William Armitage Ledgard. G

By a deed of partnership dated May 26, 1932, between Sydney Decimus Kitson of the one part, James Parish of the second part, the respondent of the third part and Noel Pyman of the fourth part, it was agreed that the parties thereto should carry on in partnership the profession of architects. The deed provided, *inter alia*, that the partnership should not be determined as regards the other partners by reason of the death, bankruptcy or retirement of any partner, and cls. 17 and 18 of the deed, which are set out in the judgment, provided for the ascertainment of the H purchase money for the share of a deceased partner. One of the partners, James Parish, died on June 25, 1933, and the respondent and Noel Pyman were the executors of his will. It was arranged pursuant to cl. 17 of the partnership deed that the purchase price for the share of the deceased partner should be a sum equal to one-half of the share of profits for three years from July 1, 1933, which would have been payable to the deceased partner had he continued to be a partner during the said period of three years. The partnership accounts were made up to Dec. 31 in each year. For the period July 1, 1933, to Dec. 31, 1933, this sum amounted to £358, of which the respondent's share amounted to £228, and for the year ending Dec. 31, 1934, to £571, of which the respondent's share amounted to £354. The sums of £358 and £571 were paid to the personal representatives of the deceased partner on account of the purchase price of the deceased partner's share and were paid under deduction of income tax.

The respondent contended that in computing his total income for surtax purposes for the years ending Apr. 5, 1934 and 1935, he was entitled to deduct the sums of £228 and £354, his share of the said sums of £358 and £571, and that the said sums of £358 and £571 were annual payments and not instalments of a capital sum. The Inland Revenue Commissioners contended that the sums were payments on account of a capital sum and that the respondent was not entitled to make the deductions claimed. The Special Commissioners held that the respondent's contentions were correct and reduced the assessments made upon him to £3,458 and £3,495. The Inland Revenue Commissioners appealed.

The Solicitor-General (*Sir Terence O'Connor, K.C.*), and *Reginald P. Hills* for the appellants.

J. S. Scrimgeour for the respondent.

LAWRENCE, J.: In this case, the question is whether the purchase money for a deceased partner's share is capital or income, for the purposes of the Income Tax Acts. The Special Commissioners have decided that the purchase money for the deceased partner's share in this case was income. I regret to say that I find myself unable to agree with the Special Commissioners in this case. It has been laid down in the Court of Appeal in *Inland Revenue Comrs.* v. *Ramsay* (1) that the real substance of the transaction is the matter which must be considered. In this partnership agreement, which was a partnership of architects, it was agreed, by cl. 17, that, on the death of one of the partners:

> The purchase money for the share of a deceased partner shall be such a sum of money as the personal representatives of the deceased partner and the surviving partners may agree upon, and failing such agreement the purchase money shall be a sum equal to one-half of the share of profits for three years commencing from the first day of the month immediately following the death of such partner, which would have been payable to such deceased partner had he continued to be a partner during the said period of three years.

By cl. 18 it was provided:

> The decision of the auditors for the time being of the firm as to the amount of any

> purchase money payable under the two preceding clauses shall be final and binding upon all interested parties and no payment on account of such purchase money shall be required until the same shall have been actually ascertained unless the remaining partners are willing to make payments on account thereof.

Those are the two clauses which govern the matter in this case. It appears that the remaining partners, who were also executors of the deceased partner, did not carry out strictly the terms of the partnership agreement. They did not agree, as they might have agreed, under cl. 17, upon the purchase money of the share of the deceased partner, but they took a sum equal to one-half of the share of the profits from July 1, 1933, which was the first of the month after the death of the deceased partner on June 25, 1933, up to Dec. 31, 1933, and they then took the profits from Dec. 31, 1933, up to Dec. 31, 1934, and they paid over those sums to the personal representatives of the deceased partner under deduction of income tax.

The argument which has been presented to me on behalf of the respondent is that the true construction of this partnership agreement is that the purchase money for the deceased partner's share should be paid in three annual instalments, and that, having regard to the fact that there was no previously quantified or fixed sum, the sums which had to be paid for the deceased partner's share, which are to be fixed by reference to the profits of the partnership for the three years following the death of the deceased partner, are income for the purposes of the Income Tax Acts. Mr. Scrimgeour contends that the true construction of the partnership deed is that that purchase money is to be paid in instalments, and that the partners did carry out the true construction of that agreement, and that that fact, coupled with the fact that the sums so to be paid were dependent upon the fluctuation of the profits of the partnership business, renders the sums so to be paid income, and not capital. He relies upon the *dictum* of WALTON, J., in *Chadwick* v. *Pearl Life Insurance Co.* (2), and upon *Ramsay's* case (1), in which the purchase money for a dentist's business, which was there in question, was fixed by the agreement of sale at £15,000, and it was held that, although that sum was to be satisfied by ten annual payments of 25 per cent. of the net profits of the business, which obviously might be more or less than £15,000, those annual payments were capital, because they related to the previously quantified or fixed sum. It may be that there would be much force in that argument in the present case if the true interpretation of this partnership agreement was that the purchase money was to be paid by annual instalments out of the profits of the partnership business, without quantifying the amount of the purchase money in any shape or form, but, in my judgment, that is not the true interpretation of the partnership agreement. I think that the *dictum* of SCOTT, L.J., in *Dott* v. *Brown* (3), at p. 550, commenting upon the *dictum* of WALTON, J., in *Chadwick* v. *Pearl Life Insurance Co.* (2), is relevant to the present matter. There he says, after quoting WALTON, J.:

> "The distinction is a fine one, and seems to depend on whether the agreement

> between the parties involves an obligation to pay a fixed gross sum." Now, that phrase is an illustration of the danger of taking a particular sign-post as having more meaning than that of mere sign-post. The words "fixed gross sum" are a phrase that may mislead if stated as a final test. Take a very simple case—a sale for a lump sum, which is to be paid ultimately by reference to certain subsequent considerations affecting the amount—a sort of arrangement that the ultimate sum payable may be higher or lower as the value of the property sold may turn out to be more or less—a perfectly natural and not uncommon transaction in the sale of certain types of property, particularly where goodwill is included in the sale. No fixed sum is there defined because the true essence of the transaction is that the consideration shall vary according to future calculations depending on certain facts. To say that, because in that transaction the sum might so vary, it was not a capital payment, would be an erroneous conclusion.

Similarly, in my judgment, it is erroneous to say in this case that this is not a capital payment because the purchase money for the deceased partner's share is to be dependent upon what the capital profits of the business are for the three years succeeding the death of the deceased partner. It is, I think, a fairly common method of arriving at the value of a share in a business, a large part of which share is dependent upon goodwill, to ascertain the value of that share by reference to the profits of the business over a certain term of years. In my judgment, that is what was done in this case. Cl. 17 simply provides for a method of valuing the deceased partner's share of the business, including therein the goodwill; and, as Lord Buckmaster said, in *Glenboig Union Fire Clay Co.* v. *Inland Revenue Comrs.* (4), the fact that annual profits, which are, of course, of an income character, are used as the measure of the sum does not affect the quality of the sum which is arrived at by that method.

I hold, upon the construction of this partnership agreement, that it was not a lump sum to be paid by instalments, but was a lump sum to be paid at the end of the three years, when it had been ascertained by the auditors. That seems to me to be clear upon the construction of cls. 17 and 18, which throughout speak of the purchase money in the singular, which is to be agreed upon by the partners, or, failing agreement, is to be a sum equal to one-half of the share of profits for the three years commencing from the first day of the month immediately following the death of such partner, which is to be determined or decided by the auditors for the time being, and no payment is to be required on account until the sum shall have been actually ascertained. In my judgment, that contemplates one ascertainment of one sum, and not the ascertainment of three or more instalments. I am therefore of opinion that the deceased partner's share in this case is capital, and not income. The appeal will be allowed, with costs.

Appeal allowed with costs.

Solicitors: *Solicitor of Inland Revenue* (for the appellants); *G. M. Saunders & Son* (for the respondent).

[*Reported by* Leslie Carnegie, Esq., *Barrister-at-Law.*]

BRENDON *v.* SPIRO.

[Court of Appeal (Scott, L.J., and Swift, J.), **April 12, 13, 1937.]**

Solicitor—Litigation—Misconduct—Application for solicitor to pay costs personally—Summary jurisdiction—Solicitor ceasing to be on the record—Form of application—Solicitors Act, 1932 (*c.* 37), *s.* 5 (1).

It was alleged that two of the solicitors in the main action had been guilty of misconduct, and application was made to the judge at the trial to order them to pay the costs personally. The judge directed that the matter should be brought before him on a later day. It was then contended that the judge had no jurisdiction, on the ground that, before judgment had been given, both solicitors had ceased to be solicitors on the record. Objection was also taken that the judge was not entitled to hear the application because no affidavits had been filed verifying the facts on which the application was based :—

Held : (i) the court's summary jurisdiction over a solicitor does not cease merely because he ceases to be on the record.

(ii) the summary jurisdiction has not been impaired by the Solicitors Act, 1932, s. 5.

(iii) the judge had jurisdiction to deal with the application.

(iv) it was a matter of discretion for the judge whether affidavits were required, and what form of procedure should have been followed.

[**EDITORIAL NOTE.** This was an application to the court to exercise its summary jurisdiction over a solicitor as an officer of the court and to make an order that, by reason of his misconduct in the action, he should pay the costs personally. It was contended that the solicitor having ceased to be the solicitor on the record, was not subject to such jurisdiction, but this contention was rejected by the Court of Appeal. It will be noticed that the case of *Haxby* v. *Wood Advertising Agency, Ltd.* (1913), 109 L.T. 946 ; Digest, Practice, 706, *3011*, was not cited to the court. This case was referred to in *Lever Bros., Ltd.* v. *Kneale* at p. 479 *ante*.

As to Summary Jurisdiction, see HALSBURY, 1st Edn., Vol. 26, Solicitors, p. 830, para. 1352 ; and for Cases, see DIGEST, Vol. 42, pp. 319-325, Nos. 3545-3650.]

Cases referred to :

(1) *Gold Reefs of Western Australia, Ltd.* v. *Dawson*, [1897] 1 Ch. 115 ; Digest, Practice, 262, *24* ; 66 L.J. Ch. 147 ; 75 L.T. 575.

(2) *Simes* v. *Gibbs* (1838), 6 Dowl. 310 ; 42 Digest 326, *3670*.

(3) *Re Blake* (1860), 3 E. & E. 34 ; 42 Digest 400, *4519* ; 30 L.J. Q.B. 32 ; 2 L.T. 429.

(4) *Stephens* v. *Hill* (1842), 10 M. & W. 28 ; 42 Digest 394, *4420* ; 11 L.J. Ex. 329.

(5) *Re Hulm & Lewis*, [1892] 2 Q.B. 261 ; 42 Digest 358, *4082* ; 61 L.J. Q.B. 502 ; 66 L.T. 683.

(6) *Wilton* v. *Chambers* (1837), 7 Ad. & E. 524.

(7) *Simmons* v. *Liberal Opinion, Ltd., Re Dunn*, [1911] 1 K.B. 966 ; 42 Digest 343, *3874* ; 80 L.J. K.B. 617 ; 104 L.T. 264.

(8) *Re A Solicitor, Ex p. Law Society*, [1912] 1 K.B. 302 ; 42 Digest 399, *4515* ; 81 L.J. K.B. 245 ; 105 L.T. 874.

(9) *Re Gray, Ex p. Incorporated Law Society* (1869), 20 L.T. 730 ; 42 Digest 403, *4569*.

(10) *Yonge* v. *Toynbee*, [1910] 1 K.B. 215 ; Digest, Practice, 706, *3012* ; 79 L.J. K.B. 208 ; 102 L.T. 57.

(11) *Re Gregg, Re Prance* (1869), L.R. 9 Eq. 137 ; 42 Digest 337, *3816* ; 39 L.J. Ch. 107 ; 23 L.T. 234.

(12) *Rouch* v. *Alberty* (1863), 3 New Rep. 137 ; 42 Digest 337, *3815* ; 33 L.J. Q.B. 127 ; 9 L.T. 420.

(13) *Martinson* v. *Clowes* (1885), 52 L.T. 706; 42 Digest 352, *4008*.
(14) *Re* —— (1861), 10 W.R. 86; 42 Digest 325, *3645*.

APPEAL from a decision of GREAVES-LORD, J., dated Mar. 18, 1937. The facts of the case are fully stated in the judgments.

W. A. L. Raeburn for the appellants.

A *Roland Burrows, K.C.*, and *Harold Simmons* for the respondent, Griffiths.

J. P. Eddy, K.C., and *E. A. Jessel* for the respondents, Ralph Wood & Co.

Raeburn: The court has inherent jurisdiction over its officers, and B can visit costs on a solicitor who has misconducted himself in a case: see *Re A Solicitor, Ex p. Law Society* (8), *Re Gray, Ex p. Incorporated Law Society* (9), and *Yonge* v. *Toynbee* (10). If a man be once an attorney, he cannot get rid of the summary jurisdiction of the court by ceasing to be an attorney: *Simes* v. *Gibbs* (2). [Counsel also referred to C *Simmons* v. *Liberal Opinion, Ltd. Re Dunn*, (7).] At the time of the matters complained of, the solicitor was on the record; that is the crux of the matter. It would be contrary to principle if a solicitor could escape from the jurisdiction of the court by retiring from a case in which he had flagrantly misbehaved. It is of no avail for the Law Society D to petition the divisional court, as is suggested: that gives no compensation to the injured party.

Burrows, K.C.: The summary jurisdiction of the court over solicitors as officers of the court is not disputed. It is expressly preserved by the Solicitors Act, 1932. There are two ways of exercising this jurisdiction, E but the procedure here adopted, viz., by motion in the action, was wrong in this case, because the solicitor was not before the court, having ceased to be on the record before the hearing. That procedure rests on the fact that the parties are before the judge who hears the action, and the solicitors for the parties are also before the court. Where a solicitor F has ceased to be on the record, what happens at the trial is *res inter alios acta*. If the other procedure were adopted, the matter would be dealt with by motion in a divisional court, where the charges would be supported by affidavit, and the solicitor would not be required to answer unless sufficient cause were shown by the affidavit. There is no precedent for G the procedure here adopted in the case of a solicitor not on the record. *Simes* v. *Gibbs* (2) is clearly not such an authority. In that case there were proceedings subsequent to an action, and the objection was merely to the affidavits being entitled in the action. The action was at an end and the proceedings were not in the action. This was not an ordinary H application for costs, but a punitive procedure based on misconduct, which must be properly proved. The motion was completely opened by the plaintiffs against the first respondent, and, as the material used was not before the judge by affidavit or witnesses, but consisted of documents read and statements made by counsel as to what happened, no evidence was given against the first respondent, and therefore the order appealed from was right. [Counsel referred to *Re Gregg* (11), *Rouch* v. *Alberty* (12), *Martinson* v. *Clowes* (13), and *Re Hulm & Lewis* (5).]

Eddy, K.C. : If there is misconduct by a solicitor who is not in the suit, the judge can refer the matter to the Law Society, or action can be brought, as in this case. But without proper affidavits this procedure does not lie : *Re* ——(14). A

W. A. L. Raeburn was not called on to reply.

Scott, L.J. : The only question upon which we have to adjudicate in this appeal is whether the trial judge had jurisdiction at the close of the case, after he had given judgment, to deal with an application on B behalf of the plaintiffs that two firms of solicitors who were then, or had been in the early stages of the case, on the record as solicitors to different defendants, should be ordered personally to pay the plaintiffs' costs, on the ground that they had been guilty of professional misconduct in the course of the case. C

The writ was issued on Oct. 19, 1936, the appellants, the then plaintiffs, suing various defendants, whose names are Stanley Grove Spiro, Maclean & Henderson, S. R. Bunt & Co., Samuel Taylor (who was the real person behind the firm of S. R. Bunt & Co.), A. Graham (about whom I do not think we have heard anything), William Underhill, and the D Scottish Gas Utilities Corpn., Ltd. The judgment was for £12,000 damages, broadly speaking, for fraud. Counsel for the plaintiffs, as soon as judgment was given, intimated to the judge that he proposed to ask for an order that the plaintiffs' costs should be paid personally by the two solicitors, neither of them then being on the record. The E learned judge, we are informed, took the view that it was essential that the solicitors in question, who were not present in court, should be given notice of the proceedings, and directed that the matter should be again brought before him, after notice to them, by way of motion. The application which was filed on behalf of the plaintiffs said this : F

> Take notice that the above-named plaintiffs intend to apply to Greaves-Lord, J., on Mar. 10, 1937, for an order that Thomas Griffiths, solicitor, do personally pay to the plaintiffs such of the costs of this action as were ordered under the terms of a final judgment in this action dated Mar. 1, 1937, to be paid to the plaintiffs by the defendants S. R. Bunt & Co. and the defendant Samuel Taylor, and that Messrs. Ralph Wood & Co., solicitors, do personally pay to the plaintiffs such of the costs of this action as were ordered under the terms of the said final judgment to be G paid to the plaintiffs by the defendants Maclean & Henderson and the defendant William Underhill.

The solicitor Mr. Griffiths, there first mentioned, ceased to be the solicitor on the record on Feb. 18, 1937, a change of solicitors being then intimated. The solicitors, Ralph Wood & Co., continued on the record as solicitors H for William Underhill and for Graham, down to the end of the first day of the trial ; but, after the first day of the trial, which was Feb. 25, they ceased to act as solicitors for Messrs. Maclean & Henderson, continuing to act as solicitors for William Underhill. When the matter came before the judge, on Mar. 15, the point was taken that, as from the moment when the solicitors ceased to act for the respective defendants, the judge ceased to have any jurisdiction over them in respect of matters that had happened before those dates, and that he was therefore not competent to consider a claim that they should be ordered to pay the plaintiffs' costs. It would appear that the judge went into the merits of the case to some extent, but that, after a considerable discussion, lasting, as I have said, over a day, he came to the conclusion that he had no jurisdiction to inquire into the misconduct alleged against them in respect of the time when they were acting as solicitors on the record. Consequently, upon the merits of the case, he expressed no opinion of a final character at all.

An additional argument was addressed to him on behalf of the two solicitors, that, in any event, whether the fact that the solicitors had ceased to be on the record was or was not a good ground for saying that he had no jurisdiction, he was not entitled to hear the application at all, because no affidavits had been filed stating the facts upon which the application was based. The judge gave a short judgment in the following terms:

> The conclusion to which I have come is this—and I have given attention to it—that there are matters which would be well worthy of inquiry; they are put before me to substantiate and to justify a motion which in the circumstances I am not prepared to accede to. I think, in all the circumstances, that the facts and the matters affecting these two solicitors ought to be the subject of inquiry, because I do not believe that this kind of thing is good for the administration of justice, or for the interests of the legal profession, and certainly not for the public. As far as I can see—and I have been waiting to find it—there is no authority which has been cited to me which gives me, in this case, jurisdiction, and therefore I have to decline to make the order. I am not going to say more, because I might be going rather further than the position which I conceive to be my position would warrant. In other words, I should be saying things which in my view I have no jurisdiction to say, and therefore I decline to go further, and the motion will have to be dismissed.

In my view, the judge was wrong in holding that he had no jurisdiction.

The question of law raised by his decision is one of very general importance. It was argued before him, I understand, and was certainly argued before us, that if, in the course of an action, a solicitor is guilty of such conduct as would entitle the court, in the exercise of its summary jurisdiction, to take disciplinary measures, either striking off the rolls, fining, or ordering the solicitor to pay the costs of the party who has suffered by his misconduct, the judge has no jurisdiction at all to take that disciplinary action if, although the solicitors were on the record, and although they were in his opinion guilty of that misconduct, they have ceased to be solicitors on the record before the application is made. In my view, it would be lamentable if the power of discipline by the court over the solicitors on the record, acting as officials of the court, were limited in any such way, and, in my opinion, it is not so limited.

Under the Judicature Act, 1875, the powers of the court were preserved, although new rules were formulated. The decision of NORTH, J., in

Gold Reefs of Western Australia, Ltd., v. *Dawson* (1), explains the position. North, J., on p. 118, said :

> In my opinion this motion is properly made. It is argued that the notice of discontinuance has put an end to the action and to the motion of which notice had been previously served. This is a technical objection, and I must assume that the motion is rightly made if the technical objection can be got over. Is the objection well founded ? R.S.C., Ord. 26, r. 1, says that on wholly discontinuing A the action the plaintiff shall pay the defendant's costs of the action ; but it does not say in express terms that nothing else shall be done in the action. In my opinion the discontinuance of an action cannot have any larger effect than the dismissal of a bill with costs under the old practice. Under that practice it was well settled that after the dismissal of a bill with costs a person whose name had been used as plaintiff without authority could obtain an order to strike out his name, and that the solicitor should indemnify him against costs. This was so under the old practice, B and it has not been in express terms altered by R.S.C., Ord. 26, r. 1. It would be surprising if such an application as this could be evaded by the solicitor's putting an end to the action in this way. I can find nothing in the Acts or the Rules which alters the old practice in this respect. The Judicature Act, 1875, s. 21, provides that : " Save as by the principal Act or this Act, or by any rules of court, may be otherwise provided, all forms and methods of procedure which at the commencement of this Act were in force in any of the courts whose jurisdiction is by the principal Act or this Act transferred to the said High Court and to the said Court C of Appeal respectively, under or by virtue of any law, custom, general order, or rules whatsoever, and which are not inconsistent with the principal Act or this Act, or with any rules of court, may continue to be used and practised, in the said High Court of Justice and the said Court of Appeal respectively, in such and the like cases, and for such and the like purposes, as those to which they would have been applicable in the respective courts of which the jurisdiction is so transferred, if the principal Act and this Act had not passed. D

The judge made the order accordingly upon the solicitors in that case. By the Solicitors Act, 1932, s. 5 (1), it is enacted in the proviso :

> That nothing in this section shall affect the jurisdiction which, apart from the provisions of this section, is exercisable by the Master of the Rolls or any judge of the High Court over solicitors. E

The procedure of that fasciculus of sections in the Act, it will be remembered, relates to the power of the Law Society to inquire into matters preliminary to the proceeding for striking a solicitor off the rolls. The old procedure being maintained, the old jurisdiction of the court inherent in the position of a judge is thus maintained to-day. F

Simes v. *Gibbs* (2) is a direct authority that the judge had jurisdiction to inquire into the matter of the application on behalf of the plaintiffs in this case. It is a very short case, and I read the whole of it :

> Petersdorff showed cause against a rule *nisi*, requiring an attorney named Humfrey to deliver up a bill of exchange. He objected to the entitling of the G affidavit on which the rule had been obtained, on the ground that it was entitled in the cause out of which the alleged claim to the bill of exchange arose. In that action judgment had been signed and execution issued. The cause was at an end, and therefore it was improper to entitle the affidavits in that manner. They should have been entitled " In the matter of Humfrey." Another objection was, that Mr. Humfrey had ceased to be an attorney of the court.

Patteson, J., said, at pp. 310 and 311 : H

> I think that the affidavits are properly entitled in the cause out of which the claim to the bill is alleged to have arisen, although that action may be at an end. With respect to the fact of Mr. Humfrey having ceased to be an attorney of the court since this action arose, I do not think that is any answer to the present application. If a man be once an attorney, he cannot get rid of the summary jurisdiction of this court with respect to what he has done while an attorney, by ceasing to be

> an officer of the court. The rule is, once an attorney always an attorney, for that purpose. As it appears by the affidavit, that, at the time of the transaction out of which this application has arisen, he was an attorney of this court, it does not lie in his mouth to say he is not one now.

A fortiori on that principle, that must be so where the solicitor in question has not ceased to be a solicitor, but has merely ceased to be the solicitor A on the record at some stage before the application for an order that he should pay costs is made.

In *Re Blake* (3), COCKBURN, C.J., said, at p. 34:

> I am of opinion that Blake is amenable to the summary jurisdiction of this court, although the misconduct of which he was guilty did not arise in a matter strictly B between attorney and client. I consider we are bound to hold him thus amenable on the broad ground, that when an attorney is shown to have been guilty of gross fraud, although it may not be such a fraud as may make him subject to criminal proceedings, and although the fraud was not committed by him while the relation of attorney and client was subsisting, or in his character of attorney, yet, still, in such a case, where one, who is an officer of this court, has been guilty of gross fraud and dishonesty, we are called upon, for the protection of suitors and others who C would give credit to him as an attorney, to visit such misconduct with summary punishment.

WIGHTMAN, J., agreed, saying, at p. 34:

> It is of the greatest importance that transactions, in which attornies are parties, should be *uberrimæ fidei*, and that those who are accredited as officers of the court should be above suspicion.

D

CROMPTON, J., said at p. 35:

> The law as to the summary jurisdiction of the court over its attornies, as laid down in the text-books, is of wider extent than Mr. Dowdeswell [counsel in the case] seems to allow. Thus, in ARCHBOLD'S PRACTICE, Vol. 1, p. 127, it is said, "The court will, in general, interfere in this summary way and strike an attorney E off the roll, or otherwise punish him, for gross misconduct, not only in cases where the misconduct has arisen in the course of a suit or other regular and ordinary business of an attorney, but where it has arisen in any other matter so connected with his professional character as to afford a fair presumption that he was employed in or intrusted with it in consequence of that character."

BLACKBURN, J., said, at p. 35:

> F The jurisdiction which the courts exercise in such cases as the present is to ascertain whether the person accredited as an officer of the court is unfit to be so accredited.

To-day, as we know, the ordinary procedure for striking a solicitor off the roll is laid down in the Solicitors Act, 1932; but the summary G jurisdiction is left unimpaired where the judge thinks it proper to exercise it over a solicitor who has been guilty of misconduct in the course of a case tried before him. An illustration of that type of case is *Stephens* v. *Hill* (4), tried in 1842. The headnote is:

> Where an attorney has been guilty of misconduct in the course of a cause, the court will grant a rule calling on him to show cause why his name should not be H struck off the roll, even although the matter complained of may amount to an indictable offence; but the court will not, under such circumstances, call upon him to answer the matters of an affidavit.

The reason for that limitation is this, that the answer might incriminate the solicitor in putting it on record, and therefore, on the ordinary principle of English law, that no man shall be called upon to incriminate himself, he is not to be asked to make an affidavit in answer; but the summary jurisdiction of the judge over a solicitor who has been guilty of misconduct in the course of the case is clearly recognised and laid down. It is not necessary to read the judgments in that case, because the headnote accurately states their effect. In *Re Hulm & Lewis* (5), the headnote says: A

> Where an unqualified person had obtained possession of money and documents by pretending to be a solicitor:—Held, that the court, in the exercise of its summary jurisdiction could order him to deliver up such money and documents, and upon his disobedience could punish him by attachment.

There again you have the inherent jurisdiction of the court exercised in B a summary form. Mathew, J., said, at p. 262:

> The court has, in my opinion, power to deal with the delinquent. He professed to be a solicitor, an officer of the court, and in that capacity obtained possession of money and documents belonging to the applicant. On the supposition that he was a solicitor, an order was made against him at chambers for the delivery to the applicant of the money and documents so obtained. He did not obey that order, C but negotiated in a manner calculated to deceive his supposed client. An application was, in consequence, made for leave to attach him for his disobedience, and then for the first time it was disclosed that he was not a solicitor. *Wilton* v. *Chambers* (6) shows that this is no answer to the order, and, therefore, no answer to the application for an attachment for disobedience to the order.

That is an illustration of the exercise of jurisdiction by the court to protect its duly authorised officers, solicitors on the roll, from imposition D by persons representing that they are solicitors when they are not. In *Simmons* v. *Liberal Opinion, Ltd., Re Dunn* (7), the defendant company did not exist. Although the jury gave a verdict for the plaintiff for £5,000, there was nobody against whom the judgment could be enforced. Sir H. Cozens-Hardy, M.R., on pp. 970 and 971, said: E

> This is an application in the action of *Simmons* v. *Liberal Opinion, Ltd.* (7) and in the matter of Mr. Dunn, a solicitor, asking that the solicitor should be ordered to pay the plaintiff's costs of the action less the sum of £150 which has been received from a co-defendant, against whom the action has been discontinued upon terms.

Then: F

> On Nov. 14 the plaintiff's solicitors, Messrs. Lewis & Lewis, wrote to Mr. Dunn a perfectly proper letter, saying that they had made exhaustive search and could not find that there was any such company as Liberal Opinion, Ltd. That was replied to by a letter of the 15th, which I can only describe as impertinent and improper. It invited Messrs. Lewis & Lewis to continue their research. The action came on for trial on Jan. 18 and 19. G

Then the judge states the verdict. Then:

> In my opinion the proceedings in the action have been futile, and the costs incurred by the plaintiff have been absolutely thrown away by reason of the appearance entered by Mr. Dunn for a non-existing corporation.

Then he says at the end of his judgment: H

> I think we have jurisdiction to order Mr. Dunn to pay the plaintiff's costs of the action (less £150), and that we ought to exercise this jurisdiction.

That series of cases shows that the judge had jurisdiction here to deal with the application made on behalf of the plaintiffs, and that he was wrong in coming to the opinion that he had no jurisdiction.

The other ground of objection to the jurisdiction which was taken on behalf of the two solicitors was that, under modern procedure, the proper course was to proceed before a divisional court upon affidavits asking for some form of order. What that form of order was was not stated by counsel for the respondents here, and, when I ventured to ask what
A was the appropriate form of application, I could not obtain a clear answer. But, in my view, there is no question of procedure which affects the judge's jurisdiction to deal with the matter. The summary jurisdiction which he possessed over the solicitors as officers of the court is, for the reasons I have already given, clear. Having that jurisdiction,
B I think it was for him to exercise his own discretion as to the appropriate procedure for ensuring that the solicitors, who were in the position of respondents to the application, had due notice of what the claim was against them, and sufficient opportunity to meet the claim in any way that it was reasonably necessary for them to do. But those principles
C do not touch the jurisdiction of the judge to hear the case, and do not help the respondents in their attempt to answer this appeal. The conclusion I reach is that the judge was wrong, that his decision must be set aside, and that the case must go back to him to deal with, in such a manner, and according to such procedure, as he thinks proper, ensuring,
D of course, that the two solicitors know what the case is against them, and have a sufficient opportunity of meeting it. Whether the judge should order affidavits, whether he should direct oral evidence, how far he can properly refresh his mind from his notes of the hearing of the case, and dispense with additional or new evidence to prove facts which
E were already established in the course of the proceedings, will be all matters for him to consider, and I do not think we should say anything at all on the merits, or as to the form of procedure which he should adopt. The appeal will be allowed with costs, and the costs of the previous inquiry should be left to the discretion of the judge when he deals with the
F new inquiry.

SWIFT, J.: In this case directly the jury had returned their verdict, counsel for the plaintiffs applied to the judge for an order to the effect that Mr. Thomas Griffiths and Messrs. Ralph Wood & Co. should
G personally pay the costs to which his client had been put, owing to what was alleged to be their improper conduct during the progress of the case. Instead of deciding the matter there and then, as he might well have done, GREAVES-LORD, J., in consideration for those against whom the application was made, said: "I will not hear this application now. I will
H postpone it. Bring it before me on some other date." The exact language which he used I do not know, because I have not any transcript of the shorthand note. Whether he said, "Give notice to the solicitors," whether he said, "Put it down as a motion," or whether he merely adjourned it for further consideration at some later date, I cannot tell, and I think it is quite immaterial. Obviously he was postponing the

application which was being made by the plaintiffs until there should be given ample opportunity to the solicitors against whom the application was being made of putting in an answer to the charge which was being suggested against them, of having acted improperly in the course of the trial which the judge had been dealing with. The matter came before him again on Mar. 15, on notice of an application which set out in very great detail the allegations which were being made by the plaintiffs against the two respondent solicitors, or firms of solicitors. It is dated Mar. 6. I should have thought that nobody could have had much doubt as to what was being said against them, when they read that notice of application. If there was no more than that, I should have thought that the judge would have had no difficulty in dealing with it one way or the other, but it is now said that it was insufficient, because there should have been an affidavit. It has been solemnly argued in this court that this is a notice of motion, and that a notice of motion can be supported only by an affidavit verifying the facts upon which it is based. I very much doubt whether this is a notice of motion at all. I am quite certain that no notice of motion was necessary. All that was required to be done was what was done. An application having been made to the judge in open court, he said: " Well, it is not convenient to deal with it now. Make this application to me again later, and give notice to the other side as to the date upon which you are going to apply." I think in that he was acting with perfect propriety. The matter came before him on Mar. 15, and he dealt with it from Mar. 15 to Mar. 17. He heard some opening statement, and possibly—I do not know, as the proceedings are not before this court—some evidence, as to what it was alleged the solicitors had done, or had failed to do. I know nothing at all about the merits of the application. That has nothing to do with me. But the judge, having listened for some time to the case, then had submitted to him on behalf of the two respondent firms of solicitors two propositions: first, this was a motion which ought to have been supported by affidavit—which I have already dealt with—and, secondly, that you cannot deal with these two solicitors: you have no jurisdiction, because they are not at the present time solicitors on the record, the truth being that Mr. Griffiths had ceased to be on the record in this action of *Brendon* v. *Spiro* on Feb. 18, and that Messrs. Ralph Wood & Co. had ceased to represent the Scottish Gas Utilities Corpn., Ltd., on Feb. 22, because the Scottish Gas Utilities Corpn., Ltd., had ceased to exist, and on Feb. 25, which was the end of the first day's trial, Messrs. Ralph Wood & Co. ceased to represent Maclean & Henderson although they continued to represent Underhill. It was said that, as they have gone from the record, or have gone from the record in so far as any allegation of impropriety is made against them, the court has no jurisdiction to deal with them. Having heard that argument presented to him by Mr. Burrows and Mr. Eddy, the judge, in my opinion, erred. He was wrong in accepting the contention which they made to him. I do not

think that the court loses its inherent jurisdiction to control its officers, amongst whom solicitors are to be numbered, merely because, after they have done something which it is alleged they ought not to have done, they have ceased to be either officers of the court altogether, or officers concerned in the particular matter with which they were dealing.
A SCOTT, L.J., has referred to, and indeed has read, *Simes* v. *Gibbs* (2), which is of no less authority because it is ninety years old. To my mind, that case is conclusive of this matter. There have been many occasions since, in the cases to which my Lord has called attention, in which the disciplinary power of the court over solicitors has been considered, but
B the judgment of PATTESON, J., has never been assailed, and, to my mind, it expresses exactly what is the law to-day. Adopting that, following it, convinced that it is right, I have come to the conclusion that GREAVES-LORD, J., erred when he said that he had no jurisdiction, and I think the matter must go back to him in order that, with that erroneous impression
C removed from his mind, he may deal with this case upon its true merits.

He has said there is something to be inquired into. I believe, from reading his judgment, that he has not inquired into it. He saw enough to make him think that there was something to be inquired into, and then he thought he was barred from holding the inquiry. In the opinion of
D this court, he was not so barred, and he should hold the inquiry which he thinks ought to be held. How he will do it is, to my mind, entirely a matter for him. I agree with SCOTT, L.J., that it is not for us to lay down the procedure which he should adopt. I therefore agree with SCOTT, L.J., that this appeal should be allowed and the case should go
E back again to be dealt with according to law.

Appeal allowed with costs.

Solicitors: *Smith & Hudson*, agents for *T. R. McCready*, Plymouth (for the appellants); *Thomas Griffiths* (for the respondent, Griffiths); *R. Wood, Finer & Co.* (for the respondents, Ralph Wood & Co.).

F [*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Re T. N. FARRER, LTD.

[CHANCERY DIVISION (Simonds, J.), **March, 17, 18, 24, 1937.]**

G *Companies—Directors—Governing director—Contract of service—Articles of association—Termination of employment—Liquidation of company.*

By the articles of association of a private company, it was provided that one of the signatories of the memorandum and articles of association was to be the governing director of the company for life, or until he should resign or be removed by special resolution. Subsequently an
H extraordinary resolution of the company was passed, by which it was resolved that the company should be wound up voluntarily. The governing director voted in favour of the resolution. The liquidators, having assumed office, neither employed nor remunerated the governing director. In a claim for damages for an alleged breach of the governing director's contract of service:—

HELD: (i) in the absence of any evidence to the contrary, the governing director must be regarded as holding office on the terms of the articles, and it was an implied term of his contract of service that his employment was conditional upon the continued existence of the company. There had, therefore, been no breach of contract.

(ii) as the governing director was employed on terms under which it was competent for the company at any moment to dismiss him, he could not recover damages, even if there had been a breach of his contract of service.

[**EDITORIAL NOTE.** The articles provided for the termination of the duties of the governing director by special resolution or resignation. Otherwise his appointment was stated to be for life, but this, it is held, must be qualified by a term that the office could continue only so long as the company existed as a going concern. The office was therefore liable to termination by the commencement of a voluntary winding up.

As to Dismissal by Winding up, see HALSBURY, Hailsham Edn., Vol. 5, pp. 345, 346, para. 569 ; and for Cases, see DIGEST, Vol. 9, pp. 536, 537, Nos. 3528-3534.]

Cases referred to :

(1) *Re Anglo-Austrian Printing & Publishing Union, Isaacs' Case*, [1892] 2 Ch. 158 ; 9 Digest 450, *2922* ; 66 L.T. 593.

(2) *Fowler* v. *Commercial Timber Co., Ltd.*, [1930] 2 K.B. 1 ; Digest Supp. ; 99 L.J.K.B. 529 ; 143 L.T. 391.

(3) *Re South Western of Venezuela (Barquisimeto) Ry.*, [1902] 1 Ch. 701 ; 9 Digest 461, *2996* ; 71 L.J. Ch. 407 ; 86 L.T. 321.

Application that the decision of the liquidators of T. N. Farrer, Ltd., rejecting the applicants' proof to the extent of £3,587, might be reversed. The facts are set out in the judgment.

H. A. H. Christie, K.C., and *J. G. Strangman* for the applicants : The position is not analogous to that of an employee who relies upon the value of his services, but it is a case where a man, by contract, had a control. It was part of his contract that he should have a certain voting power. He was entitled to use it for his own benefit and he could only be deprived of the benefit of his contract with the company by some act of his own. The company *qua* company has no means to deprive him of that right.

C. E. Harman, K.C., and *J. B. Lindon* for the liquidators.

Simonds, J. : This is an application by Mr. Frank Herbert Marlow and Mr. Percy Edward Marlow in the winding up of T. N. Farrer, Ltd. They ask that the decision of the liquidators rejecting their proof in the liquidation to the extent of £3,587 may be reversed. My judgment is concerned only with £3,300, part of the £3,587. The residue of that sum arises out of a different claim. The applicants are, and claim as, the assigns of one Mr. Gilbert Arthur Jell, and though at first some point was taken as to the validity or effect of the assignment under which they claim, it was not insisted on, and I accordingly treat the applicants as entitled to assert whatever rights their assignor had. The claim for £3,300 rejected by the liquidators with which I have to deal is, in the applicants' proof, described as " Claim for compensation for loss of office of managing director." The word " managing " was a slip for "governing," for the office held by Mr. Jell was that of governing director. But nothing turns on this distinction. The company was incorporated in 1918 to acquire as a going concern the business then carried on under the name of T. N. Farrer. From the articles it appears that an agreement was entered into by the company with Mr. Gilbert Arthur Jell, who was no doubt the proprietor of the business. The articles adopted Table A, except as therein provided, but included the necessary provisions to make the company a private company, and also included an article dealing with Mr. Jell's position, which is of importance in this case. By art. 12 it was provided that Mr. Jell should, notwithstanding cl. 77 of Table A, be the governing director of the company for life, or until he should resign or be removed by special resolution, and that cl. 68 of Table A should not apply. It was by the same article further provided that, while he retained the said office, he should have in effect plenipotentiary powers and that his remuneration as governing director should be at the rate of £300 a year. Mr. Jell was a signatory of the memorandum and articles of association, and from the incorporation of the company until its liquidation he acted as its governing director, exercising the powers and receiving the remuneration prescribed by the articles. On Oct. 17, 1934, an extraordinary resolution of the company was passed, by which it was resolved that the company should be wound up voluntarily and that Mr. Frederick Sidney Parsons be appointed liquidator. Subsequently at a meeting of creditors Mr. Thomas Fleming Bride was appointed liquidator jointly with Mr. Parsons. Mr. Jell voted in favour of the resolution for winding up. He in fact held the whole of the issued shares by himself or a nominee, and no such resolution could be passed without his assent. The company was in a financial situation in which liquidation was the only honest course to take. The liquidators, having assumed office, forthwith dispensed with the services of Mr. Jell; they neither employed nor remunerated him. Accordingly the present applicants, having had assigned to them his rights, whatever they were, against the company, made their claim in the liquidation for, *inter alia*, the sum of £3,300 in the terms which I have already set out. The liquidators, on Dec. 3, 1936, rejected this claim on the ground that Mr. Jell was not entitled to claim compensation for loss of office, and on another ground which was afterwards withdrawn.

I have, I think, stated the whole of the relevant facts, and the single question is whether, in such circumstances, Mr. Jell is entitled in the liquidation to claim damages for breach of his contract of service. His claim is expressed to be for compensation for loss of office, but this is an inaccurate way of stating a claim which, if it rests on anything, must rest on some contract which has been broken to his damage. First, then, what was the contractual relation between Mr. Jell and the company? I have no doubt that Mr. Jell, having signed the memorandum and articles, and having assumed the office of governing director and held it for some 16 years, must, in the absence of any evidence to the contrary, be regarded as holding office on the terms of the articles. It is from them alone that the terms of his contract of service can be ascertained: see *Re Anglo-Austrian Printing & Publishing Union, Isaacs' Case* (1). I have used the phrase "contract of service," though in some connections a director, and particularly a governing director, may not be regarded as a "servant" of the company. It is, however, a sufficiently appropriate description for the present purpose. Secondly, what was the result of the liquidation on Mr. Jell's contract of service? Again, I have no doubt that the result of the liquidation was to put an end to the contract. It is not necessary for me to determine whether the resolution for winding up automatically put an end to Mr. Jell's contract, though some authority might be found for that view in the judgment of Greer, L.J., in *Fowler* v. *Commercial Timber Co., Ltd.* (2), at p. 6. But whether that is so or not the same case shows, if it is necessary to cite authority for it, that a resolution, followed by such action of the liquidator as was here taken, must operate as a determination of a governing or other director's service. Now he is debarred from making a claim, if it is otherwise valid, by the fact that he has himself supported the resolution.

Thirdly, the questions arise, such being the contract and such its termination, has there been a breach of contract by the company, and, if so, what, if any, damages are recoverable? It is, in my opinion, necessary to distinguish between a case like the present one, in which the contract is constituted by the articles, and the governing director has assumed office in accordance with them, and a case where, apart altogether from the articles, the company and the director have entered into an independent agreement. In the latter case, if the period of service is for a fixed term, or for the life of the director, it will be a matter of construction in each case whether a provision is to be implied limiting the employment to the term of the company's active existence, so that, if the company is wound up during the fixed term or during the life of the director, he will nevertheless have no claim by reason of the termination of his service, and as a matter of construction it may well be difficult to import such a provision into such a contract. But where the terms of the contract are to be found only in the articles, it appears to me to be reasonably clear that a condition of the continued employment of the director must be the continued existence of the company. No case has been brought to my notice where a director, having no agreement with the company outside the articles, has claimed, much less been held entitled to receive, damages because his period of office has been brought to a premature end by the winding up of the company. On the contrary, such cases as *Re South Western of Venezuela (Barquisimeto) Ry.* (3) appear to me to be inconsistent with the maintenance of such a claim. On this ground alone—namely, that the employment of the governing director was, as a matter of contract, limited to the active life of the company—I should uphold the decision of the liquidators and dismiss the application. I should, however, add that the same result may be reached by a consideration of the damages resulting from a breach of contract, if there were a breach, for, if the terms of the contract are to be found in the articles, they must include the term that the governing director may be removed by special resolution of the company and, I think, also the term that his tenure of office must always be subject to the relevant articles themselves being altered under the statutory power.

In effect, therefore, Mr. Jell was employed on terms, under which it was competent for his employer, at any moment, to dismiss him. I do not think I can speculate on the probability or improbability of the right of dismissal being exercised. It appears to me impossible to hold that a servant can, on the termination of his contract of service, however it may be terminated, recover damages by reason of such termination from a master who can at any moment dismiss him. I therefore dismiss, with costs, the application so far as it relates to the sum of £3,300. I should, perhaps, add that, having decided that no damage is recoverable, I have not thought it necessary to discuss the amount which might, in another view, be recoverable, but I must not be taken as assenting to the proposition that £3,300 could be recovered. That seems to me to be, in any view of the case, an excessive amount.

Solicitors: *Langford, Borrowdale & Thain* (for the applicants); *Robinson & Bradley* (for the liquidators).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

HOWARD *v.* ODHAMS PRESS, LTD.

[COURT OF APPEAL (Greer, Slesser and Greene, L.JJ.), **February 15, 16, 17, March 22, 1937.**]

Contract—Illegality—Public policy—Undertaking not to disclose to trade union a member's confession of wrongdoing—Measure of damages.

Extensive frauds were being carried out on certain newspapers which promoted prize competitions. A sorter, who had been in the employ of the proprietors, and was, as a condition of his employment, a member of the appropriate trade union, made a written statement to the proprietors implicating himself and others in the frauds. A condition of the agreement was that the contents of the statement should not be divulged to any third party. The defendant company later forwarded the statement to the plaintiff's trade union, and the plaintiff was expelled, in consequence of which he was unable to obtain further employment. In an action for damages for breach of the agreement:—

HELD: (i) the agreement was contrary to public policy and therefore invalid.

(ii) on the assumption that the agreement was a valid one, any loss suffered by the plaintiff was due to his own wrongful act, and he would be entitled only to nominal damages.

[EDITORIAL NOTE. An agreement to take precautions to prevent a man committing a crime is not against public policy. The question in the present case is whether the agreement here under consideration was of this nature or whether it was an agreement to prevent the public knowing that crimes had been or would be committed. It is held that the agreement is of the latter nature, and also that, if the other view were taken, the damage suffered by the plaintiff arose from his own wrongful acts.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 7, p. 161, para. 230; and for Cases, see DIGEST, Vol. 12, pp. 256-263, Nos. 2091-2154.] A

Cases referred to:

(1) *Weld-Blundell* v. *Stephens*, [1919] 1 K.B. 520; [1920] A.C. 956; 17 Digest 114, *237*; 89 L.J. K.B. 705; 123 L.T. 593.

(2) *Egerton* v. *Brownlow (Earl)* (1853), 4 H.L. Cas. 1, 12 Digest 240, *1971*; 23 L.J. Ch. 348; 21 L.T. O.S. 306.

(3) *Williams* v. *Bayley* (1866), L.R. 1 H.L. 200; 12 Digest 92, *567*; 35 L.J. Ch. 717; 14 L.T. 802. B

(4) *Collins* v. *Blantern* (1767), 2 Wils. 341; 12 Digest 260, *2122*.

(5) *Keir* v. *Leeman* (1846), 9 Q.B. 371; 12 Digest 260, *2129*; 15 L.J. Q.B. 360; 7 L.T. O.S. 347.

(6) *Windhill Local Board of Health* v. *Vint* (1890), 45 Ch.D. 351; 12 Digest 260, *2127*; 59 L.J. Ch. 608; 63 L.T. 366. C

(7) *Brown* v. *Brine* (1875), 1 Ex. D. 5; 12 Digest 253, *2075*; 45 L.J. Q.B. 129; 33 L.T. 703.

(8) *Crampton* v. *Green* (1848), 10 L.T. O.S. 442; 12 Digest 262, *2147*.

(9) *Lound* v. *Grimwade* (1888), 39 Ch.D. 605; 12 Digest 263, *2152*; 59 L.T. 168.

(10) *Neville* v. *London "Express" Newspaper, Ltd.*, [1919] A.C. 368; 17 Digest 155, *560*; 88 L.J. K.B. 282; 120 L.T. 299. D

(11) *Burrows* v. *Rhodes*, [1899] 1 Q.B. 816; 42 Digest 980, *112*; 68 L.J. Q.B. 545; 80 L.T. 591.

(12) *Bradstreets British, Ltd.* v. *Mitchell*, [1933] Ch. 190; Digest Supp.; 102 L.J. Ch. 34; 148 L.T. 111.

Appeal from a decision of Porter, J., dated Apr. 24, 1936, and reported in [1936] 2 All E.R. 40. The facts are set out in the judgments. E

R. O'Sullivan, K.C., and *B. M. Cloutman* for the appellant.

Gilbert Beyfus, K.C., and *Valentine Holmes* for the respondent company.

O'Sullivan, K.C.: The defendant company acted as it did in bad faith and in breach of its agreement, with the intention that what did in fact happen should happen—that the branch of the trade union should take disciplinary action and expel the plaintiff. An agreement to indemnify a man against the results of a criminal act is invalid; but here there was no connection between committing a misdemeanour and the plaintiff's losing his job. In *Weld-Blundell* v. *Stephens* (1), which was followed in *Bradstreets British, Ltd.* v. *Mitchell* (12), it was decided that a man cannot recover the consequences of his wrongful act. But where there is a breach of contract the case is different. The plaintiff is entitled to recover unless it can be proved that the sole reason for expelling him from his trade union was the crime to which he had confessed, and that was not the offence with which he was charged. F G H

Cloutman followed for the appellant.

Beyfus, K.C.: A criminal wrong was committed, not a civil wrong; that is a vital distinction. Any agreement tending to affect the course of justice is void. There is no distinction between a felony and a misdemeanour, and the *bona fides* of the parties is wholly immaterial. Even a compromise of proceedings not criminal, such as an indictment for obstruction of a highway, and one that is sanctioned by the judge at the trial, is void as being against public policy: see *Windhill Local Board of Health* v. *Vint* (6); *Williams* v. *Bayley* (3); *Keir* v. *Leeman* (5); and *Crampton* v. *Green* (8). This case is wholly analogous to *Weld-Blundell* v. *Stephens* (1). Whether the plaintiff's expulsion flowed from his own misconduct or not, he is not entitled to recover. All the loss he suffered was the result of his own wrong.

Cloutman, in reply: A contract not to disclose is not against public policy. In any criminal trial the document would be inadmissible; it was a confession obtained by a person in authority as a result of inducements. A bargain not to do what in any event the criminal law would not allow a man to do cannot be objectionable.

GREER, L.J. [read by SLESSER, L.J.]: The appellant appeals on the ground that the finding that he was entitled only to nominal damages was wrong, and he asks for judgment against the respondent company for £400, which the judge estimated he would be entitled to if his finding that only nominal damages were recoverable was held to be wrong. The appellant's claim was a claim for damages for breach of a contract, whereby the respondent company, through its agent, a Mr. Cook, undertook not to use in any way against the appellant the contents of a written statement dated Feb. 26, 1934, which he had made to Mr. Cook, and undertook that the contents of the document would not be divulged to a third party by Mr. Cook or by anyone present at the taking of the statement. The statement involved a confession by the appellant of fraudulent practices in connection with cross-word competitions. The respondent company gave notice of cross-appeal, claiming that the judge was wrong in deciding that the appellant was entitled to any damages whatsoever, on the ground that the alleged agreement was void as contrary to public policy.

The appellant is a workman in the printing trade, and, until he lost his membership, as hereinafter stated, he was a member of the National Union of Printing, Bookbinding and Paperworkers, a union which is an important and powerful body, comprising in its membership nearly all the workers engaged in printing, bookbinding and paper works. It is not only an important and powerful union, but it is also a union the membership of which is equivalent to a testimonial for honesty and respectability. The respondent company is the printer of two papers called *The People* and *The Daily Herald*. It was proved in evidence that the respondent company had for several years organised competitions, in which large prizes were awarded to competitors who sent correct solutions to cross-word puzzles. Up to some date in 1932, the company had employed the appellant as a sorter in its competition department.

The sorters' work gave them an opportunity, if they were inclined to be fraudulent and dishonest, of cheating their employers and the real winners of the competition by putting amongst the letters to be sorted a letter containing the correct solution after they had ascertained what the predetermined correct solution was. The respondent company, having received anonymous letters which made it suspect that this A
fraudulent cheating was going on amongst the sorters employed by it, decided to cause inquiries to be made so that it would be able to deal with those sorters who were ascertained to be guilty of those fraudulent practices. Through a private inquiry agent named Bunn, who had been a police officer, they got into touch with the appellant and his B
wife. Mr. Cook, who was acting on behalf of the respondent company, seems to have come to the conclusion that the appellant could help to discover which of the company's employees had taken part in the swindling. Before the document of Feb. 26 was obtained from the appellant and his wife, they had orally made a communication to Mr. C
Cook to the same effect, without any stipulation that the information so orally given was to be kept secret, but Mr. Cook wanted the statement reduced into writing. The appellant and his wife agreed to put their statement into writing, subject to the provision as to secrecy hereinafter mentioned. In para. 3 of the written statement, the appellant D
admitted that he assisted a man named George Wood in a fraud whereby Mrs. Wood was able to put forward a false claim to a prize of £1,000, offered by *The Daily Express*, in whose employment the appellant was at that time. In his statement, the appellant says Mrs. Wood got the money, and that he received £400 as his share. Para. 4 of the appellant's E
written statement is in the words following:

> In return for this, Wood promised to do a similar thing for me in *The Daily Herald* or *The People* competition, but to date I have received no further money of any kind from him.

It was proved, and was not in dispute, that Mr. Cook, on behalf of the F
defendant company, promised not to use the written statement to the detriment of the plaintiff, and not to divulge it to a third party.

There came a time when Mr. Cook was dissatisfied with the plaintiff's efforts to assist the defendant company in discovering the persons who were carrying on the fraudulent practices in connection with the prizes G
offered by *The People* and *The Daily Herald* for success in their crossword competitions. He accordingly came to the conclusion that, as the plaintiff was not performing his part of the contract, he, Mr. Cook, was free from the obligation of secrecy which he had undertaken with regard to the plaintiff's written statement, and, on Apr. 9, 1934, he H
gave the secretary of the union a copy of the written statement. Thereupon, the plaintiff and a number of other men were summoned to appear before the committee of the branch of the union to which they belonged, and the plaintiff was expelled from the union. On the question as to whether the agreement was invalid, as contrary to public policy, I was

inclined, at the end of the argument, to take the view that, inasmuch as it was an agreement for the purpose of assisting the defendant company to prevent further frauds being committed, it was not against public policy, but was valid, for the reasons given by BANKES, L.J., and SCRUTTON, L.J., in *Weld-Blundell* v. *Stephens* (1), but on consideration
A I have arrived at the conclusion, for the reasons stated by GREENE, L.J., in his written judgment, which I have had an opportunity of reading, that the agreement was invalid, and contrary to public policy.

On the other question, I am of opinion that the judge was right, that is to say, on the assumption that the agreement was a valid agree-
B ment, and the defendant company disclosed the plaintiff's confession in breach of its agreement, the judge was right in awarding only nominal damages, because the damages the plaintiff sought to recover were due to his own wrongful act, that such act was the *causa causans* of the damage suffered by him by losing his membership of the union, and the
C defendant company's wrongful disclosure of the confession was only the *causa sine qua non.* For reasons such as those which commended themselves to the Court of Appeal and to the House of Lords in *Weld-Blundell* v. *Stephens* (1), I think PORTER, J., was right in deciding that the *causa causans* of the plaintiff's damages was his own wrongful act,
D and that the disclosure of the confession was only the *causa sine qua non.* SLESSER, L.J., will cite, in his judgment, which I have had an opportunity of reading, the words of LORD SUMNER, LORD DUNEDIN, and LORD WRENBURY in *Weld-Blundell* v. *Stephens* (1), which show that their Lordships took the same view on the question of damages as had been
E taken in the Court of Appeal. For these reasons, I agree that the appeal should be dismissed with costs, and that the cross-appeal should be allowed with costs.

SLESSER, L.J.: The judge has come to the conclusion that the
F contract between the plaintiff and the defendant company, whereby, in consideration of its secrecy, he gave it certain statements, is enforceable at law, but he has further come to the conclusion that no damage other than nominal follows from that breach. On this view, as to the quantum of damage, the plaintiff appeals, but the defendant company cross
G appeals, and says that in law the whole agreement is illegal, as being an agreement, to quote the words of LORD LYNDHURST in *Egerton* v. *Brownlow* (*Earl*) (2) at p. 163:

> having a tendency . . . to affect the administration of justice.

H To decide this preliminary question, thus raised in the cross-appeal, it is necessary first to form a judgment as to the exact scope and intention of the written statement which the plaintiff signed. It is clear, in the first place, that it speaks not only of past swindling done by the plaintiff and others, but also, in para. 4, of proposals to continue a similar iniquity in *The Daily Herald* and *The People* competitions, and in the case of the radio prize. The competition swindle, as it is called, is explained and is said to be being presently worked by at least three schools in *The Daily Herald* and *The People* competition department staffs, and, it is further alleged, there is an organization continuing for arranging accommodation addresses. It impliedly contemplates, also, a concealment of the facts of the fraud, so far as they appear in the statement, from the proprietors of other newspapers who had been cheated, such as the owners of *The Daily Express*. On these facts, I think that the case falls within the observation of Warrington, L.J., in *Weld-Blundell* v. *Stephens* (1), at p. 533, to the effect that:

> if the document in question revealed a contemplated crime, the commission of which its disclosure might prevent, I think there would be a duty owing to the public which would override any private obligation.

The view there expressed, though *obiter* in that case, seems to me to be right on general principle, and consistent with authority. The perversion of the administration of justice may take place in many different ways. The concealment, or procuring the concealment, of a felony known to have been committed, is misprision, which is a misdemeanour at common law: Hawkins, Vol. 1, chap. 20, p. 59; Coke's Institutes, Vol. 3, p. 139; but, apart from this, an agreement not to prosecute, or to stifle a prosecution, is unenforceable, for, in the language of Lord Westbury, in *Williams* v. *Bayley* (3) at p. 220:

> if you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. . . . If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed.

The principle has been extended to agreements between a prosecutor and persons indicted, that a proposed witness should not give evidence at a trial for reward: *Collins* v. *Blantern* (4). As is there said by Wilmot, C.J., at p. 350:

> This is a contract to tempt a man to transgress the law, to do that which is injurious to the community; it is void by the common law.

So, also, an agreement to compromise pending legal proceedings is illegal if the offence be of a public nature: *Keir* v. *Leeman* (5) and *Windhill Local Board of Health* v. *Vint* (6). In this latter case, there are observations both by Cotton, L.J., and by Fry, L.J., which are important, having regard to the argument which is here addressed to us on behalf of the plaintiff, that this information given to the defendant company would be of public benefit, in that it would enable it to stop further frauds (although, as was stated in the evidence, Mr. Cook told the plaintiff that it might hurt Odhams if the public knew that there were frauds in connection with the competitions, and that the company was very desirous that the frauds should be kept secret) and so serve the public interest. But, even accepting the view that it might be said that it was in the public interest that the statement should be made, it is important to have regard to what Cotton, L.J., says in the *Windhill* case (6), at p. 363 :

> The court will not allow as legal any agreement which has the effect of withdrawing from the ordinary course of justice a prosecution when it is for an act which is an injury to the public. It would be the case of persons taking into their own hands the determining what ought to be done ; and that ought not to be taken into the hands of any individuals even if they are a *quasi*-public body like the plaintiffs here, but ought to be left to the due administration of the law, and to the judges, who can determine what in the particular case ought to be done.

And Fry, L.J., said, at p. 365 :

> It is said that the principle does not apply where the benefit secured by the agreement is a benefit to the public, and not to some private individual. I am of opinion that no such exception can be made. . . . I do not think that the prosecutor is at liberty to weigh the advantage to the public in continuing the prosecution against the advantage of some sum of money . . . or of something else being done for the public, and that he has no right to put those two things into the balance and determine in favour of the one as against the other.

It may be said that the particular facts on which this agreement is said to be illegal are not those, precisely, of stifling a prosecution, or compounding a crime, but the agreement would, in my opinion, have the necessary effect of restricting the opportunity which the defendant company and others might otherwise possess of assisting the authorities in the investigation of, and, if necessary, in the prosecution of, the alleged crimes. Perhaps one of the decided cases nearest to the present, one in which it has been held that an agreement in consideration that, if a defendant would not expose and make public the conduct of the plaintiff in adultery, he would not sue on a bond, is to be found in *Brown* v. *Brine* (7), where, the court holding such an agreement to be illegal, Cleasby, B., said, at p. 7 :

> The consideration for the promise to give up a bond must either be a benefit to the promisor or some prejudice to the promisee. What is the benefit in this case ? It is the benefit derived from the deceased keeping certain events secret, and that is the same thing as depriving the public of the knowledge of the truth, and of the opportunity of acting upon it. It is only, therefore, a benefit to the plaintiff so far as it would be material to the public to know the circumstances.

In the same case, Kelly, C.B., said :

> The forbearance to commit such a breach of duty cannot be made the consideration for a promise.

In *Crampton* v. *Green* (8), it was held that a promise not to give evidence before the House of Lords in relation to a certain line of railway without the consent of certain parties was illegal. In the language of Patteson, J., at p. 442 :

> The words are, that he will not give evidence. If, therefore, the Speaker issued his warrant for his examination on the other side, he must run away.

Finally, on this head, I would mention *Lound* v. *Grimwade* (9), where A. gave B. a bond to secure £300, the evidence showing that the consideration included an agreement that certain criminal proceedings against him should be conducted in such a way either that A.'s name should not be mentioned, or that, if mentioned, he should be exonerated from all blame in connection with the proceedings. STIRLING, J., quotes LORD LYNDHURST in *Egerton's* case (4), in the passage to which I have already referred, and adds, at p. 612 :

> Upon this principle it has been repeatedly held that agreements tending to affect the course of legal proceedings are illegal, even though those proceedings may not be strictly criminal in their nature.

A

A fortiori, if they are criminal. Counsel for the plaintiff, however, relied upon certain observations of SCRUTTON, L.J., in the *Weld-Blundell* case (1). SCRUTTON, L.J., following WARRINGTON, L.J., in pointing out that in that case there was no reason to suppose that the libel involved criminality, added, at p. 539 : B

> I do not think it necessary in this case to consider whether a plaintiff who has committed an act punishable criminally can ever recover damages based on his liability for that criminal act. . . . I do not at present see that an agreement to take precautions to prevent a man committing a crime is in any way contrary to public policy.

That *dictum* does not seem to me to apply in the present case for, on Mr. C Cook's admission, the statement was agreed to be kept secret in order not to hurt Odhams by the publicity which a disclosure to the police or the public might bring about. This statement, obligatory of secrecy, was to be concealed not only in order not to expose an existing crime, but also, I think, because it did tend to discourage the revelation of D contemplated crime, though possibly not committed by the plaintiff. Its motive was primarily to protect the reputation of the defendant company, which might well suffer from exposure of the facts, and I see no reason, on the evidence of Mr. Cook, to come to any conclusion other than that, if the prevention of further crime had involved such E public exposure, he would have hesitated to inform the police, and so possibly have defeated his primary object of concealment. At any rate, I think, on the facts of this case, it is impossible to say that any public policy of prevention of crime countervailing the *prima facie* illegality of the contract can be established, and I do not view the agreement as one F to take precautions to prevent a man committing a crime within the meaning of the *dictum* of SCRUTTON, L.J., but rather as an agreement to prevent the public knowing that crimes had been, or would be, committed.

PORTER, J., has come to the conclusion that the agreement was not G unenforceable. He thinks that the condition might impose an obligation to disclose the statement to the police, but appears to disregard the fact that it is not only the plaintiff's past wrong-doing, but also the conspiracy as to continuing and future frauds, which is involved. PORTER, J., does not mention the *dictum* of WARRINGTON, L.J., in the *Weld-Blundell* H case (1). He agrees that an agreement to pay, either directly or indirectly, for non-disclosure of a crime, is against public policy, but here, though there was no actual payment, yet one of the benefits which Mr. Cook derived from the matter was a concealment, which he admitted was very much in the interests of his newspaper. In my judgment, on all the facts, it was in the public interest that nothing should be agreed by the defendant company which might have the effect of preventing the authorities knowing the facts. In my view, PORTER, J., was wrong in holding that this agreement was enforceable in law, and consequently the cross-appeal should succeed.

A In deference to the interesting argument of Mr. Richard O'Sullivan, however, I think it right, although my decision on the question of legality really determines the whole matter, to express an opinion upon his contention that, assuming the agreement to be valid, damages other than nominal should be awarded. PORTER, J., has come to the conclusion B on this matter that the case is covered by the decision of the House of Lords affirming the Court of Appeal in *Weld-Blundell* v. *Stephens* (1), and I agree with him. So far as concerns the House of Lords, the decision was given in part upon a matter which does not here directly arise, namely, the failure of the plaintiff to show that his loss was due to the C wrongful acts of the defendants, there being, in the opinion of the majority of the House of Lords, a *novus actus interveniens* to be gathered from the fact, in the language of LORD SUMNER, at p. 982, that:

> If the damages, of which evidence was given, were not simply caused by the appellant's publication of the libel, they arose in actions directly and immediately brought about by the intervention of Mr. Hurst. . . . The responsibility of Mr. D Stephens ended with Mr. Swift, his partner, who was careless but did not drop the letter intentionally. No authority was given by Mr. Stephens to Mr. Hurst in the matter. It was never intended that he should read or make use of the letter.

But, in addition to this view, LORD SUMNER further points out, as an additional reason, at p. 981:

> E either the sums which the appellant had to pay were the direct result of what he did himself and were self-inflicted injuries, or they were caused not by Mr. Stephens but by Mr. Hurst.

Dealing with the first matter, he says:

> The appellant's liability did not depend on or spring from Mr. Stephens, unless a mere occasion is identified in law with cause. The way in which the appellant must naturally and necessarily state his case seems to me to put this view in a F nutshell. "True it is," he says, "that I libelled Messrs. Comins and Lowe to Mr. Stephens; but, if Mr. Stephens had not lost my letter, they would have known nothing about it, and I should have escaped the consequences of my own wrong-doing." My Lords, what is this but saying in plainer language: "My own act was the *causa causans* of the judgment against me, and Mr. Stephens' omission to be careful was the *causa sine qua non*." From the moment when the libel was published the appellant was under legal liability, and the effect of the action was G merely to ascertain its amount and to compel the appellant to discharge it.

So, here, I think it right to say that, from the moment the plaintiff did the wrongful acts he admits, he was under liability to be expelled from the trade union, and that the effect of the action of the defendant company was merely to prevent him from escaping the consequences H of his own wrong-doing. LORD DUNEDIN, in the *Weld-Blundell* case (1), thinks that the matter had already then been decided in the case of maintenance in *Neville* v. *London "Express" Newspaper, Ltd.* (10) where, in his view, a similar principle was applied. At p. 977, he says, speaking of *Neville's* case (12):

> It was found by the majority in this House that the maintenance of the action

> was wrong against the plaintiff although the maintained action was successful. Once it was successful the natural and probable consequence was that the plaintiff had, as a defendant in action, to pay the sums found due. Yet he was not entitled to recover the same as special damage.

He speaks of the underlying proposition, at p. 976, that:

> no man can claim damages when the root of the damage which he claims is his own wrong. A

And LORD WRENBURY, at p. 998, to the same effect, says:

> Weld-Blundell's liability to pay money to Lowe and Comins, however, arose not from that negligence, but from his own wrongful act in indulging in malicious libel . . . It was not *causa causans* but at most *causa sine qua non*.

A similar view had been expressed by the majority in the Court of B Appeal, where it had been held that the plaintiff could recover nominal damages, and no more, for the breach of the duty to keep secret a letter of instructions, which contained the libel, any further damages being in the nature of an indemnity for the consequences of his own wrongdoing. To sum up, I think, here, that PORTER, J., was right in applying C that principle to the present case. The exclusion of the plaintiff from the trade union, assuming he has been excluded, and his consequent loss of employment, are due to the fact that he had knowingly acted to the detriment of the trade union whose interests, among others, may fairly be said to include the maintenance of honesty among the members D and in their dealings with their employers. In the final result, the cross-appeal succeeds, and the appeal stands dismissed.

GREENE, L.J.: Two questions arise for decision. The first, which is raised upon the cross-appeal, and, logically, must be considered before E the other, is whether the undertaking given by Cook not to disclose the contents of the plaintiff's signed statement is, as the defendant company contends, void, as being against public policy. The second, which is raised by the main appeal, is whether, if the undertaking is a valid one, damages are recoverable for the loss sustained by the F plaintiff by reason of his expulsion from the union, or whether he is entitled to nominal damages only for the defendant company's breach of its undertaking. PORTER, J., decided the first question in favour of the plaintiff. He construed the undertaking, rightly, as I think, as imposing an obligation not to disclose the contents of the statement G to the police, although its primary object was to conceal them from the plaintiff's union. The undertaking, in my opinion, goes further, and, by giving it, the defendant company precluded itself from using any of the information given in connection with any prosecution of the plaintiff or any other guilty parties, for example, by communicating any of its H contents to solicitors or counsel employed in a prosecution of any guilty party, although I agree with PORTER, J., that the undertaking would not cover the case where the defendant company was compellable to testify, or to produce the document by due process of law. PORTER, J., held that the undertaking was merely a promise to keep information secret in return for the revelation of matters which it was in the public interest that the defendant company should know, and he held that it was not void as being against public policy. The second question was decided in favour of the defendant company. PORTER, J., held, upon the authority of *Weld-Blundell* v. *Stephens* (1), that the loss suffered by the plaintiff through expulsion from his union was not caused by the A defendant company's breach of its undertaking, but by his own wrongdoing, and, accordingly, he awarded to the plaintiff nominal damages only. In the event of his view upon this question being incorrect, he assessed the damages at £400, which is the sum for which the plaintiff asks for judgment in the main appeal.

B I will deal first with the question which arises on the cross-appeal. It is, I think, clear that Cook's motive in obtaining the statement from the plaintiff, and in giving the promise of secrecy, without which it could not have been obtained, was a desire to protect the defendant company by putting a stop to the frauds. He had no desire or intention C to place the information obtained in the hands of the police, or to use it in any way for the purposes of a prosecution. I do not, however, think that, in a question whether or not a contract is void as being against public policy, the motives of the parties in entering into it are to be considered. The crucial matter is the tendency of the contract D itself—will it, if carried out according to its terms, operate to the public detriment ? The application of this test to the circumstances of the present case is not easy. The information contained in the statement had already been given verbally without any promise of secrecy on Cook's part. It was only when Cook asked for a statement in writing E that the plaintiff insisted upon the promise. It is not, I think, clear whether that promise, upon its true construction, extends to the information verbally given, although my own view is that it does. But, however that may be, the statement, being in writing, was a valuable document, and, even though, in the circumstances, it probably would F not have been admissible in criminal proceedings against the plaintiff, it would have been extremely useful in the hands of the police, or in those of solicitors or counsel engaged in a prosecution of the plaintiff and the other members of the gang who were in the defendant company's employment. The effect of the promise of secrecy was to sterilise this G document in the defendant company's hands. In the circumstances, however, I doubt whether, if the fraud in question had been directed only against the defendant company, the undertaking would have been against public policy. It is true that, so far as the defendant company alone is concerned, the undertaking applies to frauds already committed H against it by the plaintiff and others, and to such further frauds as might be committed against it before the operations of the gang could effectively be brought to an end. To this extent, the promise may be said to be a promise, not merely not to disclose a statement relating to crimes actually committed, but also not to disclose a statement relating to crimes which might be committed in the future. Bankes, L.J., in *Weld-Blundell* v. *Stephens* (1), said, at p. 528:

> I do not agree that a contract not to disclose the fact that a crime has been committed is necessarily either illegal or against public policy.

In the same case, at p. 533, Warrington, L.J., said:

> If the document in question revealed a contemplated crime, the commission of which its disclosure might prevent, I think there would be a duty owing to the public which would override any private obligation. A

In these passages, the case contemplated is, I think, a more simple one than the present. In the present case, the defendant company, by obtaining the statement, was obtaining something which would be useful B to it, and which it intended to use, for the purpose of preventing the commission of future frauds against itself, and it was only by giving the promise of secrecy that it was able to obtain it. If the matter had stood there, I should have inclined to the view that there was nothing against public policy in the undertaking. But the statement is not a C mere statement as to frauds already committed against the defendant company, or as to possible future frauds against it, which the possession of the statement would enable it, by itself taking action, to prevent. It contained, in addition, the following matters: (*a*) information as to a fraud already committed by the plaintiff and Wood against *The* D *Daily Express*, with which the defendant company had no concern; (*b*) information as to a contemplated fraud in connection with the "Radio" prize, which I do not understand to have been a prize offered by the defendant company; and (*c*) information, of a quite general character, and not confined to the defendant company's competitions, E as to the method of working cross-word competition swindles, a method, if I construe the statement correctly, in regular use. Now, the effect of the promise of secrecy was this. The defendant company was precluded by it from divulging the statement to *The Daily Express* or to any other newspaper concerned, and thus assisting them, by means of F the information which it contained, to prevent the commission of future frauds against themselves, or to secure the conviction of the guilty parties who had defrauded them in the past. Indeed, the defendant company was not concerning itself with any competition but its own, nor did it wish to protect anyone but itself. It may well be permissible G for a person against whom frauds have been, and are intended to be, committed to give a promise of secrecy, in order to obtain information relating to them, which will enable him, by taking steps himself, to prevent the commission of future frauds. I do not, however, think that such a promise ought to be held to be valid where it extends to frauds H committed and contemplated against others, to whom the communication of the information obtained would be of use in preventing the commission of such frauds. The effect of obtaining the statement under cover of the promise was to assist the defendant company, indeed to protect itself, but the effect of the promise was to preclude the defendant

company from disclosing to others written information as to a systematic system of fraud which was said to be regularly put in practice against them. The defendant company was protecting itself, and, as a condition of obtaining that protection, it was leaving others exposed to criminal activities which the disclosure of the statement might bring to an end.
A For these reasons, although the point is, in my opinion, a difficult one, I have come to the conclusion that the promise of secrecy is void as being against public policy. If my opinion on the question raised by the cross-appeal is right, the main appeal cannot succeed. But, as it has been argued at length, it is right that I should express my views upon it.

B Before I consider the questions of law involved, it is necessary to examine certain aspects of the facts a little more closely. Under r. 24 of the union rules, which is headed "Misconduct of Members," it is provided, in para. (2), that :

> any member shall be liable to exclusion from the union and shall forfeit all money
> C paid thereto . . . (*f*) if, having knowingly acted to the detriment of the interests of the union.

It was, I think, clearly under this provision that the plaintiff was expelled, although it appears that the supposed offence in respect of which he was actually summoned before the committee was a different one, involving
D at most a fine under r. 24 (1). It is also, I think, clear that the particular acts detrimental to the interests of the union which led to his expulsion were the frauds, actual and contemplated, in which he had personally been concerned with Wood, who was also a member of the union, and was expelled at the same time. The position, therefore, was that, by
E being concerned in these frauds, he had put himself in a position in which, according to his contract of membership, he was liable to suffer deprivation of his contractual rights by expulsion. This liability was the result of his own wilful acts, and it arose the moment that he committed them. The effect of the defendant company's breach of contract was to bring
F to the knowledge of the union the facts giving rise to this liability, and thus to place the union in a position to enforce it. It is said, on behalf of the plaintiff, that the loss which he suffered is not only the natural and probable result of the defendant company's breach of contract, but also was actually contemplated by the parties as likely, if not certain,
G to occur ; that, although a man cannot, in the shape of damages for breach of contract, claim an indemnity for the loss occasioned by his own crime or wilful tort, this rule has nothing to do with causation of damage, but is a substantial rule of law, and is, moreover, confined to cases where the damage suffered is that occasioned by legal proceedings
H by way of prosecution or an action for damages (as the case may be), and, in any event, does not extend to cases where the damage suffered resulted from a breach of contract or some diminution of contractual rights. It is necessary, at this stage, to examine two decisions of the House of Lords which bear closely upon these questions. The first is *Neville* v. *London "Express" Newspaper, Ltd.* (10). In that case, the

plaintiff sued the defendant company for damages for its maintenance of an action of deceit, which had been successfully brought against him by a number of individuals. The House held, by a majority, that an action for damages for maintenance will not lie in the absence of proof of special damage, but all members of the House concurred in holding that the loss suffered by the plaintiff in having to pay damages to the persons defrauded could not be treated as damages consequential on the maintenance of the action in which they were recovered. It is instructive to see the reasons given for this opinion. Lord Finlay, L.C., at p. 380, says this : A

> In the present case there is no damage. The plaintiff, it is true, has had to repay money which he had obtained by fraud and to pay costs in respect of his having resisted payment. It cannot be regarded as damage sufficient to maintain an action that the plaintiff has had to discharge his legal obligations or that he has incurred expenses in endeavouring to evade them. B

Lord Atkinson, speaking of the loss caused by a successfully maintained action to recover a debt or damages, said, on p. 395 : C

> The invasion of this right [the right not to be harried by maintained litigation] does not create the liability [to pay the debt or damages] in either case. It existed independently of it. . . . It appears to me that a debt which a debtor is forced by litigation to pay cannot properly be called damages. . . .

I read the decision on this point as one based, and based only, on the proposition that the damage alleged did not flow from the breach of contract. I do not accept the view that the principles enunciated in it are to be limited to cases where the damage complained of is caused by the recovery of a judgment for debt, or for damages for tort, although these were the examples which were specifically referred to. Nor, in view of what is said in the case to which I shall next refer, can I treat this decision as limited to actions in which damages for maintenance are claimed. I may adapt the words of Lord Atkinson, which I have quoted above, to the circumstances of the present case, by saying that the defendant company's breach of contract did not create the plaintiff's liability to lose his contractual rights as a member of his union. That liability existed independently of the defendant company's breach of contract. D E F

The other case is *Weld-Blundell* v. *Stephens* (1), and I shall confine myself to a short examination of the opinions of the noble and learned Lords who formed the majority in that decision. The plaintiff had written a libel which, by reason of the carelessness of the defendant, his professional adviser, had been picked up by a third party, one Hurst, and shown by him to the individuals libelled. No question arose in the House of Lords as to the existence of an implied obligation on the defendant to keep secret the plaintiff's private letter to himself, in which the libel was contained, and the libel was treated as merely tortious, and not criminal. The plaintiff, having been compelled to pay damages to the persons libelled, sought to recover from the defendant damages for the loss which he had suffered, by reason, as he said, of the defendant's G H breach of the implied obligation of secrecy. It was held that the only damages to which he was entitled for that breach were nominal. There were two main grounds for the decision. One was that the damage caused to the plaintiff was due to a *novus actus interveniens*, namely, the act of Hurst in showing the libel to the persons concerned. This reason has no bearing on the present case. The other reason, however, has a close bearing upon it and, in my opinion, is conclusive. LORD SUMNER, at p. 981, states the dilemma. He said :

> My Lords, either the sums which the appellant had to pay were the direct result of what he did himself . . . or they were caused not by Mr. Stephens but by Mr. Hurst.

He then proceeds to deal with the former alternative in the following words :

> To say that Mr. Weld-Blundell gave Mr. Stephens the opportunity of making him liable and that Mr. Stephens took it and did so, is to my mind a mere quibble. The appellant's liability did not depend on or spring from Mr. Stephens, unless a mere occasion is identified in law with cause. The way in which the appellant must naturally and necessarily state his case seems to me to put this view in a nutshell. " True it is," he says, " that I libelled Messrs. Comins and Lowe to Mr. Stephens ; but, if Mr. Stephens had not lost my letter, they would have known nothing about it, and I should have escaped the consequences of my own wrong-doing." My Lords, what is this but saying in plainer language : " My own act was the *causa causans* of the judgment against me, and Mr. Stephens's omission to be careful was the *causa sine qua non*." From the moment when the libel was published the appellant was under legal liability, and the effect of the action was merely to ascertain its amount and to compel the appellant to discharge it. If he had been in possession of lost property, belonging to Mr. Comins, and the letter had betrayed to the owner the secret of its whereabouts ; if he had encroached on Mr. Lowe's land and the letter had apprised that gentleman of the fact, just before a title accrued by lapse of time ; if he had owed a debt to them and the letter had recalled it to their attention, I can hardly suppose that the several judgments recovered could be alleged to be caused by the respondent, even though it was by his fault that Messrs. Comins and Lowe got at the letter. As BANKES, L.J., says : " The damages and costs in question are payable by reason of the plaintiff's own wrong-doing and were legally recoverable from him independently of the defendant's breach of his obligation."

LORD WRENBURY, after stating the appellant's contention, says, on p. 998, that there is more than one answer to it. The first answer which he gives is the same as that given by LORD SUMNER in the passage last quoted. He says :

> The relations between Weld-Blundell and Stephens were such that the latter no doubt owed a duty to the former, and in that duty he was negligent. Weld-Blundell's liability to pay money to Lowe and Comins, however, arose not from that negligence, but from his own wrongful act in indulging in malicious libel. And the amount he had to pay was measured by his own wrongful act. It bore no pecuniary relation to Stephens's wrongful act. Stephens's act was not the cause (whether with or without the word " effective ") of his having to pay, but was an act without which possibly he would never have been called upon to pay. It was not *causa causans* but at most *causa sine qua non*. In discharging his liability to pay damages for malicious libel Weld-Blundell suffered no damage at all. A man is not damnified by being compelled to satisfy his legal obligation. In *Neville* v. *London "Express" Newspaper, Ltd.* (10), the House were unanimous upon this proposition.

LORD WRENBURY then proceeded to give a further reason, based on a passage from the judgment of KENNEDY, J., in *Burrows* v. *Rhodes* (11), at p. 828. That passage, as I understand it, is not dealing with the question of causation of damage, but with a special substantive rule of law, which prescribes that, even if the damages are caused by the act complained of, they cannot be recovered if they are equivalent to an indemnity for the consequences to the plaintiff of an act, whether criminal or tortious, which manifestly or to his knowledge was unlawful. A I cannot read this reference to the judgment of Kennedy, J., as in any way qualifying what Lord Wrenbury has said in the passage which I have quoted.

The opinion of Lord Dunedin proceeds, I think, on different lines from those of Lord Sumner and Lord Wrenbury. Lord Finlay, L.C., B had declined to accept the view that the case was governed by the principle applied in *Neville's* case (10). Lord Sumner, while disposed to think that that principle was in point, forbore from expressing any concluded opinion to that effect, in deference to Lord Finlay, L.C. Lord Wrenbury treated *Neville's* case (10) as establishing the general C proposition which he enunciated. Lord Dunedin, referring to *Burrow's* case (11) and *Neville's* case (10), said, at p. 976:

> But though the cases are distinguishable upon the ground that the application of the principle is to be found in different circumstances, yet in my opinion the underlying principle is the same.

D

There is an element of difficulty in this statement, since, if the opinion which I have ventured to express is correct, the two cases referred to deal with two different matters, *Neville's* case (10) with the causation of damage, and *Burrow's* case (11) with a special substantive rule of law. Lord Dunedin then takes as one example of "the underlying pro- E position that no man can claim damages when the root of the damage which he claims is his own wrong," the case of contribution between wrongdoers. He then deals with *Neville's* case (10). He appears to treat the damage which the plaintiff in that case had suffered as the natural and probable consequences of the maintenance of which the F defendant company had been guilty, and to hold that the reason why the plaintiff was unable to recover was the rule of law that:

> a man cannot recover damages because he has had to make reparation for a wrongful act committed by himself.

G

If I have correctly understood the opinion of Lord Dunedin, it is based on a different ground to those of Lord Sumner and Lord Wrenbury. But, in so far as it is necessary or proper for me to express my own preference between these different views, I accept the reasons given by Lord Sumner and by Lord Wrenbury, which, if I may respectfully H say so, appear to me to be more consonant with the decision in *Neville's* case (10) than the views of that case expressed by Lord Dunedin.

The result, in my opinion, is that the plaintiff in the present case is not, in any event, entitled to more than nominal damages. This conclusion is not, in my judgment, affected by the fact that both parties contemplated that, if the promise was broken, the plaintiff would, in all probability, be expelled from his union.

Appeal dismissed. Cross-appeal allowed.

Solicitors: *Kays & Jones* (for the appellant); *Lewis & Lewis* (for the respondent company).

A [*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

LANGLEY CARTAGE CO., LTD. *v.* JENKS. ADAMS *v.* JENKS.

B [King's Bench Division (Lord Hewart, L.C.J., Humphreys and Singleton, JJ.), **April 14, 15, 1937.**]

Street Traffic—Traffic sign—" Stop, Road Traffic Officer "—Regulation of movement of traffic—Validity of authorisation by Minister of Transport—Road Traffic Act, 1930 (c. 43), *ss.* 48, 49.

C The appellant company was charged that it did unlawfully aid, abet, counsel and procure a person in its employment, who was driving a motor vehicle, to fail to conform to the indication given by a traffic sign, " Stop, Road Traffic Officer, Bucks C.C.," being a sign for regulating the movement of traffic, and being of the character authorised by the Minister of Transport under the Road Traffic Act, 1930, s. 48, as amended D by the Road Traffic Act, 1934, which had been lawfully placed on the road in accordance with the directions of the Minister of Transport given under sect. 48 of the said Act, which offence was contrary to sect. 49 of the said Act. The appellant company contended that the purported authorisation of the sign by the Minister of Transport was *ultra vires*, and that the sign was not a traffic sign within the meaning of sects. 48 and 49 of the said Act, in that it did not regulate the move- E ment of traffic:—

Held: the traffic sign referred to, being a sign directing the driver of a motor vehicle to stop, was a sign regulating the movement of traffic within the meaning of sect. 48 of the Act of 1930; and, as there was a failure to conform to the indication properly given by the sign, the justices rightly convicted the appellant company.

F

[EDITORIAL NOTE. The case made against this sign was that the statute read as a whole required that only policemen in uniform should be empowered to stop motor vehicles, but the court refused to take this view of the statute.

As to Erection of Traffic Signs, see HALSBURY, Supp., Street and Aerial Traffic, para. 563; and for Cases, see DIGEST, Supp., Street and Aerial Traffic, G Nos. 3(*a*)–5(*c*).

Appeal by way of case stated from a decision of the justices for the county of Buckingham, sitting at Amersham. The same question was raised in both appeals. The facts are set out in the judgment of Lord H Hewart, L.C.J.

Roland Oliver, K.C., and *David Karmel* for the appellant company.

J. P. Eddy, K.C., and *Colin Pearson* for the respondent.

Lord Hewart, L.C.J.: This case arises out of an information preferred by the present respondent against the appellant company, charging that it did unlawfully aid, abet, counsel and procure one Adams, on a day in July last, who was driving a motor vehicle on London Road, to fail to conform to the indication given by a traffic sign in these words: "Stop, Road Traffic Officer, Bucks County Council," being, the information said, a sign for regulating the movement of traffic, and being of the character authorised by the Minister of Transport under A the Road Traffic Act, 1930, s. 48, as amended by the Road Traffic Act, 1934. That traffic sign, it is said, had been lawfully placed on that road in accordance with the directions of the Minister of Transport given under sect. 48 of the Act of 1930. That information was heard by the justices, and they convicted the appellant company and fined it £2. B

The question raised by this case is whether, upon the facts, the justices came to a correct determination in point of law. It was proved, among other things, that, by an authorisation in writing of the Minister dated Jan. 5, 1935, the Minister authorised the erection, for the purposes of stopping any motor vehicle which a duly authorised person might require C to be weighed pursuant to the provisions of sect. 27 of the Act, of traffic signs of a certain size, colour, and type, illustrated in a diagram which was attached to that authorisation; and it is further found that, by directions dated Jan. 5, 1935, the Minister gave certain directions as to the erection and use of the traffic signs which are referred to. Accordingly, on July 10, D 1936, an inspector of weights and measures of the county council, who was the person duly authorised, was on duty in London Road, and on the side of the road he had a portable device, comprising a board which could be revolved so that only one side would be in view of the drivers of approaching vehicles or the driver of a particular approaching vehicle. E The words upon that board were the words which were authorised, and it is found that the device was used to regulate the movement of traffic, and was being used, in conformity with the said directions, by the said inspector, for the purpose of stopping motor vehicles which he required to be weighed pursuant to sect. 27. On the day in question Adams, an F employee of the appellant company, who was driving a heavy motor car, saw this traffic sign, but, acting upon the instructions of the appellant company, failed to stop. In those circumstances, it was contended in the court below, and the contention has been repeated here, that the device referred to was not a traffic sign within the meaning of sect. 48 or G sect. 49 of the Act of 1930, and that the purported authorisation by the Minister was *ultra vires*. On behalf of the respondent, it was contended that the authorisation and directions were *intra vires* and valid, that the device was a traffic sign of the kind authorised by the said authorisation, and was a traffic sign as defined and described in sects. 48 and 49 of the H Act of 1930, as amended by the Act of 1934. The justices came to the conclusion that the device was a traffic sign, that such motor vehicles as were sought to be stopped by the authorised person were traffic, that a stopping of the vehicle is a regulating of its movement, and, so holding, they came to the conclusion that the device conformed to the requirements of the Act, and that the authorisation and directions issued by the Minister of Transport were therefore *intra vires* and valid.

In my opinion, the conclusion at which the justices arrived was a correct conclusion, for the reasons which the justices have given. It is not necessary to explore these sections. Sect. 48 (9) enacts that:

A

> the expression "traffic sign," includes all signals, warning sign-posts, direction posts, signs, or other devices for the guidance or direction of persons using roads.

Sect. 49, which deals with penalties, provides that:

B

> Where a police constable is for the time being engaged in the regulation of traffic in a road, or where any traffic sign being a sign for regulating the movement of traffic or indicating the route to be followed by traffic, has been lawfully placed on or near any road . . . any person driving or propelling any vehicle who (*a*) neglects or refuses to stop the vehicle or to make it proceed in or keep to a particular line of traffic when directed so to do by the police constable in the execution of his duty; or [and these are in this case the material words] (*b*) fails to conform to the indication given by the sign, shall be guilty of an offence.

C I have no doubt at all that this traffic sign came within the definition in sect. 48, and that this person, the employee of the appellant company, failed to conform to the indication given, and properly given, by the sign. I think, therefore, that this appeal fails.

The second case, as I understand, is a reiteration of the same facts and D contentions with reference to the employee, Adams, himself, and raises no further question.

HUMPHREYS, J.: I am of the same opinion. If the language of the statute were in any respect doubtful or ambiguous, it might be possible E to give effect to Mr. Roland Oliver's ingenious but, I think, misguided argument, which, as I understand it, was this: he says that, throughout the statute, there is obvious reluctance on the part of the legislature to give power to stop a motor vehicle to anybody unless he is a policeman in uniform. Therefore, it must be assumed that any sign authorising a F person other than a policeman in uniform to stop motor vehicles upon the road must be *ultra vires* the powers of the Minister of Transport, and he endeavoured to frighten the court by holding out prospects of motor bandits who might in future be expected to forge signs of this character, and so induce persons to stop their motor vehicles with the object of G robbing them. It is to be observed, for one thing, that these signs are not permitted to be used during the hours of darkness at all. However that may be, in my view the language of the statute is plain and quite clear. The sign in question is a sign directing the driver of a vehicle to stop. In my view, it is really almost unarguable to say that a sign directing H a motor vehicle to stop is not a sign regulating the movement of the motor vehicle. It also seems to me to be abundantly clear that such a sign comes within the language of sect. 48 (9) of the Act, in which traffic signs are defined as, amongst other things, including all signals, warnings, signs or other devices for the guidance of persons using roads. I agree that the appeal must be dismissed.

Singleton, J. : I agree, and I have nothing to add.

Appeals dismissed with costs.

Solicitors : *Mawby, Barrie & Letts* (for the appellant company) ; *Pyke, Franklin & Gould*, agents for *G. R. Crouch*, Aylesbury (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*] A

ETHERINGTON *v.* CARTER.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and Singleton, JJ.), **April 16, 1937.**] B

Street Traffic—Regulation of traffic—Prevention of obstruction of streets—Order restricting sale of confectionery, etc.—Restricted hours not specified—Validity—Town Police Clauses Act, 1847 (*c.* 89), *s.* 21.

A borough council being empowered by the Town Police Clauses Act, 1847, s. 21, from time to time to "make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets. . . ." made an order as follows : "During the months of May, June, July, August and September in each year no hawker, pedlar or other person shall use the streets set out in the schedule hereto, for the purpose of selling therein toys, postcards, souvenirs, fruit, vegetables, flowers, confectionery or ice-cream, and all constables are directed to enforce the provisions of this order." The appellant was charged with having unlawfully and wilfully committed a breach of the said order by using one of the streets referred to in the schedule for the purposes of selling confectionery, and was convicted and fined 5*s.* The appellant contended, *inter alia*, that the order was not a valid order, in that it was too general, as it did not specify the hours within which the streets might not be used for the sale of the articles mentioned :— C D E

Held : the order was valid, as the generality thereof was not in excess of the powers conferred on the borough council by sect. 21 of the Act of 1847.

Cases referred to :

(1) *Teale* v. *Williams*, [1914] 3 K.B. 395 ; 42 Digest 842, *3 ;* 83 L.J. K.B. 1413 ; 111 L.T. 285. F

(2) *Edwards* v. *Wanstall* (1929), 142 L.T. 288 ; Digest Supp.

[EDITORIAL NOTE. This case considers the extent of the power of making regulations under the Town Police Clauses Act, 1847, s. 21. It was argued that this power was limited to certain particular occasions, such as public processions, mentioned in the section, or, at any rate, to certain specified hours of the day. This argument the court has rejected, and such an order may be made for the period of the summer or any similar period. G

As to Regulation of Traffic, see HALSBURY, 1st Edn., Vol. 27, Street and Aerial Traffic, pp. 269-271, paras. 563-567 ; and for Cases, see DIGEST, Vol. 42, p. 842, Nos. 1-5.]

H

Appeal by way of case stated from a decision of the justices for the borough of New Windsor. The facts are set out in the judgment of Lord Hewart, L.C.J.

A. S. Comyns Carr, K.C., and *John Davidson* for the appellant.

R. M. Montgomery, K.C., and *W. E. P. Done* for the respondent.

LORD HEWART, L.C.J.: This case arises out of an information preferred by the respondent, the chief constable, against the appellant, for that, on a day in July last, he unlawfully and wilfully did commit a breach of a certain order of the borough under the Town Police Clauses Act, 1847, s. 21, by using a certain street called Riverside for the purpose A of selling confectionery. The justices convicted the appellant and imposed a small fine. The question raised is whether the justices came to a correct decision in point of law. Now, the opinion which they formed was that the order of July 8, 1936, which purported to be made under the Town Police Clauses Act, 1847, s. 21, was a valid order, and, B if it was a valid order, then the particular facts which were proved brought the appellant within it. The argument which has been made here with great particularity is that this order was not a valid order. The section, in its material part for the present purpose, provides as follows—the section was enacted, of course, in the year 1847, so the terminology C is in one respect no longer applicable:

> The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets. . . .

Under the provisions of that section, the borough council of Windsor D made an order which was in the following terms:

> During the months of May, June, July, August and September in each year no hawker, pedlar or other person shall use the streets set out in the schedule hereto, for the purpose of selling therein toys, postcards, souvenirs, fruit, vegetables, flowers, confectionery or ice-cream, and all constables are directed to enforce the provisions of this order.

E The case finds that that order was made at the instigation of the watch committee of the borough, and that the streets named run in a certain direction from the river, and bound Windsor Castle on one of its sides. Those streets are busy every day of the week, especially throughout the summer months, and it is to the summer months that the order F refers. Both vehicular and pedestrian traffic are at times dense, and obstructions of traffic, both vehicular and pedestrian, frequently occur. Then more particular findings are made as to the obstructions, and finally it is found as a fact that, contrary to the terms of the order, the appellant was selling confectionery at 7 p.m. on a day in July in one of G the streets so scheduled.

Our attention has been directed to *Teale* v. *Williams* (1), where it undoubtedly appears that the three members of the court did not exhibit a uniform degree of enthusiasm in supporting the order which had been made. I turn to the judgment of SHEARMAN, J., for giving an analysis H of this section, with which, if I may say so respectfully, I entirely agree. He says, at p. 398:

> The only question left to the court in this case is whether the words of sect. 21 authorise the making of a general order for the regulation of traffic in any street where the ordinary traffic of such street makes such a regulation necessary in the opinion of the local authority. In my judgment the words are amply wide enough to confer such a power.

> The section begins with a general reference to the regulation of traffic—"The commissioners may from time to time make orders for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction." Those are the opening words. Then it goes on to give two or three particular occasions—"in all times of public processions, rejoicings, or illuminations." Having given those three special occasions it then uses the widest possible words "and in any case when the streets are thronged or liable to be obstructed." I cannot entertain much doubt that "in any case" means in any case and not in a few special cases. It appears to me that although the statute is not very aptly worded the intention A is merely to give a few examples and then to confer the widest possible power to be exercised by the local authority.

That case was referred to and followed in *Edwards* v. *Wanstall* (2), and the argument for the appellant here was that *Teale* v. *Williams* (1) could be differentiated from the present case in two respects: first, it is B said that in that case stress was laid by Avory, J., upon the particular circumstance that the respondent was found to be selling goods from a standing barrow; and, secondly, it is said that that case differs from this in that, in the order there referred to, there was a specified number of limited hours, whereas, *per contra*, the order here does not contain a C limitation as to hours, nor a limitation as to the mode of trade which is to be hit. It is quite true that there are in fact those differences, but they are differences which, in my opinion, make no real distinction. It is quite true that, on the facts of that case, Avory, J., when he was reading and paraphrasing the special case which was in his hands, referred to the D circumstance that the hawker was standing with a barrow in a particular road. I do not in the least assent to the suggestion that that was the turning point of his judgment, nor do I assent to the suggestion that the order would have been bad if it had not been limited as to hours. Let us suppose, for the sake of the argument, and only for the sake of the E argument, that this local authority, charged with the responsible duties, *inter alia*, of dealing with traffic in the neighbourhood of Windsor Castle, a place much frequented by visitors from all over the country and from all over the world, had applied its mind to the precise question: which are the hours properly to be dealt with by name in this order? It F would undoubtedly, if it had done its work thoroughly, as it would have done, have come to the conclusion that there should be named every hour during which the endeavour to sell or the desire to buy might be expected to lead to a crowd or an obstruction; in other words, it would have included every material hour; and the position of this pedlar and others G like him would have been exactly the same as it is now. Instead of naming all the hours during which it might be expected that sales would be encouraged or desired, it throws the net generally over the particular day in the summer months of the year. I cannot think that the generality of that provision in the least militates against the validity of this H order, and, except for the observations of Swift, J., in *Edwards* v. *Wanstall* (2), reiterating a certain element of doubt expressed by Rowlatt, J., in *Teale* v. *Williams* (1), I do not think it is correct to say that the decision of the court in *Teale* v. *Williams* (1) has been the subject of judicial hesitation. On the contrary, I think it has been clearly upheld, and in this present case also I think we are following it, and not extending it, by applying it to slightly different circumstances, all falling within the same principle. For these reasons, I think that the justices were right in the conclusion at which they arrived, and I think, therefore, that this appeal ought to fail.

A

Humphreys, J.: I am of the same opinion. I add a few words only because I agree with the observations of Mr. Comyns Carr, for which there is indeed the highest judicial authority, that these cases are important, since the court should always be jealous of the rights of
B the public, which to some extent are interfered with, but, it is to be observed in such a case as this, interfered with and restricted in the interests of the public as a whole by the elected local authority. The main point, I think, that Mr. Comyns Carr has taken is the question of the hours. He says that this order is too general because it does not
C mention the hours within which the streets may not be used for the sale of certain articles. I think that the observations in the judgment which has just been delivered by my Lord are sufficient to dispose of that point. I may say for myself that, if any case should ever arise and come before me in which the evidence was that an obstruction of streets occurred
D between certain hours, and there was an order in the terms of the present order, and, further, the sale which was the subject of the prosecution had occurred during some other hours, then it would be very interesting to consider whether that order, in those circumstances, was not too wide; but in this case the findings of the justices are that this, amongst other
E streets, is busy every day of the week, especially during the summer months; both vehicular traffic and pedestrian traffic are at times dense, and obstructions of traffic, both vehicular and pedestrian, occur frequently in the street, and the police have to take steps to move the crowd. Then there follows the statement that:

F obstructions occasioning difficulties to the police occur only between 10.0 a.m. and 7.0 p.m. on weekdays and between 10 a.m. and 9.0 p.m. on Sunday.

If that were to be construed as a finding that there is no obstruction of the streets after 7 p.m., then I should agree that it was prohibiting street trading after that hour, and was too wide; but I do not so read
G it at all. I read that finding as indicating only that those are the worst hours, when in fact the police have difficulty in dealing with the obstruction, but that the obstruction exists from time to time, not necessarily every day, as is said in the case, but frequently and every day of the week, especially during the summer months.

H One of the other points which has been argued by Mr. Comyns Carr is this, as I understand it: that, so far as the judgment of Avory, J., was concerned, he would have been content, in *Teale* v. *Williams* (1), to uphold the order in that case, if he had not thought that the fact was that the hawker in question there was selling from a standing barrow. When I read the words which Avory, J., is reported to have used, I cannot help thinking that what was in his mind was the distinction between a person who is using the street for the purpose of selling, which involves some standing, because it is almost, if not quite, impossible, or it certainly is unusual, to find a sale taking place where the parties are continuously walking along a street, and the case of a person who, although a street trader, is at the time using the street (to use the language of Avory, J.), merely passing along the street with his barrow as one of the ordinary passengers. However that may be, I agree (and for the reasons mentioned in his judgment by my Lord) that we are bound by the decision in that case. For my own part, I am glad to be bound by it, because I think it was rightly decided, and I agree that this appeal must be dismissed.

Singleton, J.: I agree.

Appeal dismissed with costs.

Solicitors: *J. R. Cort Bathurst* (for the appellant); *Sharpe, Pritchard & Co.* (for the respondent).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

CANEY *v.* LEITH.

[Chancery Division (Farwell, J.), **March 11, 1937.**]

Contract—Assignment of lease—"Subject to purchaser's solicitor approving the lease"—Conditional contract—Conduct of solicitor—Unreasonableness.

In an agreement for the assignment of a certain lease it was stated that the agreement was "subject to the purchaser's solicitor approving the lease." The purchaser's solicitor did not approve the existing lease by reason of various terms therein contained. The vendors sought to enforce the agreement by specific performance:—

Held: the agreement was conditional on the purchaser's solicitor approving the lease, and, in the absence of *mala fides* or unreasonable conduct on the part of the solicitor, there was no enforceable contract unless and until the solicitor's approval was obtained.

Per Farwell, J.: it is not, in a case of this sort, for the court to consider and hear evidence from the solicitor with regard to what view he took of the matter, or anything of that sort. The court has to look at the document of which the solicitor has expressed disapproval, and, if that disapproval can be given *bona fide* and without any unreasonable conduct on the part of the solicitor, then the court is bound to say that the condition has not been fulfilled.

[EDITORIAL NOTE. It will be noted that this is a case of an assignment of an existing lease, and not a grant of a new lease. It is not uncommon upon an assignment for the lease to be inspected by the solicitor before any agreement is entered into, but, as is here shown, where this is not done, the position can be properly safeguarded by making the contract subject to the purchaser's solicitor approving the lease.

As to Conditional Acceptance of Contract, see HALBSURY, 1st Edn., Vol. 25, Sale of Land, p. 289, para. 493; and for Cases, see DIGEST, Vol. 40, pp. 14, 15, Nos. 27-34.]

Cases referred to:

(1) *Chipperfield* v. *Carter* (1895), 72 L.T. 487; 12 Digest 412, *3326*.

(2) *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311; 12 Digest 72, *420*; 48 L.J. Ch. 846; 41 L.T. 1.

(3) *Hudson* v. *Buck* (1877), 7 Ch.D. 683; 12 Digest 412, *3324*; 47 L.J. Ch. 247; 38 L.T. 56.

(4) *Clack* v. *Wood* (1882), 9 Q.B.D. 276; 1 Digest 510, *1755*; 47 L.T. 144.

(5) *Curtis Moffat, Ltd.* v. *Wheeler*, [1929] 2 Ch. 224; Digest Supp.; 98 L.J. Ch. 374; 141 L.T. 538.

ACTION for specific performance of an agreement dated Aug. 28, 1936, for the assignment of a lease.

The agreement of Aug. 28, 1936, which was an agreement for the assignment of a lease of a certain hotel, stated that it was "subject to the purchaser's solicitor approving the lease." The intending purchaser's solicitors did not approve the existing lease by reason of various terms therein contained, and the intending purchaser refused to proceed.

J. Alan Bell for the plaintiffs.

J. A. Reid for the defendant.

FARWELL, J.: The question which I have to determine is whether, in the circumstances, there is an enforceable contract between the parties, and whether the plaintiffs are entitled to enforce the contract, either by specific performance or in any other way.

As I read this agreement of Aug. 28, 1936—and I do not think there is any dispute between the parties—it is an agreement which is subject to certain events, one of which is that the purchaser's solicitors are to approve the lease. As a matter of construction I have not the smallest doubt that the word "lease," as used in this document, refers to the existing lease, which is to be assigned by the plaintiffs to the defendant, and not to some other lease which has to be obtained. In my judgment, the condition is a condition that the solicitors of the purchaser are to approve a document which is in existence and which neither the plaintiffs nor the defendant had any power to alter or vary in any way. It is this document which has to be approved, and which the solicitors of the purchaser have not approved. It is, however, said that, although the solicitors have not approved the lease, the contract is now enforceable, because the solicitors ought to have approved the lease, and that, by not approving the lease, they must be taken to have acted unreasonably, and, consequently, that the condition must be treated as having been properly fulfilled. In support of that view I have been referred to certain authorities, but before I deal with them I should like to state my view as to the effect of a contract of this kind. The contract is one which is clearly conditional on the purchaser's solicitors approving the lease, and unless and until that approval is obtained there is no enforceable contract at all. The effect of such a condition as that is that the parties have agreed that the purchaser's solicitors shall be the persons who shall determine whether the lease is one of which they approve or not. *Prima facie*, if they express their disapproval, that is an end of the matter, because the condition is not fulfilled. In my judgment, if parties choose, when they make a contract, to make it subject to a condition of that sort, whether it is wise or not, they are bound by the condition, and unless the condition is fulfilled the contract never becomes one that is enforceable. That is, *prima facie*, the effect of the refusal of A the solicitors to approve the lease. It is said, however, that, on the authorities, although, *prima facie*, the solicitors' refusal may be enough to prevent the contract being enforceable, if the plaintiffs can show that the solicitors have acted unreasonably and ought to have approved the lease, then the contract must be treated on the footing that that condition B has been fulfilled and is enforceable. In support of that proposition of law, certain cases have been cited to which I will now refer.

The first of these is interesting, *Chipperfield* v. *Carter* (1). It is a decision of R. S. WRIGHT, J., and the headnote is this:

> C By a letter which contained all essential terms of a contract, the defendant offered to take a lease of a number of houses from the plaintiff, but there was this provision at the end: "Such lease to be approved in the customary way by my solicitor." The offer contained in this letter was accepted by the plaintiff. The defendant's solicitor subsequently refused to approve the lease, or to complete:—HELD, that there was a binding, and not a conditional, contract, which must be specifically enforced. The meaning of the provision was that the defendant's solicitor was to see that nothing irregular or unusual was inserted in the formal D lease which was to carry out the agreement.

That was not a case of the assignment of an existing lease. The plaintiff, who was the owner in fee of certain property, had agreed to grant, and the other party to the contract had agreed to take, a lease of the property. When the draft lease was submitted to the defendant's solicitor, he did E not approve it, and thereupon the defendant refused to carry out his contract. The matter came before the court in an action in which the plaintiff asked for specific performance. R. S. WRIGHT, J., said, at p. 488:

> F One has, of course, very often had to consider cases of this kind, or else I should have taken time to look over the authorities on this point again. It is admitted that there is no authority precisely in point upon these exact words. Any opinion which I may express is certain not to be shared by other authorities at least as competent as I am, and I do not know what the final decision would be if the matter were carried further. But, to my mind, the intention of the parties is really plain. It is that by the letter of Sept. 21, 1894, there was a firm offer by Mr. Carter to take a lease. In that letter he does not use any such words as "subject to the terms of G the contract being approved by a solicitor," nor even "subject to the lease being approved by a solicitor," but having stated the terms which he was willing to give, he inserted the statement "such lease to be approved in the customary way by my solicitor." It is as if he had meant to say in so many words, "My solicitor must see that you do not put anything wrong in the lease." I think he has done so, and I think that is just what he means, namely, that "you must not put anything in the lease either irregular or unusual, and my solicitor must see to it, and keep me H straight as to the formal lease which is to carry out our agreement." I think that the words of LORD CAIRNS in the case of *Hussey* v. *Horne-Payne* (2) are in point. There the words were stronger than in the present case; they were "subject to the title being approved by our solicitors." And LORD CAIRNS said, at p. 322: "I feel great difficulty in thinking that any person could have intended a term of this kind to have that operation, because, as was pointed out in the course of the argument, it virtually would reduce the agreement to that which is illusory. It would make the vendor bound by the agreement, but it would leave the purchaser

perfectly free. He might appoint any solicitor he pleased—he might change his solicitor from time to time. There is no *delectus personarum*; there is no appointment of an arbitrator in whom both sides might be supposed to have confidence. It would be simply leaving the purchaser, through the medium of his solicitor, at liberty to say from caprice at any moment, 'We do not like the title, we do not approve of the title, and therefore the agreement goes for nothing.' My Lords, I have great difficulty in thinking that any person would agree to a term which would have that operation; but it appears to me very doubtful whether the words have that meaning. I am disposed rather to look upon them, and the case which was cited from Ireland would be authority, if authority were needed for that view. I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser Of course that would be subject to any objection which the solicitor made being submitted to decision by a proper court, if the objection was not agreed to." Lord Selborne was of the same opinion. I think that case comes nearer to the present than any of the others which have been referred to. I think, therefore, that there should be a decree for specific performance of the agreement, and a reference to chambers to approve the form of the lease.

R. S. Wright, J., was not treating the contract in that case as a conditional contract at all. He was treating it as a concluded contract, but with the reference to the solicitor, inserted, no doubt, as a protection to the proposed lessee, to provide that he should not take the lease without his solicitor having had an opportunity of inspecting it. As Lord Cairns pointed out, in the passage I have just read, the provision was not intended in that case to be more than a guard against its being supposed that the title was to be accepted without investigation—as meaning, in fact, that the title must be investigated and approved of in the usual way. So R. S. Wright, J., took the view that it was a concluded contract, but that the purchaser was protecting himself by saying that the contract was to be subject to the terms of the lease being approved. That was the only thing which had to be done. The contract was to be concluded, the lease was to be submitted to the solicitor in the ordinary way, and if any question arose as to whether the lease was one which the lessee ought not to accept, then it would be a matter, if necessary, for decision by the court. It was not a case where the parties agreed that the lessee's solicitor was to be the person to determine whether or not the lease was one which ought to be accepted. That is how I read that judgment of R. S. Wright, J., and I think that that must be the true construction of his judgment, having regard to the reference which he made to the opinion of Lord Cairns in *Hussey* v. *Horne-Payne* (2), and his pointing out that there was a concluded contract. If that be the right construction of that decision, it does not assist me in this case, because I am not dealing with a concluded contract but with a conditional contract.

The case which comes nearer to the present matter is a decision of Fry, J., in *Hudson* v. *Buck* (3). The headnote says:

> A contract for the purchase of a lease stated that it was made "subject to the approval of the title by the purchaser's solicitor": Held, that, in the absence of *mala fides* or unreasonableness on the part of the purchaser or his solicitor, the vendor could not enforce specific performance of the contract if the purchaser's solicitor disapproved of the title.

In that case there was an agreement to purchase the lease of a house from the plaintiff, and the contract was conditional on the title being approved by the purchaser's solicitor. The purchaser's solicitor not having approved the title, the purchaser refused to complete the agreement, and thereupon the action was started. FRY, J., said, at p. 687 :

A

> This gives rise to the inquiry, what is the true meaning of the words "subject to the approval of Mr. Buck's solicitor." It is contended on behalf of the plaintiff that they are merely the expression of that which the law would imply if they had not been inserted, and that therefore they operate nothing. What, then, does the law imply in the case of a contract for the sale of leasehold property ? It implies that the vendor shall make a good title to the property. Is that the same thing as a stipulation that the contract shall be subject to the approval of the title by the purchaser's solicitor ? It appears to me that it is not. Observe the difference B between the results in the two cases. In the one case the approval or disapproval of the person specified is, in my opinion, in the absence of bad faith or unreasonable conduct, conclusive as to the goodness of the title shown. In the other case the goodness of the title may be a matter for the decision of the court. It might come first before this court, then before the Court of Appeal, and lastly before the House of Lords. In all these courts the question of the title might be discussed, and possibly with varying results. Moreover, the title might be the subject of refer- C ence to the chief clerk in chambers, and upon his findings interlocutory applications might be made to the court, and in this way the final decision of the matter might be indefinitely protracted. It appears to me that it is not unreasonable to suppose that the purchaser should desire to preclude the possibility of such a protracted litigation, and that he should intend to stipulate that the opinion of a particular person, his own solicitor, should be conclusive as to the sufficiency of the title deduced, and that, in the absence of compliance with that condition, the contract should not be capable of being enforced. D It is not necessary to decide that the absence of approval by the purchaser's solicitor would be conclusive, if the purchaser himself had acted unreasonably, as, for instance, if he had declined to appoint any solicitor, or if the solicitor whom he appointed had insisted upon utterly unreasonable objections to the title. Possibly in such cases the purchaser would not be able to enforce the condition. It is not suggested in the present case that the conduct of the purchaser himself has been in any respect unreasonable, and I have therefore to consider whether the objections taken to the title by his solicitor were E unreasonable.

FRY, J., was there pointing out, as I was endeavouring to point out in connection with the case before R. S. WRIGHT, J., that the conclusion of the contract was a matter which might ultimately have to be determined by the court on the issue whether a good title was shown. The F case before FRY, J., points out that the parties, to avoid the possibility of litigation on a matter of this kind, have stipulated and agreed that one person—namely, the purchaser's solicitor—should be satisfied and determined as to the particular matter referred to, and that, in the absence of *mala fides* or unreasonableness, the fact that the solicitor G has not approved renders the conditional contract no contract which can be enforced, because the condition has not been fulfilled. It is quite true that FRY, J., pointed out that, if the purchaser's solicitor made unreasonable objections to the title, that might be a ground for saying that there had not been proper disapproval, and certain consequences might H result from that. That was only *obiter dicta*, and what the result of such a finding might be he did not say. He did, however, proceed in the latter part of his judgment, to deal with the objections taken by the purchaser to the title, to see whether they were reasonable or not. The effect of that judgment, in the case of a conditional contract, such as that in the present case, if the solicitor says that he does not approve of the lease, is, *prima facie*, that it is an end of the matter. But it may be that, if the purchaser was so unreasonable as not to appoint a solicitor at all, and therefore there never could be anyone to express his approval of the lease, or if the solicitor had acted on grounds which were so unreasonable as to amount to something like bad faith, the failure of the solicitor to approve would not conclude the matter.

The other case to which I was referred was *Clack* v. *Wood* (4). The headnote says :

> The plaintiff's claim was for commission on the sale of a piece of land by A. to the defendant, one term of the plaintiff's contract being that A.'s title should be approved by the defendant's solicitor. The defendant broke off the sale of his own accord, so that A.'s title was never submitted to the defendant's solicitor :—
>
> HELD : that the plaintiff could not succeed without proving that the defendant's solicitor had approved A.'s title, or else that such a title was submitted to him as it was unreasonable for him to disapprove.

SIR GEORGE JESSEL, M.R., said, at p. 279 :

> The plaintiff did not offer any evidence to the jury of Maxwell's title, or of its approval by the defendant's solicitor. On the other hand, there was evidence given by the defendant that his solicitor did not approve it, although it was not really necessary for the defendant to offer any evidence on that point, because it was for the plaintiff to give *prima facie* evidence either that the title was approved, or that there was a good title but that the defendant's solicitor unreasonably and improperly refused to approve it. The plaintiff tendered no evidence on either point, therefore there was no evidence to go to the jury. . . .

Finally, the matter has been considered in a recent case by MAUGHAM, J., and I desire to refer quite shortly to what he said in his judgment. In *Curtis Moffat, Ltd.* v. *Wheeler* (5), at p. 233, MAUGHAM, J., said, with regard to this matter :

> The first defence set up by the defendant is that the contract was expressly made subject to the approval of the title by the purchaser's solicitors and that, such approval not having been given by Dec. 11, the vendor was entitled to treat the contract or negotiations as at an end. This raises a question upon which there is direct authority.
>
> In the case of *Hudson* v. *Buck* (3) it was held by FRY, J., that if a contract for the purchase of a lease was stated to be made subject to the approval of the title by the purchaser's solicitors, the vendor could not enforce specific performance if the purchaser's solicitor in good faith disapproved of the title. A similar point came before the Court of Appeal in *Hussey* v. *Horne-Payne* (2) on a demurrer, and the court, consisting of SIR GEORGE JESSEL, M.R., and COTTON and THESIGER, L.JJ., agreeing with the views expressed by FRY, J., in *Hudson* v. *Buck* (3), decided that the phrase, " subject to the title being approved by our solicitors," did not express merely what the law would otherwise have implied, but was an additional term. It is true that when the case came before the House of Lords (*Hussey* v. *Horne-Payne* (2)) LORD CAIRNS, then Lord Chancellor, expressed a strong doubt whether the opinion of the Court of Appeal in that respect could be maintained, but the appeal was dismissed on a different ground—namely, that the correspondence as a whole amounted merely to negotiation. It may be observed that LORD SELBORNE expressed no opinion on the meaning of the phrase in question, and that LORD CAIRNS did no more than express doubts. In my view I am clearly bound by the decision of the Court of Appeal until it is overruled ; and I may perhaps add that it is not altogether surprising to find a great lawyer, once in a way, mistaking the meaning of an uninstructed and perhaps inaccurate layman. LORD CAIRNS indeed seems to have considered that, if the phrase meant what the Court of Appeal thought it meant, it would follow that the purchaser was at liberty through the medium of his solicitor to decline the title from mere caprice ; but none of the judges accepted this extreme view. It is reasonable, they thought, to imply good faith as a necessary ingredient. On the other hand, it seems to be putting an undue strain on the

words to construe them, when used by a layman, as connoting not the approval of his own solicitor, which is their plain, ordinary meaning, but the decision of a court of justice after an unknown delay and at an unascertainable cost. Nor can I think that there is anything strange in a purchaser, without legal advice and in complete ignorance and with a natural terror of the niceties of real property law, agreeing to purchase property with a condition that his solicitor, acting reasonably and in good faith, should approve the title.

With respect to MAUGHAM, J., I entirely accept that as the effect of the A cases which he dealt with, and as being a correct statement of the law on the matter. He takes the view that, if the solicitor acts from mere caprice or unreasonableness, it may be that the purchaser cannot insist on the condition being fulfilled, but he does point out that the words must be given their proper meaning in the first instance. In those B circumstances, what do the judges mean when they talk about unreasonableness? In my judgment, when they are using the word "unreasonable," they are dealing with a position where the solicitors are not acting in good faith—that is to say, where, to assist their client, and get him out of the contract, or for some other reason, the solicitors refuse to approve C the lease, without giving the matter any consideration at all, or where their reasons for disapproval are so patent and absurd that the court can say in a moment: "This is ridiculous and the solicitors cannot possibly make such an objection as that." It is not, in my judgment, in a case of this sort, for the court to consider and hear evidence from the D solicitors with regard to what view they took of the matter, or anything of that sort. The court has to look at the document of which the solicitors have expressed disapproval, and if that disapproval can be given *bona fide*, and without any unreasonable conduct on the part of the solicitors, then the court is bound to say that the condition has not been fulfilled. E

In the present case, I have seen the existing lease, and it does contain a restrictive covenant with regard to the user of the premises. It provides:

> To use and occupy the premises as a private dwelling-house or boarding or lodging house and for no other purpose.

F There are other restrictive covenants which possibly are not very onerous, and it is not very unusual to find them in leases of this kind, but such restrictive covenants would render it quite impossible to say that the solicitors, in expressing their disapproval, acted in such a way as to suggest that their taking objection was not *bona fide*, and that the G objection was so unreasonable as to render it no real objection at all. In those circumstances it must necessarily follow that there was no contract which could be enforced, and the action must be dismissed with costs.

Action dismissed with costs.

Solicitors: *E. C. Kilsby & Son* (for the plaintiffs); *Courtenay, Croome & Finch* (for the defendants). H

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

HAGUE *v.* HAGUE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton and Bucknill, JJ.), **April 7, 1937.**]

Husband and Wife—Maintenance—Provisional order made in South Africa—Confirmation by court of summary jurisdiction in England—Appeal to Probate, Divorce and Admiralty Division—Jurisdiction—Maintenance Orders (Facilities for Enforcement) Act, 1920 (*c.* 33), *s.* 4 (7).

The appellant had since 1931 resided in England. His wife, whom he had married in the same year, took the two children of the marriage to South Africa and resided there until in 1936 she obtained from the magistrate in Johannesburg a provisional order for maintenance against the appellant. The order came before a petty sessional court in England for confirmation pursuant to the Maintenance Orders (Facilities for Enforcement) Act, 1920, and the Union of South Africa Statutes, 1923, No. 15 (Maintenance Orders), and was duly confirmed. Upon appeal to a divisional court of the Probate, Divorce and Admiralty Division the question was raised as to the jurisdiction of that court to hear the appeal :—

HELD : upon the construction of the Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 4 (7), the court had jurisdiction to hear the appeal.

[**EDITORIAL NOTE.** The fact that two previous appeals under the Act of 1920 had been heard in a divisional court of the King's Bench Division made it a matter for argument whether the Probate, Divorce and Admiralty Division had jurisdiction to hear such appeals. The matter was not fully argued here, since one side was unrepresented, but their Lordships were satisfied that there was jurisdiction to hear the case.

AS TO THE QUESTION OF JURISDICTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 848, 849, paras. 1355, 1356 ; and FOR CASES, see DIGEST, Vol. 27, pp. 568, 569, Nos. 6265-6275.]

Cases referred to :

(1) *Peagram* v. *Peagram*, [1926] 2 K.B. 165 ; Digest Supp. ; 95 L.J.K.B. 819 ; 135 L.T. 48.

(2) *Re Wheat*, [1932] 2 K.B. 716 ; Digest Supp. ; 101 L.J.K.B. 720 ; 147 L.T. 437.

APPEAL by a husband against an order of the St. Albans justices, confirming a provisional order made *ex parte* by a magistrate in Johannesburg in favour of the wife.

The parties were married in South Africa in 1931, and subsequently they came to England. The husband had from that time been employed in and had made his permanent residence in England. There were two children of the marriage. In 1935 the wife returned with the children to South Africa and in Aug., 1936, following certain correspondence not material to this report, she took proceedings in South Africa under the Transvaal Ordinance No. 44 of 1903 (Deserted Wives and Children Protection) to obtain a maintenance order against her husband. The magistrate in Johannesburg having made a provisional order in favour of the wife, ordering the husband to pay maintenance at the rate of £1 10*s.* per week for the wife and 12*s.* 6*d.* and 7*s.* 6*d.* respectively for the two children, the order came before the St. Albans petty sessions for confirmation in pursuance of the Maintenance Orders (Facilities for Enforcement) Act, 1920, and the Union of South Africa Statutes, 1923, No. 15 (Maintenance Orders). In the result the order was confirmed, but the amount of the maintenance was reduced to 17*s.* 6*d.* per week for the wife and 12*s.* 6*d.* per week for the two children. The husband appealed on the grounds *inter alia* that the decision to confirm was contrary to the weight of the evidence and to the justice of the case. The case is reported only on the question of jurisdiction raised on the appeal.

The Maintenance Orders (Facilities for Enforcement) Act, 1920, s. 4, provides :

> (7) Where an order has been confirmed [under the provisions of the preceding subsections of sect. 4], the person bound thereby shall have the same right of appeal, if any, against the confirmation of the order as he would have had against the making of the order had the order been an order made by the court confirming the order.

William Latey (*Douglas Potter* with him) for the appellant.

Langton, J. : [His Lordship referred to the history of the proceedings.] Mr. Latey, there being no representation on the other side, quite properly has drawn our attention to two reported cases under the Maintenance Orders (Facilities for Enforcement) Act, 1920, both of which came before the King's Bench Division : *Peagram* v. *Peagram* (1) and *Re Wheat* (2). It was, of course, necessary and important for him to establish that we had jurisdiction to hear this appeal. We have not heard argument about the matter and, therefore, I would not like to express a final opinion, save this : the cases in question were cases where the justices had stated a case, and in *Peagram* v. *Peagram* (1), the point was taken that the King's Bench Division had not got jurisdiction to hear that particular appeal. The court held that it had jurisdiction to hear cases stated in that way, and I see no reason at all to differ from the opinions there expressed, but, as I read those opinions, the court in the King's Bench Division did not say that, where a dissatisfied party in a court of summary jurisdiction chose to bring his or her appeal to the Probate, Divorce and Admiralty Division, there was anything to prevent him or her from doing so. What they did say was that the jurisdiction of the courts of the King's Bench Division was not ousted, nor especially were they by the manner of the case stated. The two things seem to be quite consistent, and the two jurisdictions might quite easily run side by side. Reading, therefore, sect. 4 (7) in its natural sense, it seems to me that it confers on a dissatisfied litigant from a court of summary jurisdiction, in a case of this class, the right to come to this court.

[His Lordship then considered the facts of the case and held that there had been no desertion by the husband, actual or constructive, and no failure by him to maintain his wife and children within the Transvaal Ordinance No. 44 of 1903. The justices' decision ought to be reversed and the order of the court of South Africa ought not to be confirmed.]

BUCKNILL, J.: I agree.

Appeal allowed.

Solicitors: *Pothecary & Barratt*, agents for *T. Anderson Davis*, St. Albans (for the appellant husband).

A [*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

ST. FRANCIS HYDRO ELECTRIC CO., LTD. *v.* R.

[PRIVY COUNCIL (Lord Blanesburgh, Lord Atkin, Lord Maugham, Lord
B Roche, Sir Sidney Rowlatt), **February 5, 8, 9, 11, 12, March 12, 1937.]**

Privy Council—Canada—Practice—Ownership of river bed—Historical documentary evidence—Concurrent findings of fact.

In a case where the respondents have the benefit of concurrent findings
C of fact in the court below unless there are special circumstances, the Judicial Committee of the Privy Council will not advise His Majesty to interfere. The appellants contended that as the evidence which led to the findings consisted mainly, if not entirely, of documentary or historical evidence, the true effect of which might well be discussed in an appellate court, the ordinary rule ought not to be applied:—

HELD: if the question were that of the construction of deeds or other
D documents, it would be one of law; but the question being as to the effect to be given as evidence to certain historical writings the ordinary rule applied.

Luchmun Lal Chowdhry v. *Kanhya Lal Mowar* (1894), L.R. 22 Ind. App. 51, *applied.*

[EDITORIAL NOTE. This case is only reported upon the point relating to the
E non-interference with concurrent findings of fact by the highest appellate court. The principle has not been uniformly applied in the highest courts and it was here sought to establish that the principle did not apply to a consideration of the effect of historical documents. Their Lordships, however, took the view that these were merely part of the evidence in the case and the rule must be applied.

AS TO CONCURRENT FINDINGS OF FACT, see HALSBURY, Hailsham Edn.,
F Vol. 8, p. 572, para. 1258; and FOR CASES, see DIGEST, Vol. 16, pp. 162-164, Nos. 650-679, and Vol. 36, pp. 268, 269, Nos. 128-135.]

Case referred to:

(1) *Luchmun Lal Chowdhry* v. *Kanhya Lal Mowar* (1894), L.R. 22 Ind. App. 51 16 Digest 164, *671.*

G

APPEAL from a majority judgment of the Court of King's Bench for the Province of Quebec, Appeal Side (HALL, GALIPEAULT and WALSH, JJ.; SIR MATHIAS TELLIER, C.J., and BERNIER, J., dissenting), dated May 29, 1936, confirming a judgment of the Superior Court for the District of
H Quebec (PRÉVOST, J.), dated March 25, 1935, whereby the appellants' action, in which they asserted rights of ownership in the bed of the St. Francis River opposite their riparian property, at a point called Spicer Rapids, was dismissed.

The facts of the case, relevant to the appeal, appear in the judgment of their Lordships, delivered by LORD MAUGHAM.

L. S. St. Laurent, K.C., and *R. St. Laurent* for the appellant company.
Aimé Geffrion, K.C., and *Edouard Masson* for the Crown.

Lord Maugham: This is an appeal from a majority judgment of the Court of King's Bench for the province of Quebec (Appeal Side), dated May 29, 1936, confirming a judgment of the Superior Court for the district A of Quebec, dated Mar. 25, 1935. The appellant company succeeded in maintaining its title to certain riparian lands on the St. Francis River at a point called Spicer Rapids, some 25 miles up the river from Lake St. Peter, through which the St. Lawrence flows. With that question His Majesty the King, who is the first respondent, was not concerned, and B there has been no appeal with regard to it. Except incidentally, it need not be further mentioned.

The appellant company also claimed certain parts of the bed of the St. Francis River opposite its riparian property at Spicer Rapids. His Majesty and the second respondent, the Southern Canada Power Co., C Ltd., have disputed the appellant company's claim. The provincial government had, in fact, granted to the respondent company a lease, dated Aug. 3, 1917, for a period of 75 years, from Oct. 29, 1912, which purported to include the stretch of the bed of the St. Francis River claimed by the appellant company. The provincial government claimed, D and the respondent company asserted, that this part of the river, including that opposite the appellant company's property, was part of the Crown domain. The provincial government accordingly refused to approve plans, submitted for its approval by the appellant company in 1927, for the establishment of a power plant of considerable magnitude at this E site. In 1929, the respondent company submitted plans of its own for the development of a power plant at Spicer Rapids. While the application of the respondent company was pending, in Jan., 1930, the appellant company filed a petition of right, and, having obtained a fiat, instituted an action against the Crown and against the respondent com- F pany, asserting its ownership of the riparian property and of the river bed opposite to it, and praying for a declaration that the lease of Aug. 3, 1917, was null and void and inoperative as regards that part of the bed and banks of the St. Francis River opposite and adjoining its property. These claims have failed in the Superior Court and in the Court of King's G Bench for the province of Quebec. Hence the present appeal.

The appellant company claimed the bed of the river at the site in question on two grounds. First, it alleged that the river was neither navigable nor floatable, and therefore, under Quebec law, its bed belonged to the riparian proprietors. The portions of the river bed which H were claimed were those which, under Quebec law, would, if the river was not navigable or floatable, have belonged to the appellant company as riparian proprietor. Secondly, it alleged that, even if the river or the material part was navigable or floatable, the riparian lands opposite and adjoining the portions of the bed of the river in dispute had ceased to be part of the Crown domain by reason of certain concessions, by the Comte de Fontenac, of *seigneuries* in the years 1678, 1683, and 1754; and, further, that, by letters patent granted by George III in the early years of the nineteenth century, the Crown had granted the properties in question to hold in free and common soccage, and, according to its contention, the English law, and not the law of Quebec, was therefore applicable in respect of ownership by riparian proprietors of the bed of the river. It may be explained that, the river not being a tidal river, if English law applied, the bed would belong, in the absence of any evidence of ownership to the contrary, by presumption of law, in equal moieties to the owners of the riparian lands, and this whether the river were navigable or not. As will be seen, the law of the province of Quebec is different in an important respect.

Thirdly, the appellant company, which, as stated, was attacking the validity of the lease of Aug. 3, 1917, contended that, even if the river had ever been navigable, it had ceased to be such before the date of that lease, and it claimed to have had the exclusive right to utilise it for power purposes under the provisions of 19 & 20 Vict. (Can.) c. 104.

The case came on for trial in the first instance before D'AUTEUIL, J., now deceased. He refused to admit certain evidence of a historical nature, which their Lordships will have to mention later, and, basing his judgment exclusively upon the evidence given by living witnesses, he held that the river was neither navigable nor floatable. The conclusion, therefore, was that the river bed in question *usque ad medium filum* belonged to the appellant company as riparian owner, and the learned judge maintained the petition of right and the suit.

On appeal, this judgment was reversed, by a majority, on the ground that the historical evidence should have been admitted, and a new trial was accordingly directed. The court also expressed the opinion that the second reason alleged in support of the petition of right and the suit, namely, that the English law, and not the Quebec law, should apply, was not well founded. An appeal to the Court of King's Bench on this point at this stage was not entertained, on the ground that the judgment was interlocutory, and not final.

The case was then tried on a rehearing before PRÉVOST, J., and the historical evidence was admitted. The learned judge held that this evidence established that, at the time when the riparian lots were originally granted by the Crown to the predecessor in title of the appellant company, namely, in the years from 1800 to 1816, it was sufficiently established that the River St. Lawrence was navigable and floatable at least up to the first falls at Drummondville, known as Lord's Falls, that is to say, to a distance 6 miles above the Spicer Rapids. It was admitted that the bed of the river, if part of the public domain at that time, would not cease to be such merely because, by obstructions or otherwise, the river ceased to be navigable and floatable. Accordingly, he held that the bed and banks of the river at this place remained a part of the Crown domain under the Civil Code, art. 400. He followed the opinion expressed in the Court of Appeal on the second point as to the effect of a grant in free and common soccage, and he apparently thought that there was no substance in the third point. Except, therefore, as regards the title to the riparian properties above referred to, he dismissed the action and the petition of right. There was an appeal (except as regards the A riparian properties) to the Court of King's Bench which gave rise to differences of opinion on the question of fact, whether the St. Francis River was navigable and floatable at the material reach or reaches. The majority, consisting of Hall, Walsh, and Galipeault, JJ., agreed with the decision of Prévost, J., that the river had been navigable and B floatable in the early days from Lake St. Peter at least up to Drummondville Falls, while Sir Mathias Tellier, C.J., and Bernier, J., held that the evidence did not establish that there had ever been such navigation on the river as would justify the view that it was navigable and floatable at the time of the early grants. The court also held that the second and C third points were ill-founded. In the result, the appeal was dismissed with costs.

Their Lordships have had the advantage of able arguments, in the course of which all the relevant evidence was discussed; but the respondents have taken the point that they have the benefit of concurrent D findings of fact on the question of navigability, and they rely on the well known rule that their Lordships, in such a case, unless there are special circumstances, should decline to advise His Majesty to interfere. The rule certainly has a *prima facie* application, notwithstanding the considerable difference of opinion among the judges. It was, however, argued E for the appellant company that, as the evidence which led to the findings consisted mainly, if not entirely, of documentary or historical evidence, in other words of writings, the true effect of which might well be discussed in an appellate court, the ordinary rule ought not to be applied. Their Lordships cannot accept this distinction. If the question were that of F the construction of deeds or other documents, it would be one of law; but in this case the question is as to the effect to be given as evidence to certain historical writings as referring to the state and the use of the river in the past—matters which have to be considered in relation to the facts proved as to the present state of the river and other circumstances. G Their Lordships must hold that, in such a case, the ordinary rule applies, and they may observe that the same view was taken in the case of *Luchmun Lal Chowdhry* v. *Kanhya Lal Mowar* (1). It was open to both courts, taking this evidence in conjunction with other documentary evidence and parol evidence as to the physical conditions at Spicer's H Rapids, to hold that below Drummondville down to the lake the river was, in the early part of the nineteenth century, navigable or floatable. Their Lordships therefore think it unnecessry further to discuss the evidence on this point, or to express any opinion upon the question of fact beyond that already stated. They may perhaps add that, in a matter as regards which public general knowledge as to local conditions may be very important, they would naturally be loath to interfere.

Appeal dismissed with separate sets of costs to the respondents.

Solicitors: *Blake & Redden* (for the appellant company); *Lawrence Jones & Co.* (for the Crown); *Allen & Overy* (for the respondent, the Southern Canada Power Co., Ltd.).

[*Reported by* T. A. DILLON, ESQ., *Barrister-at-Law.*]

Re HARGRAVES' TRUSTS, LEACH *v.* LEACH.

[CHANCERY DIVISION (Farwell, J.), **April 14, 1937.**]

Settlement—Beneficial interests—Trusts for issue—Females attaining 21 *or marrying under that age—Omitted words supplied.*

A settlement recited that it was the desire of the settlor to benefit certain grandchildren described as "all the children present and future of the marriage of" A. and B. The ultimate trust for the grandchildren was worded thus: "in trust for such of the grandchildren as being male shall have attained the age of 21 years or being female shall have married under that age":—.

HELD: the court should give effect to the settlement considered as a whole and the provision for female grandchildren should be given effect to as if it read: "or being female shall have attained the age of 21 years or shall have married under that age."

[EDITORIAL NOTE. The difficulty in the present case arises from the incorrect copying of a common form and the omitted words are given effect to. The case of a will has already been decided in *Re Hunt* (1), and the present decision extends that decision to a settlement.

AS TO TRUSTS FOR CHILDREN ATTAINING 21 OR MARRYING, see HALSBURY, 1st Edn., Vol. 25, Settlements, pp. 575, 576, para. 1031; and FOR CASES, see Digest, Vol. 40, pp. 568, 569, Nos. 1056-1062.]

Cases referred to:

(1) *Re Hunt, Davies* v. *Hetherington* (1890), 62 L.T. 753.

(2) *Re Daniel's Settlement Trusts* (1875), 1 Ch. D. 375; 40 Digest 458, *85*; 45 L.J. Ch. 105; 34 L.T. 308.

ADJOURNED SUMMONS asking whether, on the true construction of a settlement, dated Dec. 19, 1924, and in the events which had happened, the defendant, Diana Ximena Helen Leach and such other daughters of Ellen Ximena Leach (the daughter of Edward Thomas Hargraves) by her marriage with the plaintiff George Catterall Leach as should attain the age of 21 years or marry under that age were entitled to participate in the ultimate division of the trust funds, directed by cl. 5 of the settlement.

Denis Chetwood for the plaintiff.

G. P. Slade for the first defendant, the eldest daughter of the settlor's daughter.

J. G. Strangman for the three youngest daughters.

Hector Hillaby for the executors of the settlor, the fifth and sixth defendants.

G. P. Slade, for the first defendant: This is an error which the court can make right, as it is a common form which has been employed. Where a testator has intended to use a common form, there is ample authority for the view that the court can give effect to the intention of the A testator and supply the words necessary to give effect to the intention of the testator. That rule should be applied here. [Counsel referred to *Re Hunt, Davies* v. *Hetherington* (1) and *Re Daniel's Settlement Trusts* (2).]

B

FARWELL, J.: One Edward Thomas Hargraves, on Dec. 19, 1924, made a disposition for the benefit of certain of his grandchildren. The grandchildren in question were the children of his daughter Ellen Ximena Leach, who was then living in India with her husband. The children, or some of them, had been sent home to be looked after by their grand- C parents. The settlement begins by reciting that it was and is his desire to make provision:

> in favour or for the benefit of the children present and future of the present marriage of his daughter Ellen Ximena Leach wife of George Catterall Leach.

D

In that first recital there is recited the intention of the testator to make provision for the benefit of the children of that daughter. Then there is an expression of the intention and desire that the money should be invested and held for the purposes of the trusts with power to appropriate, and there is a further recital that the daughter and her husband E have 3 children. Since the date of the settlement, another child has been born, and she is a defendant to this summons. The settlor said:

> "The grandchildren" means and includes all the children now living or hereafter to be born of the settlor's said daughter Ellen Ximena Leach by her present marriage with the said George Catterall Leach.

F

Cl. 4 provides:

> So long as either the said Ellen Ximena Leach shall be living or any of the grandchildren shall be living and under the age of 21 years the trustees shall stand possessed of the trust fund and the income thereof (*a*) and pay or apply the whole or so much as the trustee or trustees in his or their uncontrolled discretion shall think proper of the income of the trust fund to or for the education or benefit of G all or any one or more exclusively of the others or other of the grandchildren for the time being resident in England in such manner as they shall think fit.

By cl. 4 (*b*) the trustees may from time to time, at their absolute discretion, raise any part of the capital for the purpose mentioned in the last foregoing clause, and any capital so raised shall be applicable for H the purposes aforesaid

Cl. 4 (*c*) provides that the trustees may, at their absolute discretion, make a payment to any of the grandchildren upon marriage, provided a marriage settlement is made as indicated. Then there is a provision that, subject to the foregoing, the trustees, in their uncontrolled discretion, may apply the whole or so much as they think proper of the income of the trust fund :

for the education or benefit of all or any one or more exclusively of the others or other of the grandchildren not being objects of the trust or power contained in sub-cl. (*a*) as they shall think fit.

A In cl. 5 comes the difficulty. It reads :

From and after the determination of all the trusts and powers contained in cl. 4
hereof the trustee or trustees shall stand possessed of the trust fund and the income
thereof or so much thereof respectively as shall not have been applied under any of
the trusts or powers contained in the said cl. 4 in trust for all or such one or more
exclusively of the others or other of the grandchildren in such manner and if more
than one in such shares as the settlor shall by deed revocable or irrevocable or by
B will or codicil appoint and in default of and subject to any such appointment as the
settlor's widow shall in like manner appoint and in default of and subject to any
such appointment as aforesaid in trust for such of the grandchildren as being male
shall have attained the age of 21 years or being female shall have married under
that age.

What happened is that both the settlor and his wife have died and
C there has been no exercise of the power of appointment in question.
The eldest of these grandchildren has attained the age of 21, and she has
not married, and it is said that she is not entitled, and her younger
sisters, if they follow her example, will not be entitled to any share of
this fund at all. In that case, the settlement for the benefit of the grand-
D children would not be operative at all, and there would be a resulting
trust for the settlor, for it was said that no daughter who attains 21,
without having married, is entitled to participate. When one reads this
settlement as a whole, it is absolutely impossible, in my judgment, to
come to any conclusion other than that there has been left out of what
E is a perfectly well-recognised and settled form the words "shall have
attained that age." These words have no doubt been left out by some
person who had to copy the form. I see that there is provision made in
the settlement for the benefit of the grandchildren, and I find it absolutely
impossible to suppose for one moment that, in the event of the settlor
F or his wife making no appointment, the funds should go only to such of the
daughters who married under the age of 21, and that those who had not
married under that age were excluded. It is, in my judgment, impossible
to suppose that that was what the settlor meant. I come to the con-
clusion, reading the document as a whole, that there is no doubt as to
G the settlor's intention. When the meaning is plainly written, thoughout
the document, from beginning to end, and I find a mistake made in
copying a common form, which may operate to defeat the object for which
the settlement was made, I am justified in construing the settlement
in the way it was intended it should be read. It may be more difficult
H to bring in words of this kind when one is dealing with a settlement,
and not with a will. From some points of view, it may be more difficult
to construe a settlement than to construe a will. But I should indeed be
sorry to say that this court was prevented from giving effect to the inten-
tions of the settlor, as one can in the case of a will, because some unfor-
tunate slip has been made in the copying of a common form, which mistake

would result in defeating the intentions of the settlor, as expressed in the document as a whole.

Declaration that granddaughters who attain 21 *years or marry under that age are entitled to participate in the ultimate division of the trusts funds directed by cl.* 5 *of the settlement.*

Solicitors: *Minet, Pering Smith & Co.* (for all parties). A

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re CLAY'S POLICY OF ASSURANCE, CLAY *v.* EARNSHAW. B

[Chancery Division (Farwell, J.), **April 20, 1937.**]

Husband and Wife—Insurance policy—For benefit of wife and children—Adopted child—No legal adoption—Married Women's Property Act, 1882 (*c.* 75), *s.* 11.

Insurance—Policy moneys—Trust—Benefit of wife and named daughter—Named person an adopted child. C

A policy effected by the assured under and by virtue of the Married Women's Property Act, 1882, s. 11, was stated to be for the benefit of the wife of the assured, and if she were dead at the time the policy moneys became payable then for his daughter, naming her, and if both of them were then dead for the executors, administrators or assigns of the D assured. The daughter was an adopted child, and there had been no legal adoption under the Adoption of Children Act, 1926:—

Held: (i) there was no effective trust for the adopted child by virtue of the Married Women's Property Act, 1882, s. 11, and the infant was outside the scope of that section.

(ii) the adopted child had no legal right to claim the policy moneys from the insurance company. The only persons who had such a right E were the assured and his wife, who could surrender the policy or otherwise deal with it without reference to the infant.

Re Engelbach's Estate, Tibbetts v. *Engelbach* (1) *followed.*

[EDITORIAL NOTE. In the first place this case decides that the Married Women's Property Act, 1882, s. 11, does not apply to adopted children. This case is concerned with a *de facto* adoption before 1926, but it would not appear that the position F would be otherwise in a case where a legal adoption has been effected under the Adoption Act, 1926, having regard to sect. 5 thereof. In the second place it was argued that there was a trust for the named child apart from the Act of 1882, but that question, so far as the insurance company and a right to claim the policy moneys from it is concerned, is held to have been already decided in *Re Engelbach's Estate* (1). G

As to Policies Effected Under Married Women's Property Act, 1882, see HALSBURY, Hailsham Edn., Vol. 16, pp. 671, 673, paras. 1069-1071; and for Cases, see DIGEST, Vol. 27, pp. 149-152, Nos. 1209-1228.]

Cases referred to.

(1) *Re Engelbach's Estate, Tibbetts* v. *Engelbach,* [1924] 2 Ch. 348; 29 Digest 422, *3288*; 93 L.J. Ch. 616; 130 L.T. 401. H

(2) *Cleaver* v. *Mutual Reserve Fund Life Assocn.,* [1892] 1 Q.B. 147; 29 Digest 369, *2969*; 61 L.J. Q.B. 128; 66 L.T. 220.

(3) *Re Richardson, Weston* v. *Richardson* (1882), 47 L.T. 514; 25 Digest 516, *114.*

(4) *Re Seyton, Seyton* v. *Satterthwaite* (1887), 34 Ch. D. 511; 43 Digest 576, *252*; 56 L.J. Ch. 775; 56 L.T. 479.

(5) *Re Policy No.* 6402 *of the Scottish Equitable Life Assurance Society*, [1902] 1 Ch. 282; 29 Digest 375, *3007*; 71 L.J. Ch. 189; 85 L.T. 720.

(6) *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264; 25 Digest 530, *206*; 31 L.J. Ch. 798; 7 L.T. 178.

SUMMONS asking for a declaration that the first defendant had no beneficial interest in a policy on the life of the plaintiff issued by the Phœnix Assurance Co., Ltd.

E. J. Heckscher for the plaintiff, the assured: Elizabeth Elvira Earnshaw was not a child of the assured, and, so far as she is concerned, the policy must be treated as taken out for the benefit of a stranger. The first defendant has no right either in law or in equity to the policy moneys. [Counsel referred to *Re Engelbach's Estate, Tibbetts* v. *Engelbach* (1).]

W. G. H. Cook for the first defendant, the adopted daughter: This case is entirely novel, and is not covered by the case which has been cited. There is an adoption agreement, and there is, on the face of the policy, a trust, quite apart from the Act. On the construction of the policy, there is a clear declaration of trust. The plaintiff has placed himself *in loco parentis* to the infant, and in the position of a trustee for her on the terms set out in the document. [Counsel referred to: *Re Engelbach's Estate* (1), *Cleaver* v. *Mutual Reserve Fund Life Association* (2), *Re Richardson, Weston* v. *Richardson* (3), *Re Seyton, Seyton* v. *Satterthwaite* (4), *Re Policy No.* 6402 *of the Scottish Equitable Life Assurance Society* (5), *Milroy* v. *Lord* (6).]

T. D. D. Divine for the second defendant, the wife of the assured.

FARWELL, J.: The question I am concerned with in this case is whether Elizabeth Elvira Earnshaw has any, and, if so, what, interest in certain policy moneys, or whether she has no interest, so that the plaintiff, with the concurrence of his wife only, can surrender the policy. The facts are these. The plaintiff, who is the assured, took out a policy with the Phœnix Assurance Co. on Apr. 4, 1924. That policy was a policy for moneys to be paid on the death of the assured. The amount of the policy was £1,000, and the persons for whose benefit it was taken out were:

> Mignon Elvira Clay *née* Andrée, wife of the assured, should she be living if and when the policy moneys become payable and if not living at that time then for the benefit of Elizabeth Elvira Clay, daughter of the assured, should she survive Mignon Elvira Clay and be living if and when the policy moneys become payable. If they both predecease the assured then for the executors administrators or assigns of the assured.

This policy is effected by the assured under and by virtue of the Married Women's Property Act, 1882, s. 11, so far as it is expressed to be for his wife and daughter, and there are on the back of the policy certain privileges and conditions which I need not read. There is also an indorsement by which the policy is exchanged for a fully paid-up policy for the sum of £879, instead of the sum of money provided for in the policy. There are certain persons for whom this policy is said to be effected.

The first is the wife of the assured. The second of them is the infant, who is not in fact the daughter of the assured, but she was a child who was adopted by the assured and his wife. She was not adopted legally because the adoption took place before the Adoption Act, 1926, came into force, and there has been no adoption since, but the assured and his wife adopted the child so far as they could, and the assured has put A himself *in loco parentis* to this child. But, however that may be, it is quite plain that the infant cannot come and seek the benefit of the Married Women's Property Act, 1882, s. 11, because that section provides :

> A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of B them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts.

Now, that section speaks of the children of the assured, and there is C in the Act nothing whatever to indicate that the word " children " is not used in its strict legal sense, and it is quite well established that " children " means the lawful children of the person insured. That being so, it is impossible, in my view, to bring this infant within the benefit of this section of the Act, because the person concerned was not a child of D the assured in any legal sense, although it may be that the assured had in some way put himself in the position of a parent. It seems to be plain that, if there is an effective trust in favour of this infant, it cannot be by virtue of sect. 11 of the Act of 1882. The infant is outside the scope of that section altogether, because she is not a child of the assured, and E therefore the policy being taken out and expressed in the sense that it is, although it does create a trust in favour of the wife, it does not create a trust in favour of the infant. It is said that the fact that the assured had put himself *in loco parentis* to this child, and that this policy is expressed to be for the benefit of the infant, is enough to create a trust in favour of F the infant, apart altogether from sect. 11 of the Act. It is to be noted that the policy itself expressly states that it is effected under and by virtue of the Married Women's Property Act, 1882, s. 11. Therefore, *prima facie*, the intention of the assured was to create a trust by virtue of that section in favour of his wife and children, and that some indica- G tion that it was the intention to create a trust is to be inferred from the fact that it was by reference to the Act. But if the Act itself did not create the trust, it is difficult to see how any such trust can be created. It is said that I ought to be able to find that the various payments made were by way of advancement, and that I ought to be able to find that H there is here created, apart altogether from the Act, an enforceable trust in favour of the infant. In my judgment, that argument is completely answered in *Re Engelbach's Estate* (1). The headnote of that case is :

> An endowment policy taken out by a person in his own name for the benefit of his daughter, to mature on her attaining a specified age, creates no legal estate in the daughter, and she cannot sue on the contract, nor does the assured thereby

constitute himself a trustee for his daughter of the policy and of the moneys payable thereunder. If, therefore, the assured dies before the policy matures, the policy moneys belong, not to the daughter, but to the estate of the assured, and must be paid to his executors.

The headnote ends with a reference to *Cleaver* v. *Mutual Reserve Fund Life Association* (2), a decision of the Court of Appeal.

A In *Re Engelbach's Estate* (1), the testator took out a policy to provide for the payment of a sum to his daughter on a certain date, if she should so long live. In the proposal form there were inserted the words: "Edward Coryton Engelbach, for his daughter Mary Noel, aged one month." A sum of £3,000 was expressed to be payable to the testator's B daughter if she should survive Feb. 3, 1923, and, if she should not, all the premiums paid were to be repaid to the testator. The testator paid the premiums down to a certain date, and then he ceased to pay. By a resolution of the directors of the insurance society the policy was revived as a fully paid-up policy for a reduced sum. By his will he gave C all his estate to his trustees upon trust for his wife for life. A summons was then taken out by two of the trustees of the will, asking whether the sum payable under the policy formed part of the estate of the testator or not. ROMER, J., when he came to determine this question, said this, at p. 351:

D

> A very similar question to the present one arose in *Cleaver* v. *Mutual Reserve Fund Life Association* (2). Before considering that case, however, I may say this: the daughter could of course successfully claim these moneys if she had at the death of the testator a legal right to them, that is to say, a right at law to recover the moneys from the society, because, although that legal right might have been given to her purely voluntarily by her father, still there would be no resulting trust in favour of the father, seeing that there would be a presumption of advancement.

E

Now, as I understand ROMER, J., he is saying this: in order to give effect to the presumption of advancement, you have first to find that the daughter has a right to the money. If she has a legal right to claim the money, the fact that it was a voluntary payment made by her father F is no answer to the daughter's claim, because she can set up that these payments were made by way of advancement, and that would defeat the resulting trust which would otherwise follow. But, unless and until there is some right in the person who claims the money to do that, the doctrine of advancement does not operate to defeat the resulting trust. G The only ground would be for the father to constitute himself in some way a trustee for his daughter. Then ROMER, J., deals with the case of *Cleaver* v. *Mutual Reserve Fund Life Association* (2), and cites certain passages from the judgment of LORD ESHER, M.R., and on the authority of that case comes to the conclusion that, apart from the Act, there can H be no trust, and he comes to the conclusion that the daughter in that case had no legal right, and that the policy moneys formed part of the testator's estate. In this case, that decision exactly applies. The daughter is a person who cannot claim the benefit of the Married Women's Property Act, 1882, s. 11, and as, apart from that Act, there is nothing which would entitle her in any event to claim against the insurance company any legal right to the money, the consequence is that, as between the assured and the insurance company, the only persons who have any right are the assured and his wife. They can deal with it as they please, and surrender the policy, or otherwise deal with it, without any reference to the infant, and I propose to make a declaration accordingly. The plaintiff must pay the costs.

Solicitors: *Clarke & Co.* (for the plaintiff and the second defendant); *Douglas Fearn & Co.* (for the first defendant).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

ANDREWS *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

[House of Lords (Lord Atkin, Viscount Finlay, Lord Thankerton, Lord Wright, M.R., and Lord Roche), **March 8, 9, April 22, 1937.**]

Criminal Law—Manslaughter—Reckless driving of motor car—Judge's direction to jury—Road Traffic Act, 1930 (*c.* 43), *s.* 11—*Road Traffic Act,* 1934 (*c.* 50), *s.* 34.

The appellant was convicted of manslaughter resulting from the reckless and dangerous driving of a motor car. He appealed against his conviction, on the grounds that the judge misdirected the jury (i) in telling them that, if the appellant was driving recklessly within the meaning of the Road Traffic Act, 1930, s. 11, and because he was so doing someone was killed, then the appellant was guilty of manslaughter; (ii) in telling them that, if they thought that the appellant was driving recklessly and in a manner dangerous within the words of the Road Traffic Act, 1930, s. 11, and it was because of that that the person was killed, it was their bounden duty to convict the appellant of manslaughter; (iii) in failing to tell them that, unless the appellant had been proved guilty of negligence causing the death, and of such negligence causing the death as went beyond a mere matter of compensation between subjects, and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment, they should not find him guilty of manslaughter; and (iv) in failing to tell them that, if the appellant was merely proved guilty of reckless or dangerous driving as defined by the Road Traffic Act, 1930, s. 11, and found by such reckless or dangerous driving to have caused the death of someone, they should not find him guilty of manslaughter:—

Held: (i) the effect of the summing up as a whole was that the true question was ultimately left to the jury, whose verdict was inevitable on the evidence.

(ii) the statutory offence of dangerous driving may be committed, though the negligence is not of such a degree as would amount to manslaughter if death ensues.

[EDITORIAL NOTE. The provisions of the Road Traffic Act, 1930, s. 11, have caused a difficulty since it has been argued that, if the facts come within that section, they justify a verdict of manslaughter. It has been from time to time suggested that a conviction under the section might be justified in a case where the negligence was not of a sufficiently high degree to warrant a verdict of manslaughter. The matter was argued in *R.* v. *Stringer,* [1933] 1 K.B. 704; Digest Supp., but not finally determined. The matter was again touched upon in *R.* v. *Leach,* [1937] 1 All E.R. 319, and now the House of Lords have finally determined that there may be cases where the degree of negligence warrants a conviction for dangerous driving, but not for manslaughter. The judgment herein considers fully the question of manslaughter by negligent driving.

As to Reckless or Dangerous Driving, see HALSBURY, Supp. Street and Aerial Traffic, para. 683 ; and for Cases, see DIGEST, Supp., Street and Aerial Traffic, Nos. 222*a*-222*j*.

As to Manslaughter by Negligence, see HALSBURY, Hailsham Edn., Vol. 9, pp. 441-446, paras. 759, 760 ; and for Cases, see DIGEST, Vol. 15, pp. 798-802, Nos. 8630-8700.]

Cases referred to :

(1) *R.* v. *Williamson* (1807), 3 C. & P. 635 ; 14 Digest 377, *3972*.

(2) *R.* v. *Bateman* (1925), 19 Cr. App. Rep. 8 ; Digest Supp. ; 94 L.J. K.B. 791 ; 133 L.T. 730.

(3) *Cashill* v. *Wright* (1856), 6 E. & B. 891 ; 29 Digest 14, *178* ; 27 L.T. O.S. 283.

Appeal from an order of the Court of Criminal Appeal dismissing an appeal by the present appellant against a conviction of manslaughter at Leeds Assizes. The facts are set out in the judgment. The words of the summing-up of du Parcq, J., complained of were as follows :

> If you thought that, although Andrews drove recklessly and although he drove at a speed or in a manner dangerous to the public within the words of [Road Traffic Act, 1930, s. 11], it was not because of that that Craven was killed, the law would entitle you to convict him not of manslaughter but of dangerous driving. But in this case I am bound to tell you that, if you think that he was driving recklessly and in a dangerous manner within the meaning of those words and it was because of that that Craven was killed, then it is your bounden duty to convict him of manslaughter.

The Road Traffic Act, 1930, s. 11, provides :

> (1) If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable [to certain penalties].

The Road Traffic Act, 1934, s. 34 provides :

> Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under sect. 11 of the principal Act (which relates to reckless or dangerous driving) to find him guilty of that offence, whether or not the requirements of sect. 21 of the principal Act (which relates to notice of prosecutions) have been satisfied as respects that offence.

G. Russell Vick, K.C., and *G. S. Waller* for the appellant.

The Solicitor-General (*Sir Terence O'Connor, K.C.*), *Arthur Morley, K.C.*, and *G. W. Wrangham* for the Crown.

Russell Vick, K.C. : It appears to be clear that an unlawful act causing death justifies a verdict of manslaughter, but it is not clear what amounts to an unlawful act. In every case in which an improper way of doing a lawful act has formed the basis of a charge of manslaughter, the degree of impropriety has always been a material factor. Whether or not the degree of negligence is sufficient to constitute manslaughter is a question for the jury, but, in the present case, the judge's summing up meant in effect that that question had been withdrawn from the jury.

Waller, following for the appellant, dealt with the possible interpretations which could be given to the Road Traffic Act, 1934, s. 34.

The Solicitor-General: The summing-up as a whole showed that the judge's direction to the jury upon the degree of culpability attaching to the crime of manslaughter was right. Sect. 34 of the Act of 1934 has the effect of enabling an act of dangerous driving to be punished in circumstances where it is not connected with death, e.g., where it takes place at a time antecedent to the death. In any event, where a jury finds recklessness of behaviour there is a degree of culpability sufficient to establish the crime of manslaughter. This may not be applicable to a case of dangerous, as distinct from reckless, driving.

Russell Vick, in reply.

LORD ATKIN: My Lords, this is an appeal under the necessary certificate of the Attorney-General from an order of the Court of Criminal Appeal dismissing an appeal by the appellant from conviction and sentence on a charge of manslaughter. The appellant was tried before DU PARCQ, J., at Leeds Assizes in Dec., 1936, and, being convicted, was sentenced to be imprisoned for 15 months, and was disqualified for life from holding a motor-driving licence.

He was indicted for manslaughter, the particulars of offence being that on June 27, 1936, he unlawfully killed William Burton Craven. The appeal is based solely on an alleged misdirection, and no issue is raised as to the facts, which can be stated shortly. The appellant, a man aged 37, was employed by the Leeds Corporation transport department at its Donisthorpe garage. On Saturday, June 27, at about 10.30 p.m., he was directed to take a van to assist a corporation omnibus which had broken down at Whingate, about 3 to 4 miles away. About 10.45 a man named Binks was driving a saloon car down the Tong Road away from Leeds at about 10 miles an hour. He noticed about 30 yards ahead the deceased, Craven, crossing the road from Binks' near side. The road is about 29 ft. wide. The appellant, driving fast, over 30 miles an hour, overtook Binks' car, and, driving well over on the off side of the road, ran into Craven, who was then within 3 or 4 paces of the kerb. He was carried on the bonnet for a short period, thrown forward and run over by the van. The appellant, who immediately after the accident nearly ran into a pedal cyclist, did not stop. He returned to the garage after 11, stating that he had not found the omnibus. When challenged a day or two later, he denied that he had travelled along the Tong Road on the Saturday night. At the trial, he said he was unable to remember the journey at all. There was no dispute that in fact the appellant was driving the van which killed Craven. The road was well lighted and there were people about. On these facts there would appear to have been a very clear case of manslaughter, and the only question that arises is whether the judge correctly directed the jury.

My Lords, of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions. From the early days, when any homicide involved penalty, the law has gradually evolved " through successive differentiations and integrations " until it recognises murder on the one hand, based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intention to kill, but with the presence of an element of " unlawfulness " which is the elusive factor. In the present case it is necessary to consider manslaughter only from the point of view of an unintentional killing caused by negligence, i.e., the omission of a duty to take care. I do not propose to discuss the development of this branch of the subject as treated in the successive treatises of Coke, Hale, Foster and East, and in the judgments of the courts to be found either in directions to juries by individual judges, or in the more considered pronouncements of the body of judges which preceded the formal Court of Crown Cases Reserved. Expressions will be found which indicate that to cause death by any lack of due care will amount to manslaughter ; but, as manners softened and the law became more humane, a narrower criterion appeared. After all, manslaughter is a felony, and was capital, and men shrank from attaching the serious consequences of a conviction for felony to results produced by mere inadvertence. The stricter view became apparent in prosecutions of medical men, or men who professed medical or surgical skill, for manslaughter by reason of negligence. As an instance I will cite *R.* v. *Williamson* (1), where a man who practised as an accoucheur, owing to a mistake in his observation of the actual symptoms, inflicted on a patient terrible injuries from which she died. Lord Ellenborough said :

> To substantiate that charge [of manslaughter] the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention.

The word " criminal " in any attempt to define a crime is perhaps not the most helpful, but it is plain that Lord Ellenborough meant to indicate to the jury a high degree of negligence. So at a much later date in *R.* v. *Bateman* (2), a charge of manslaughter was made against a qualified medical practitioner in circumstances similar to those of *Williamson's* case (1). In a considered judgment of the court, Lord Hewart, L.C.J., after pointing out that, in a civil case, once negligence is proved the degree of negligence is irrelevant, said, at p. 11 :

> In a criminal court, on the contrary, the amount and degree of negligence are the determining question. There must be *mens rea.*

After citing *Cashill* v. *Wright* (3), a civil case, Lord Hewart, L.C.J., proceeds :

> In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as " culpable," " criminal," " gross," " wicked," " clear," " complete." But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that,

> in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the State and conduct deserving punishment.

Here, again, I think, with respect, that the expressions used are not, indeed they probably were not intended to be, a precise definition of the crime. I do not myself find the connotations of *mens rea* helpful in distinguishing between degrees of negligence, nor do the ideas of crime and punishment in themselves carry a jury much further in deciding whether, in a particular case, the degree of negligence shown is a crime, and deserves punishment. But the substance of the judgment is most valuable, and, in my opinion, is correct. In practice, it has generally been adopted by judges in charging juries in all cases of manslaughter by negligence, whether in driving vehicles or otherwise. The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case. It is difficult to visualise a case of death caused by "reckless" driving, in the connotation of that term in ordinary speech, which would not justify a conviction for manslaughter, but it is probably not all-embracing, for "reckless" suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction. If the principle of *Bateman's* case (2) is observed, it will appear that the law of manslaughter has not changed by the introduction of motor vehicles on the road. Death caused by their negligent driving, though unhappily much more frequent, is to be treated in law as death caused by any other form of negligence, and juries should be directed accordingly.

If this view be adopted, it will be easier for judges to disentangle themselves from the meshes of the Road Traffic Acts. Those Acts have provisions which regulate the degree of care to be taken in driving motor vehicles. They have no direct reference to causing death by negligence. Their prohibitions, while directed, no doubt, to cases of negligent driving, which, if death be caused, would justify convictions for manslaughter, extend to degrees of negligence of less gravity. Sect. 12 of the Road Traffic Act imposes a penalty for driving without due care or attention. This would apparently cover all degrees of negligence. Sect. 11 imposes a penalty for driving recklessly, or at a speed or in a manner which is dangerous to the public. There can be no doubt that this section covers driving with such a high degree of negligence as that, if death were caused, the offender would have committed manslaughter. But the converse is not true, and it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public, and cause death, and yet not be guilty of manslaughter. The legislature appears to recognise this by the provision in the Road Traffic Act, 1934, s. 34, that, on an indictment for manslaughter, a man may be convicted of dangerous driving. But, apart altogether from any inference to be drawn from A sect. 34, I entertain no doubt that the statutory offence of dangerous driving may be committed, though the negligence is not of such a degree as would amount to manslaughter if death ensued. As an instance, in the course of argument it was suggested that a man might execute the dangerous manœuvre of drawing out to pass a vehicle in front with B another vehicle meeting him, and be able to show that he would have succeeded in his calculated intention but for some increase of speed in the vehicles in front: a case very doubtfully of manslaughter, but very probably of dangerous driving. I cannot think of anything worse for users of the road than the conception that no one could be convicted C of dangerous driving unless his negligence was so great that, if he had caused death, he must have been convicted of manslaughter. It therefore would appear that, in directing the jury in a case of manslaughter, the judge should in the first instance charge them substantially in accordance with the general law, i.e., requiring the high degree of negligence D indicated in *Bateman's* case (2), and then explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving, and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving. A direction that all they had to consider was whether death E was caused by dangerous driving within the Road Traffic Act, 1930, s. 11, and no more, would, in my opinion, be a misdirection.

In dealing with the summing-up in the present case, I feel bound to say, with every respect to the learned and very careful judge, that there are passages which are open to criticism. In particular, at the beginning F of his charge to the jury, he began with the statement that, if a man kills another in the course of doing an unlawful act, he is guilty of manslaughter, and then proceeded to ascertain what the unlawful act was by considering the Road Traffic Act, 1930, s. 11. If the summing-up rested there, there would have been misdirection. There is an obvious G difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal. If it were otherwise, a man who, while driving without due care and attention, killed another, would *ex necessitate* commit manslaughter. But as the summing-up proceeded the learned judge H reverted to, and I think rested the case on, the principles which have been just stated. On many occasions he directed the attention of the jury to the recklessness and high degree of negligence which the prosecution alleged to have been proved, and which would justify them in convicting the accused. On consideration of the summing-up as a whole, I am satisfied that the true question was ultimately left to the jury, and that, on the evidence, the verdict was inevitable. For these reasons, I came to the conclusion that the appeal should be dismissed.

LORD THANKERTON: My Lords, I have had the privilege of considering the opinion which has just been delivered by the noble Lord on the woolsack, and I desire to express my complete concurrence in it. A

LORD WRIGHT, M.R.: My Lords, I also agree, and I am asked by my noble and learned friend, VISCOUNT FINLAY, who has also had the privilege of considering the opinion which has just been delivered, to say that he agrees. B

LORD ROCHE: My Lords, I also concur.

Appeal dismissed.

Solicitors: *C. Butcher & Simon Burns*, agents for *Morrish, Nelson & Co.*, Leeds (for the appellant); *Director of Public Prosecutions* (for the Crown). C

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

WILLIAMS *v.* WILLIAMS AND NATHAN.

[COURT OF APPEAL (Greer and Scott, L.JJ., and Finlay, J.), **April 22, 1937.**]

Execution—Wrongful and irregular execution—Writ of possession—Judgment in respect of whole premises—Portion alleged protected by Rent Acts—Failure of landlord to warn sheriff's officer of protection—Whether officer landlord's agent.

The first defendant had obtained a writ of possession in respect of a house; the second defendant, who was a sheriff's officer, proceeding under this writ, evicted the plaintiff, who alleged that the portion of the house that he occupied was controlled under the Rent Restrictions Acts. The plaintiff brought an action against the landlord and the sheriff's officer for damages for trespass. The landlord was present at the time of the eviction but did not tell the officer that part of the house was controlled:—

HELD: (i) the landlord, although present at the eviction, had not taken any part in it, or given the sheriff's officer any such directions as would make him his agent. He was therefore not liable.

(ii) the sheriff's officer was, in the course of his duty, executing a judgment of the court, and so was not liable in an action for damages, however wrong the judgment might have been.

[EDITORIAL NOTE. Where a landlord or other party instructs a sheriff's officer to do something not covered by the judgment, he may make the officer his agent and so be liable in trespass. An attempt is here made to fix the landlord with such liability by reason of his omission to tell the sheriff's officer that part of the premises was protected by the Rent Acts. A failure to warn does not amount to a tacit instruction to do an act which may turn out to be unlawful. In the present case the judgment extended to the whole premises and therefore eviction from the whole premises was lawful.

AS TO WRONGFUL AND IRREGULAR EXECUTION, see HALSBURY, Hailsham Edn., Vol. 14, pp. 33-37, paras. 63-66; and FOR CASES, see DIGEST, Vol. 21, pp. 456-462, Nos. 384-422.]

Cases referred to:

(1) *Woollen* v. *Wright* (1862), 1 H. & C. 554; 21 Digest 550, *1244*; 31 L.J. Ex. 513; 7 L.T. 73.

(2) *Haskins* v. *Lewis*, [1931] 2 K.B. 1; Digest Supp.; 100 L.J. K.B. 180; 144 L.T. 378.

(3) *Howard* v. *Gosset, Gosset* v. *Howard* (1847), 10 Q.B. 359; 38 Digest 62, *375*; 16 L.J. Q.B. 345; 10 L.T. O.S. 51.

(4) *Brown* v. *Watson* (1871), 23 L.T. 745; 41 Digest 103, *538*.

(5) *Williams* v. *Smith* (1863), 14 C.B. N.S. 596; 21 Digest 468, *493*.

(6) *Minet* v. *Johnson* (1890), 63 L.T. 507; Digest, Practice, 391, *949*.

(7) *R.* v. *Cheshire County Court Judge & United Society of Boilermakers, Ex p. Malone*, [1921] 2 K.B. 694; 43 Digest 100, *1044*; 90 L.J. K.B. 772; 125 L.T. 588.

(8) *Mason* v. *Paynter* (1841), 1 Q.B. 974; 21 Digest 588, *1666*; 10 L.J. Q.B. 299.

(9) *Morris* v. *Salberg* (1889), 22 Q.B.D. 614; 21 Digest 549, *1236*; 58 L.J. Q.B. 275; 61 L.T. 283.

(10) *Jarmain* v. *Hooper* (1843), 6 Man. & G. 827; 21 Digest 549, *1235*; 13 L.J. C.P. 63; 2 L.T. O.S. 209.

(11) *Smith* v. *Keal* (1882), 9 Q.B.D. 340; 21 Digest 548, *1231*; 47 L.T. 142.

(12) *Lane* v. *Sterne* (1862), 3 Giff. 629; 29 Digest 467, *161*.

Appeal from a decision of His Honour Judge Spencer Hogg, dated Oct. 16, 1936.

The first defendant was the landlord of a house. Because of non-repair by the tenant, he obtained a writ of possession. The second defendant, who was a sheriff's officer, in executing the writ evicted the plaintiff, who was a sub-tenant, and who alleged that the rooms he occupied were controlled under the Rent Restrictions Acts. He brought an action, and was awarded £25 damages against each defendant. The defendants appealed to the Court of Appeal. A

Gilbert Beyfus, *K.C.*, and *W. E. P. Done* for the appellants.

D. Weitzman and *M. Marcus* for the respondents. B

Done : No action for trespass lies against a landlord or a sheriff's officer in respect of an eviction under a writ of possession. The officers were acting as agents of the High Court, not as agents of the landlord. Everything that was done was covered by the terms of the writ and the warrant. It was the duty of the sheriff to get possession of the whole premises. C In *Woollen* v. *Wright* (1), it was held that a landlord is not liable for a trespass committed by a sheriff's officer. Even if the writ is erroneous, no action for trespass lies : *Brown* v. *Watson* (4). The correct method would be to move to set aside the writ : *Williams* v. *Smith* (5) ; or for the sub-tenant to intervene in the action under D R.S.C., Ord. 12, r. 25, and obtain a summary order for restitution. This may be done even after judgment in the action has been delivered : *Minet* v. *Johnson* (6). The sheriff is absolutely protected : *Haskins* v. *Lewis* (2). He must give to the landlord absolute possession under the writ. If the claim for damages goes in this case, then the injunction E must go too, because a county court cannot give an injunction in cases where there is no right to substantive damages : *R.* v. *Cheshire County Court Judge & United Society of Boilermakers, Ex p. Malone* (7). [Counsel also referred to *Howard* v. *Gosset* (3) and *Mason* v. *Paynter* (8).]

Weitzmann : The sheriff must know that there are controlled tenants, F who cannot be turned out. If, contrary to the Acts, he turns out such tenants, he is doing a wrong. The landlord must have known his tenants were controlled ; it was on his instructions that these proceedings were started. He should have directed the sheriff's officer not to levy execution upon a controlled tenant. Once the information that there G was a controlled tenant was given to the sheriff's officer, there was a duty upon him to make some inquiry ; he must know the law. The landlord took a part in the execution by being present. [Counsel referred to *Haskins* v. *Lewis* (2), *Morris* v. *Salberg* (9), *Jarmain* v. *Hooper* (10), *Smith* v. *Keal* (11), and *Lane* v. *Sterne* (12).] H

Done was not called on to reply.

Greer, L.J. : This is an appeal from a decision of a county court judge, awarding damages to the plaintiff for trespass and granting an injunction and a declaration as an ancillary remedy. It is admitted, and it is clear law, that, in a case in the county court, unless there is a claim for damages, the ancillary remedy of an injunction or declaration cannot be granted by the county court judge. Therefore, the question we have to determine is whether the judge made a mistake in law in deciding that the defendant Williams and the sheriff's officer, who carried out the execution under a judgment obtained by Williams, were liable in law for damages.

First of all, with regard to the case of the defendant Williams, the landlord, I think it is clear to demonstration, from the case that has been cited of *Woollen* v. *Wright* (1) and other cases, and from a well known rule of law, that a sheriff and a sheriff's officer, executing a judgment of the court, are acting, as one may say, on behalf of the court. Each is doing his duty as an officer of the court, and is not a servant or agent of the plaintiff who has recovered judgment in the action. Of course, there may be circumstances which show that the plaintiff by intervention had made the sheriff his agent to do something which was not covered by the judgment, or by the writ of execution. If I had thought that what happened in this case amounted to that, or that the county court judge had found as a fact that the landlord Williams interfered, and requested the sheriff's officer to execute the judgment on property upon which he was not entitled to execute the judgment, then the judge would have been right. But, in my view, there is no evidence justifying any finding as to the special direction given to the sheriff or the sheriff's officer which might make the sheriff or the sheriff's officer the agent of the defendant Williams, the landlord. That is enough to dispose of the case as regards the defendant Williams. It seems to me that, with all respect to the very forcible argument of Mr. Weitzman, the cases he has cited have nothing to do with the matter. They are cases in which the agent of the judgment creditor, the man who has obtained judgment, has requested the officer to execute judgment against somebody who was not a party to the judgment at all, and was not a party to, or included within, the writ of *fi. fa.* Of course, if a plaintiff who has recovered judgment against Jones says to the sheriff's officer, who is about to issue execution and writ of *fi. fa.* on the judgment against Jones: "Issue execution against Williams," he would be liable for the consequences of having so instructed the sheriff's officer. But in this case there is no evidence of any such instructions. The only evidence before the judge on which Mr. Weitzman relies is that the defendant Williams, being present, did not say to the officer: "You must not execute judgment on the three rooms which are alleged to have been controlled premises." But that is quite different from saying that the appellant Williams instructed the officer to execute the judgment otherwise than in the manner in which in law it had to be executed. In addition to that, one has to remember that the judgment given by the master in this case was intended by the master to bind everybody on the premises, as in form it does. Certainly it was intended to bind the respondent in this case, because the master's attention was called to the fact that there had been a letter written, dated May 26, 1936, to Mr. and Mrs. Williams, the occupiers of the three rooms, who are the respondents to this appeal, and the parties who have obtained judgment from the judge, which was in these terms : A

> We have to inform you that, acting on behalf of the lessor, Mr. John Williams, we have instituted proceedings against the lessee Mrs. Hannah Mary Rendell, otherwise Abbott, to recover possession of the premises you occupy. The proceedings have been instituted in the High Court in an action entitled *John Williams* v. *Mrs. Hannah Mary Rendell otherwise Abbott.* If you wish to take part in this action, it will be necessary for you to intervene.

It seems to me that the master, in dealing with the matter, gave judgment B for possession, not only as against the people concerned other than the respondents, but gave judgment intending to cover the respondents as well, because he seems to have taken the view that this letter was sufficient, without proof that it was registered, or without proof that it was actually received. For these reasons, I have come to the con- C clusion that Williams, the landlord, should succeed, because there was no evidence which would affect him with liability for what the sheriff's officer did.

It is suggested that the effect of *Haskins* v. *Lewis* (2) is to show, in some manner which I do not understand, that the landlord was liable D for the acts of the sheriff. It may well be that the effect of the decision of the majority of the court is that judgment for possession does not necessarily mean that everybody has to be turned out of the premises. According to the judgment of the majority of the court in *Haskins* v. *Lewis* (2), where there is a judgment for possession against a tenant E who has sub-tenants, the effect of that judgment is that the sub-tenants are deemed to become tenants of the landlord on the same terms as they would have held on from the tenant, if the tenancy had continued. I ventured in that case to question, as I suppose I can no longer do, in view of the decision of the majority, whether judgment for possession F does not mean what it says, namely, that the plaintiff in the action shall be put into possession of the premises ; but apparently the majority of the court—and their decision is binding on me—seems to have come to the conclusion that it means only a judgment against the defendant in the action for possession, but that, if there happened to be any sub- G tenants, the judgment has only the effect of enabling the plaintiff in the action for possession to put himself in the position of the landlord of the sub-tenant, on the same terms on which the sub-tenant held from the defendant in the action. Be that as it may, it does not seem to me to show in any way that the landlord is responsible for the acts of the H officer of the court whose duty it is to carry out the judgment and the warrant in accordance with the law. For these reasons, I think that the respondent does not succeed in showing that *Haskins* v. *Lewis* (2) was an authority which entitled the judge to make the order that he did, so far as the liability of Williams is concerned. As regards the other defendants, it appears to me that the law is as stated by PARKE, B., in *Howard* v. *Gosset* (3), at p. 453, that the sheriff and his officers executing a judgment, however wrong the judgment may be, or however mistaken they may be as to the effect of the judgment, are not liable to have an action brought against them for damages for what they have done. On the authority of that very great judge, it seems to me right to say that the sheriff and his officers are free from liability for what they did in this case, however mistaken they may have been in thinking that they were entitled to turn out the respondents. For these reasons, I think that the appeal must be allowed, the judgment for the plaintiffs in the county court set aside, and judgment entered in the county court case for the defendants with costs. I think that the appellants should have the costs of this appeal.

SCOTT, L.J. : I agree, and I have nothing to add.

FINLAY, J. : I also agree, and I also have nothing to add.

Appeal allowed with costs.

Solicitors : *Parfitt Cresswell & Williams* (for the appellants) ; *Silkin & Silkin* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Dicta of SIMONDS, J., at pp. 566, 567, *applied.* *Re* GUNTER'S SETTLEMENT TRUSTS. [1949] 1 All E.R. 680.

Re LEEKE'S SETTLEMENT TRUSTS, BOROUGH *v.* LEEKE.

[CHANCERY DIVISION (Simonds, J.), **April 15, 21, 1937.**]

Settlements—Portions—Children entitled—Trust for children other than first or only son entitled for first estate in tail male—Disentail and resettlement by son entitled in remainder to estate tail—Death before life tenant—Whether entitled to portion.

By a resettlement certain estates were settled upon the father of R. L. for life, with remainder to R. L. for life, with remainder to his first and other sons successively in tail male, with certain remainders over. The resettlement contained a power for R. L. to charge the settled estates with certain sums as portions for his children "other than a first or only son entitled . . . to the premises for the first estate in tail male." R. L. exercised the power so reserved to him by a settlement in contemplation of his marriage, which was shortly thereafter solemnised. By that settlement R. L. charged the settled estates with the payment of sums for the portions of the children of the marriage excluding the children who were excluded by the resettlement from the ambit of the power. These sums were to be paid, if they vested, as happened, during R. L.'s lifetime, immediately after his death. R. L. had two sons, both of whom died in the lifetime of R. L., and both of whom were bachelors. Before his death, the elder son, with the consent of R. L., as protector of the settlement, executed a disentailing assurance, whereby, leaving untouched all estates and interests prior to his own estate tail, he effectually disentailed the settled estates and limited them in the first place to such uses as R. L. and he should jointly appoint and subject thereto to the uses upon the trusts and subject to the powers and provisions upon and subject to which they stood immediately before the disentailing assurance. The joint power of appointment was exercised once only, when a sum of money was raised and applied mainly in discharging incumbrances and in the payment of costs. A small sum was paid to R. L.'s elder son. Upon the elder son's death, the question arose as to whether the elder son came within the exclusion clause, and whether accordingly his estate was precluded from taking a portion on the death of R. L. :—

Held : the elder son, by dealing with the settled estates, although he was only then entitled to an estate therein in remainder, had disentitled himself to a portion. His exclusion was absolute, and he could not be included subject to an account. The fact that he had obtained only a trifling benefit by disentailing and resettling the estates, and that there may have been no actual detriment to the persons entitled in remainder were therefore irrelevant.

[**EDITORIAL NOTE.** It is necessary in order that an eldest son shall be excluded from the benefit of the portions clause, that he shall be " entitled " to an estate in the settled property. The question to be decided is the meaning of the word " entitled," and it is here held to be sufficient that the eldest son shall have been entitled in remainder and not in possession, and shall have, by virtue of such estate in remainder, joined in a disentailing and resettling of the settled estates, the resettlement being to such uses as he and his father should jointly appoint. It makes no difference whether or not the son has used the power of appointment to secure for himself any benefit from the settlement.

As to Persons Taking as Younger Sons, see HALSBURY, 1st Edn., Vol. 25, Settlements, pp. 588, 589, para. 1049 ; and for Cases, see DIGEST, Vol. 40, pp. 603-607, Nos. 1394-1433.]

Cases referred to :

(1) *Collingwood* v. *Stanhope* (1869), L.R. 4 H.L. 43 ; 40 Digest 607, *1429* ; 38 L.J. Ch. 421.

(2) *Duke* v. *Doidge* (1746), 2 Ves. Sen. 203, n. ; 40 Digest 603, *1394*.

(3) *Re Fitzgerald's Settled Estates, Saunders* v. *Boyd*, [1891] 3 Ch. 394 ; 40 Digest 607, *1427* ; 60 L.J. Ch. 624 ; 65 L.T. 242.

(4) *Rooke* v. *Plunkett*, [1902] 1 I.R. 299 ; 40 Digest 603, *1396 i*.

Summons asking whether the estate of Ralph Henry Leeke, deceased, the eldest son of the defendant, Ralph Leeke, was entitled to any, and, if so, what, share in the sum or sums charged by the defendant, Ralph Leeke, under the power in that behalf contained in a settlement made on June 19, 1876, of certain properties in Shropshire.

Geoffrey Cross for the plaintiff.

Fergus D. Morton, K.C., and *R. H. Hodge* for the defendants, Colonel and Mrs. Leeke.

R. F. Roxburgh, K.C., and *Cecil Preston* for the defendant, Edwin Hugh Leeke.

Simonds, J. : On June 19, 1876, a resettlement was made of the Leeke family estates in Shropshire, whereby the estates were settled upon Ralph Merrick Leeke, the father of the defendant, Ralph Leeke, whom I will hereafter call Colonel Leeke, for his life, with remainder to Colonel Leeke for his life, with remainder to his first and other sons successively in tail male, with remainder to uses, under which, in the events which have happened, the defendant, Edwin Hugh Leeke, has become entitled to the first estate tail in remainder. The resettlement contained, amongst other provisions, a power for Colonel Leeke, and other persons as therein mentioned, to charge the settled estates:

> with the payment of any sum or sums not exceeding in the different events hereinafter specified the different sums hereinafter mentioned for the portion or portions of his child or children or any one or more exclusively of the other or others of his children (other than a first or only son entitled or daughter indefeasibly entitled under or by virtue of these presents to the said premises for the first estate in tail male or in tail respectively), that is to say, if there shall be but one such child the sum of £5,000 and if there shall be two or more such children the sum of £10,000.

It also provided that Colonel Leeke should have the usual power of appointment over such sums. Colonel Leeke exercised the power so reserved to him by a settlement made on Dec. 5, 1881, in contemplation of his marriage, which was shortly thereafter solemnised. By that settlement, he charged the settled estates with the payment of sums for the portions of the children of the intended marriage excluding in identical words the children who, by the resettlement of 1876, were excluded from the ambit of the power, the sums being, if there should be only one child who became a proper object of the power, the sum of £5,000 to be an interest vested in such child being a son at 21, or being a daughter at 21, or marriage, and to be paid to him or her at the date of vesting if the same should happen after the death of the survivor of Ralph Merrick Leeke and Colonel Leeke, and if the same should happen during the life of such survivor then immediately after his death, and, if there should be two or more such children, the sum of £10,000, with a power of appointment amongst them reserved to Colonel Leeke, and other provisions not material to be stated. Colonel Leeke succeeded to the property on the death of his father in 1882. He has had two sons only of his marriage, and his wife is now 83 years of age. His two sons were Ralph Henry Leeke, who was born on Dec. 7, 1883, and died a bachelor and intestate on Nov. 5, 1915, and Charles Leeke, who was born on Mar. 26, 1887, and died a bachelor on Apr. 11, 1916. Colonel Leeke is the legal personal representative of his son Ralph Henry Leeke. The defendant Edwin Hugh Leeke, a nephew of Colonel Leeke, is entitled to the first estate tail in remainder. It is conceded that Charles Leeke was a son of the marriage who, for the purpose of the portions provision, did not come within the exclusion, but was entitled to a portion. He was for a few years the only surviving son of the marriage, but it was not, and could not, in the face of the authorities, to some of which I shall refer, be argued that he had such an estate in tail male or in tail as precluded him from taking a portion.

The question, and the only question, which I have to determine, is whether the elder son, Ralph Henry Leeke, was or was not precluded from taking a portion. It is conceded that he also would not be so precluded if he had not entered into the transactions to which I shall next refer. Having come of age on Dec. 6, 1904, Ralph Henry Leeke on Apr. 19, 1905, with the consent of Colonel Leeke as protector of the settlement, executed a disentailing assurance whereby, leaving untouched all estates and interests prior to his own estate tail, he effectually disentailed the settled estates and limited them in the first place to such uses as Colonel Leeke and he should jointly appoint and subject thereto to the uses upon the trusts and subject to the powers and provisions upon and subject to which they stood immediately before the disentailing assurance. The joint power of appointment thus created was exercised once only, namely, on Apr. 20, A 1905, the day after the disentailing assurance, where, by a mortgage of that date, the sum of £29,000 was raised upon the security of the settled estates. Of this sum of £29,000, £23,000 was paid to prior mortgagees by the direction of the mortgagee, who took a transfer of their mortgages. A further £5,000 was applied in the discharge of subsisting incumbrances B of the settled estates. Of the remaining £1,000, all except £57 13*s.* 3*s.* was applied in payment of costs of and incidental to the transaction, and the discharge of family charges. The sum of £57 13*s.* 3*d.*, and no more, was paid to Ralph Henry Leeke himself. It is upon these facts that it is contended, on behalf of the remainderman, that Ralph Henry Leeke comes C within the exclusion clause, and is precluded from taking a portion, so that £5,000, and no more, will be raisable for portions on the death of Colonel Leeke, while it is contended by Colonel Leeke, as his legal personal representative, that he is not so precluded, so that a sum of £10,000 will be raisable, of which £5,000 would go to the estate of Ralph Henry D Leeke. To determine this question, I have to decide whether Ralph Henry Leeke was, within the meaning of the exclusion clause, a first or only son entitled under or by virtue of the settlement to the settled estates for the first estate in tail male. In coming to my decision, I must be guided by the principles affirmed by Lord Hatherley, L.C., in E *Collingwood* v. *Stanhope* (1), at p. 52:

> that the court, with regard to all questions arising on provisions for children under a marriage settlement, holds that the principal intent to be imputed to the parties (however differently that intent may be expressed, so long as it is not contrary to what is actually found in the settlement) is a desire to provide equality for the children, that one child should not take a double portion, and that no child should F be excluded.

So it is that, though an "eldest" son or an "elder" son is, by the terms of a settlement, excluded from portions, and a certain son has in nature that character, yet he is not excluded if he does not in fact succeed to the settled estates; for, in such a context, as Lord Hardwicke, L.C., said, G in *Duke* v. *Doidge* (2):

> Eldership not carrying the estate along with it is considered not such an eldership as will exclude.

So, too, if the exclusion be of a "first" or "only" son, it does not operate H unless that first or only son in fact succeeds to the estate. It is for this reason that, though Ralph Henry Leeke was the first son of his father, and was, during the whole of his life, entitled to the first estate in tail male in remainder, it could not be argued that he was excluded from the portions provision, had he not entered into the transactions which I have detailed. So also a son, who is in nature a younger or a second son, may, by the death of an elder brother, succeed to the settled estates and be excluded from a portion. Consistently with this principle that I have stated, it is at the date when the portions are distributable that it must be ascertained whether a child is or is not entitled to a portion. This is made abundantly clear from the case of *Collingwood* v. *Stanhope* (1), to which I have referred, and the cases there cited. In the present case the date of distribution has not yet arrived, but the circumstances do not admit of any event happening which can affect the rights of the parties.

I have, in examining the general principles according to which the court construes an exclusion clause, more than once used a loose expression, " succeeds to the estates," which, at that stage of my consideration, was accurate enough, but it is now necessary to examine more closely what are the circumstances which, when the date of distribution arrives, enable one to say of a child that he has or has not, or had or had not, such an estate as to exclude him from portions. It is, for instance, clear that it is not necessary, in order that he may be excluded, that he should in fact enjoy an estate in possession in the settled estates at the date of distribution. It is sufficient, as LORD WESTBURY pointed out in *Collingwood's* case (1), at p. 58, that the person who is to be excluded should at some time have been entitled to the estate; and, as CHITTY, J., held in *Re Fitzgerald's Settled Estates, Saunders* v. *Boyd* (3), it is sufficient to exclude him if, being then entitled to an estate in remainder, he has, with the assistance of his father, the tenant for life, procured for himself, out of the settled estates, a benefit exceeding any share of portions which could come to him.

The point for my decision is one that in *Collingwood's* case (1) appears to have been left open, namely, is a son to be regarded, for the purpose of the exclusion clause, as having, or having had, such a first estate in tail male as to disentitle him to a portion, if he has, by virtue of his estate, disentailed the settled estates, and resettled them to such uses as he and his father jointly appoint. Does it make any difference whether, and to what extent, that power of appointment has been exercised, and, if exercised, whether the result of its exercise has been, either to confer some benefit on the son in question, or to affect, in a manner adverse to his younger brothers, the previous limitations of the settled estates ? Again, does it make any difference if, as may well happen, the son so disentailing obtains the benefit of a rentcharge immediately issuing out of the settled estates, or, as also may happen, if, by consenting with his father to deal with the settled estates under and by virtue of his estate tail, he obtains some extraneous or collateral advantage, which may or may not be detrimental to his younger brothers ? These are questions which must be borne in mind when it is sought to ascertain what is the principle upon which a son is sought to be excluded from a portions provision. No question of accounting arises : a son either is or is not excluded ; he cannot be included subject to his bringing into account sums which may be certain, or advantages which may be difficult to measure.

The conclusion to which I have come is that whenever a son, being entitled in remainder to an estate which, if it were an estate in possession, would exclude him from the portions provision, by virtue of that estate in remainder exercises dominion over and disposes of the settled property, he is at once and for ever excluded from the portions provision. It appears to me that it is not possible for the court, in its desire to observe the principle by which, as I stated earlier in my judgment, it must be guided, to measure the benefit to himself or the detriment to others which the son so disentailing the settled property creates. In *Fitzgerald's* case (3), to which I have already referred, the result of a disentailing assurance and resettlement by one who was then the eldest son had been to give to him for his own benefit a sum equal to, or more than, his proper share of the portions fund, and, upon this ground, CHITTY, J., held that, though he predeceased the tenant for life, his estate was not entitled to any further portion. As I read his judgment, he expressly left open the question which I have to decide. At least I find nothing in it which conflicts with the view that I have formed. In *Collingwood's* case (1) there is a passage in the opinion of LORD WESTBURY, at p. 59, which somewhat favours the same view, and in the opinions of LORD COLONSAY and LORD CAIRNS I find the same indication, particularly in the speech of the latter, at p. 63, when he says, speaking of the elder son who had disentailed and joined with his father in resettling the estates :

> He had so become entitled before the period of distribution ; but it appears to me that that makes not the slightest difference. It was for him to consider whether he would leave his title as it then stood, or use that title for the purpose of creating a new devolution of the estates. He had become entitled to, and obtained the benefit of, the estates within the terms of the settlement.

From an Irish case, *Rooke* v. *Plunkett* (4), I get further assistance. In that case the exclusion clause was in these terms :

> other than the son of the marriage who under the limitations of the settlement should become entitled to the lands.

The eldest son of the marriage, who would, had he survived his father, have become entitled in possession to an estate tail in the lands, joined with his father in mortgaging the settled estates for certain sums, and thereafter with the consent of his father as protector disentailed the estates so far as might be necessary to make the mortgages effective. There was no evidence how much of the mortgage money the son received for his own benefit. He died a bachelor before his father. The question was whether his estate was entitled to any share of the portions fund. SIR ANDREW PORTER, M.R., decided that his estate was not so entitled, and in the course of his decision made some observations which I would respectfully adopt. Dealing with the estate of the eldest son, he points out that he became entitled on his birth to the vested estate tail, and adds:

> It is clear, however, that this is not the sort of entitling that is meant. The words must be read as importing actual enjoyment of the property, and so equivalent to "entitled in possession" or "actually acquiring." A mere title in remainder cannot be enough to exclude from the participation in the settled funds.

It is clear from what follows that here the emphasis is on "mere," for, after observing that the son must be taken to have received the mortgage moneys out of the estate, since, whether he actually touched the money or not, it could not have been charged upon the inheritance without his positive act, the judge asks the question whether, in the circumstances, he had "become entitled" to the estate (a question not differing, in my view, from the question which I have to answer in this case, whether Ralph Henry Leeke was entitled for an estate in tail male to the settled estates), and thus he answers it:

> I have said that in one sense he certainly did. He became entitled to it in remainder. That, however, is not what is meant. Did he receive it and enjoy it in possession? His estate in remainder did not vest in possession by the determination of the previous life estate; but he and the tenant for life opened the entail and enjoyed the inheritance just as they chose and without restriction save their own good pleasure.

The judge goes on to deal with the facts of that case, but significantly says in reference to the decision of CHITTY, J., in *Re Fitzgerald's Settled Estates* (3):

> the learned judge does not decide that even a small or trifling encroachment upon the bulk of the estate would alter the result if once the entail is barred, so that it is in the power of the tenant in tail, with the concurrence of the protector, to dispose of the whole.

Consistently, then, with the Irish decision, I here decide that Ralph Henry Leeke was entitled to the settled estates for an estate in tail male within the meaning of the exclusion clause, notwithstanding that his estate never vested in possession. The actual benefit which he himself received out of the estates may have been trifling; the actual detriment to the persons entitled in remainder after him may have been none. But, unless there can be, as I hold there cannot be, some form of accounting between the parties, it matters not whether the benefit derived by the eldest son is equal to, or a little less or much less than, the portion to which he would, as a younger son, have been entitled. In my judgment, there is no room for the nicely calculated less or more. It is sufficient that a son, being entitled in remainder to an estate tail, elects to take advantage of that estate, and to make use of it for the purpose of dealing with the settled estates. What disposition he makes, what advantages he gains, either at once or subsequently, by the exercise of a joint power, are, in my view, irrelevant. There must be a declaration accordingly.

Solicitors: *Metcalfe, Hussey & Hulbert* (for the plaintiffs); *J. F. B. Satchell* (for the defendants, Colonel and Mrs. Leeke); *Preston, Lane-Claypon & O'Kelly* (for the defendant, Edwin Hugh Leeke).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re HALSTED'S WILL TRUSTS, HALSTED *v.* HALSTED.

[Chancery Division (Farwell, J.), **April 20, 1937.]**

Trusts and Trustees—Settlement—Life tenant—Power to raise capital to establish life tenant in business or otherwise for his benefit or advancement—Settlement on tenant for life and his wife and children—"Benefit."

A testator directed that part of his residuary estate should be held upon trust to pay the income thereof to one of his sons and that after the son's death it should fall back into and form part of the testator's residuary estate. The trustees were, however, empowered to advance to the son a sum not exceeding one half of this settled fund for the purpose of establishing him in business "or otherwise for his benefit or advancement in life." The son, who was married, was not in a position to make provision for his wife and child in the future, and he sought to have a sum raised out of the settled fund to be settled upon himself for life and after his death for his wife for life and after her death for his children:—

Held: the trustees had power under the terms of the settlement to raise a sum not exceeding one half of the settled fund for the purposes of a settlement upon the son and his family, but such a settlement ought to include the wife and children only, with an ultimate trust in favour of the testator's residuary trust.

[EDITORIAL NOTE. The decision here concerns the meaning of the word "benefit" in the usual advancement clause. Advances are usually regarded as payments to start a person in business or a profession, but other payments have been held to be for the benefit of the person to be advanced. The present case is very like that of *Roper-Curzon* v. *Roper-Curzon* (1), where Lord Romilly, M.R., held that, while he could not authorise payment of one quarter of a fund to a son to be settled by him, yet he could order payment of that sum to the trustees of a post-nuptial settlement made by him.

As to Advancement, see HALSBURY, Hailsham Edn., Vol. 17, pp. 649, 650, paras. 1364, 1365; and for Cases, see DIGEST, Vol. 28, pp. 251, 252, Nos. 1073-1083.]

Cases referred to:

(1) *Roper-Curzon* v. *Roper-Curzon* (1871), L.R. 11 Eq. 452; 28 Digest 252, *1083*; 24 L.T. 406.

(2) *Lowther* v. *Bentinck* (1874), L.R. 19 Eq. 166; 43 Digest 789, *2280*; 44 L.J. Ch. 197; 31 L.T. 719.

(3) *Re Brittlebank, Coates* v. *Brittlebank* (1881), 30 W. R. 99; 43 Digest 881, *3239*.

Adjourned Summons asking that the court in the exercise of its control over the discretion conferred on the defendants by the will of Henry Halsted might direct such a sum as the court should see fit to be raised under the power given to the defendants by the will and upon such trusts in favour of the plaintiff his wife and his child Arthur and any further children of the marriage of the plaintiff and his wife as the court should see fit.

The testator, Henry Halsted, died on Oct. 3, 1911, and by his will, dated Sept. 13, 1910, left his residuary estate, subject to a life interest to his wife, equally amongst six of his sons and his two daughters. In the case of one of the sons, Gerald Halsted, the plaintiff, the trustees were directed to hold his share and to pay him the income therefrom, and

after the plaintiff's death his share was to fall into and form part of the testator's residuary estate. The trustees were, however, empowered to advance to the plaintiff a sum, not exceeding one moiety of his share, for the purpose of establishing him in business or otherwise for his benefit and advancement in life. On the first question asked by the summons
A it was decided that the plaintiff was entitled to receive the whole income of his share during his lifetime.

J. Leonard Stone for the plaintiff, Gerald Halsted: The trustees have always taken the view that they have no power to raise the moiety or any part of the share for the benefit of the plaintiff's wife and child.
B [Counsel referred to *Roper-Curzon* v. *Roper-Curzon* (1).]

Farwell, J., referred to *Lowther* v. *Bentinck* (2).

G. P. Slade for the trustees: The trustees have taken the view that they are entrusted with a discretion which they must exercise for the benefit of the younger son during the whole of his lifetime.

C *Roger Turnbull* for the residuary legatee: In the present case, it is suggested that the words "or otherwise" must be read *ejusdem generis*. [Counsel referred to *Re Brittlebank, Coates* v. *Brittlebank* (3).]

M. G. Hewins for one of the persons entitled upon an intestacy.

D Farwell, J.: The question I have to determine is whether or not, as a matter of construction, the trustees, in the exercise of their discretion, can raise a sum not exceeding one half of the sum of the share of Gerald Halsted, and make a settlement of it for the benefit of him for life, and then for the benefit of his wife, and then for his children. The trustees
E have taken up a proper attitude before me. They want to know the extent of their trust. They are not proposing to surrender their discretion. They want to know whether they have any such power at all. The trustees are given a discretion to raise a sum not exceeding one half of the share of Gerald for the purpose of establishing him in business—
F he is now 63, and there is no question of his now being established in business—or otherwise for his benefit and advancement in life. The word benefit is an extremely wide word. It has been held that, under a power of this sort, a payment of a certain debt may be for the benefit of a person, and, in one case, it was held that it would apply to the payment
G of death duties. It has also been held that a settlement made on the object of the power on his marriage may also come within the word benefit. Here I have the words "otherwise for the benefit and advancement in life." I consider I am entitled to read these words disjunctively, and I have to consider whether a settlement made for the
H benefit of the plaintiff's wife and child would be for his benefit. To some extent it would be to benefit objects other than objects of the power, because the wife and children might be the persons to benefit. But I cannot doubt that it would be for the plaintiff's benefit that some provision should be made for them. The plaintiff and his wife are not in a position to make provision for the future. That a man should be married

and have a family and have no means of making any sort of provision in the event of his death is a prospect that, to many of us, would be so appalling, that some provision for the man's wife and children would seem to be for the benefit of that man, because he would be relieved from what would be a very anxious position so long as no provision was made. Having regard to the very wide terms in which the word "benefit" has been construed in the past, I consider that the trustees may, under this power, raise a part not exceeding one half, and have the part so raised settled for the benefit of the plaintiff, his wife, and his children. I think that, in any settlement which was proposed for that purpose, the only persons who could properly be included would be the plaintiff's wife and children, and any ultimate trust would, in my view, have to be for the ultimate residue of the testator's estate. Subject to that, I declare that the trustees have power to make an advancement for this purpose, if they think fit. I leave it to the trustees to say whether they will exercise the power, and on what terms. There will be liberty to apply.

Solicitors: *Rudram, Braithwaite & Co.* (for the plaintiff); *Preston, Lane-Claypon & O'Kelly*, agents for *Raper & Co.*, Chichester (for all the defendants)

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re DE CESPEDES, THE DEBTOR *v.* PETITIONING CREDITOR AND OFFICIAL RECEIVER.

[Court of Appeal (Lord Wright, M.R., Romer and Scott, L.JJ.), **March 19, 22, 1937.**]

Bankruptcy—Notice—Substituted service—Affidavit in support—Sufficiency—Bankruptcy Rules, 1915, *r.* 156.

The debtor, an alien who had become domiciled in England, had purchased the lease of a house in London which he assigned to his mother in 1928. The debtor lived in the house and paid the rates. In Apr., 1936, the debtor took up a permanent residence in France, but visited England from time to time on business. A bankruptcy notice was issued against him on Aug. 24, 1936, and an order for substituted service of this notice was made on Aug. 27, 1936. The affidavit in support of the application for substituted service stated that on Aug. 24 a clerk to the solicitors for the petitioning creditor, having been informed that the debtor's solicitors could not facilitate service of the bankruptcy notice, had attended at the house above mentioned to serve the debtor, but had been unable to obtain a reply; that a registered letter addressed to the debtor at the same house had been sent on the same day; and that the clerk had attended at the house again on Aug. 27 and had again been unable to obtain a reply. The affidavit did not state that the debtor was not within the jurisdiction, nor that service by post would not reach him, nor that there was any reason to think that the house mentioned was the place at which the debtor would be found:—

Held: the affidavit was not one on which an order for substituted service ought properly to have been made.

[**EDITORIAL NOTE.** The present case is governed in principle by the recent decision in *Re A Judgment Debtor* (1). The affidavit relied upon in the present case is in a form that has usually been accepted in bankruptcy matters as sufficient. No doubt there is a special difficulty in effecting service upon debtors upon whom it is desired to serve a bankruptcy petition, and it appears to have been thought that in such circumstances such an affidavit was sufficient to warrant an order for substituted service. The Court of Appeal, however, having regard to the fact that bankruptcy involves very serious disabilities, have decided that the affidavit must show that proper inquiries have been made to ascertain where the debtor is, and that the result of such inquiries is a complete practical impossibility of personal service.

As to Substituted Service of Bankruptcy Petition, see HALSBURY, Hailsham Edn., Vol. 2, p. 72, para. 87; and for Cases, see DIGEST, Vol. 4, pp. 137, 138, Nos. 1263-1273. See also YEARLY SUPREME COURT PRACTICE, 1937, pp. 73-79.]

Cases referred to:

(1) *Re A Judgment Debtor* (*No.* 1539 *of* 1936), *Judgment Debtor* v. *Judgment Creditor*, [1937] 1 Ch. 137; [1936] 3 All E.R. 767; Digest Supp.

(2) *Porter* v. *Freudenberg, Kreglinger* v. *Samuel* (*S.*) *& Rosenfeld, Re Merten's Patents*, [1915] 1 K.B. 857; 2 Digest 140, *155*; 84 L.J. K.B. 1001; 112 L.T. 313.

Appeal from an order made by Mr. Registrar Kean on Jan. 12, 1937, refusing to rescind a receiving order made against a debtor on Oct. 5, 1936. The debtor was a Peruvian by birth, and was educated in Paris, but came to England at the age of 20. He acquired an English domicile, and was a party to divorce proceedings in England in 1935. His mother and sisters had come to England in 1920, and he had purchased for them the lease of a house at 69, Cornwall Gardens, S.W.7. He assigned his interest in the premises to his mother in 1928. He lived in this house and paid rates. He managed a small private company for some seven years. In 1936, after his home was broken up, he became a partner with his brother in a business in Paris. He was indebted to a firm of solicitors for the costs and expenses of the matrimonial proceedings. He took up permanent residence in Paris on Apr. 30, 1936, but visited London from time to time on business connected with the private company, to whom he acted as adviser. On June 18, the solicitor for the petitioning creditor, in connection with the alimony proceedings against the debtor, inspected documents bearing on the debtor's means, and was therefore aware of his circumstances, and that he was resident out of the jurisdiction. The bankruptcy notice was issued against the debtor on Aug. 24, and an order for substituted service of this notice was made on Aug. 27, 1936. The affidavit in support of the application for substituted service did not state that the debtor was not within the jurisdiction, nor that service within the jurisdiction by post would not reach him. The petitioning creditor filed his petition on Sept. 18, and described the debtor as residing at 69, Cornwall Gardens. On Sept. 24, a clerk in the employ of the solicitors of the petitioning creditor filed an affidavit the relevant terms of which are quoted by Lord Wright, M.R., in his judgment. On Oct. 5, a receiving order was made. The debtor appealed against the receiving order and the order for substituted service.

Serjeant Sullivan, K.C., and *G. F. Kingham* for the appellant debtor.

W. N. Stable, K.C., and *Harold Simmons* for the petitioning creditor, respondent.

Lord Wright, M.R.: There are two grounds on which this appeal is supported before us. One is that the whole proceedings are bad because there was no proper service of the bankruptcy notice on the debtor. It is also said that there was no proper service of the petition on the debtor, but I shall limit my observations to the question of the bankruptcy notice, because it is sufficient to invalidate all the proceedings if the bankruptcy notice was not properly served. The second ground is that the debtor was not a debtor within the meaning of that term as contained in the Bankruptcy Act, 1914, s. 1 (2). Now, it is clear that the latter question would involve careful examination of the facts as to the position of the debtor, but they need not be investigated, as the whole proceedings are invalidated by the failure to effect proper service of the bankruptcy notice.

What happened was that an order was made by the registrar for substituted service purporting to act under the Bankruptcy Rules, 1915, r. 156, which provides:

> If personal service cannot be effected, the court may extend the time for hearing the petition, or if the court is satisfied by affidavit or other evidence on oath that the debtor is keeping out of the way to avoid such service, or service of any other legal process, or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition to some adult inmate at his usual or last known residence or place of business, or by registered letter, or in such other manner as the court may direct, and that such petition shall then be deemed to have been duly served on the debtor.

The matter is limited in terms to service of petition, but the same principles apply to service of bankruptcy notice. Rule 143 states:

> A bankruptcy notice shall be served, and service thereof shall be proved in the like manner as is by these rules prescribed for the service of a creditor's petition.

Therefore it is the terms of r. 156 which it is vital to consider. The question of the propriety of an order for substituted service was recently discussed in this court in the case of *Re A Judgment Debtor* (*No.* 1539 *of* 1936) (1) by a court one member of which is a member of the court as now constituted. In his judgment he (Romer, L.J.) says at p. 148:

> It is a fundamental principle of English law that a person shall have effective notice, if it be possible, of any process instituted against him in our courts, and certainly none the less because that process is a bankruptcy process. It is plain from the review of the facts which has just been made by my Lord that in this case that fundamental principle has been disregarded.

That, as I have said, was a case of substituted service. The registrar made an order for substituted service at the debtor's place of business in London and c/o his solicitors, and the court pointed out that the bankruptcy notice says that within seven days the debtor must pay the sums due to the creditors and that, if he does so pay, he may be acquitted of all of the consequences of failure. In view of the elaborate judgment of SLESSER, L.J., it seems unnecessary to repeat the view which the Court of Appeal took, in *Porter* v. *Freudenberg* (2), about substituted service in general. SLESSER, L.J., pointed out that, if these A rules apply to substituted service of an ordinary process, then *a fortiori* they should apply to notice of bankruptcy, which in itself naturally involves very serious disabilities and liabilities. SLESSER, L.J., after referring to r. 156, says, at p. 147 :

> Here there is no question of service upon an adult inmate at the debtor's usual B or last known residence or place of business, and there is no question of a registered letter. The service is to be done " in such other manner as the court may direct." As I have pointed out, that " other manner " was laid down, not by advertisement, as was requested, but by registered letter addressed to the debtor at a certain house in England where it was known to all persons that he was not—nor could he possibly be within seven days—and c/o his solicitors at a certain address in London. In the circumstances of this case, it seems to me entirely impossible that such a notice C sent to him by registered post in London on Aug. 26 could possibly, in his then situation, have been an effective notice to him giving him his necessary rights under the Bankruptcy Act.

Bearing these observations in mind, it is necessary to look at the affidavit on which an application was made for an order for substituted service, and on which the order for substituted service was actually made. I D protest against any attempt to justify the inadequacy or the impropriety of the affidavit by making allegations as to what happened afterwards. What we have to deal with here is the sufficiency of the affidavit. In it, Mr. Lake, clerk to the solicitors for the petitioning creditor, says :

E

> Having been instructed by my principals to effect service of the bankruptcy notice issued herein I did on Aug. 24, 1936, ring up the debtor's solicitors Messrs. Bowkers and inquire if they would facilitate service of a bankruptcy notice which my firm had issued against their client when I was informed that they could not facilitate service of the said bankruptcy notice.

That made it quite clear, therefore, that the debtor's solicitors had no F authority to accept the service, and that was their position. Then, in the second paragraph, he says :

> I did on Aug. 24, 1936, attend at 69, Cornwall Gardens, Kensington, S.W.7, in the county of London to serve the debtor with the said bankruptcy notice when I was unable to obtain a reply to my repeated rings.

G The affidavit does not state that there was any reason to think that 69, Cornwall Gardens was the place at which the debtor would be found. It merely gives this address, without the slightest indication of any connection between the debtor and that particular address. I shall say a little later what the facts seem to have been, and by the facts H I mean the facts which were known or which one would reasonably expect to be known to the petitioning creditor's solicitors. Anyhow, there is 69, Cornwall Gardens visited, without any statement why Mr. Lake attended at that house. Then the affidavit goes on :

> On the same day, *viz.*, Aug. 24, 1936, my principals caused a letter to be written and sent by registered post addressed to the debtor at 69, Cornwall Gardens aforesaid.

The letter states that the clerk had attended at that address to serve the bankruptcy notice, but had been unable to obtain a reply to repeated knocks and rings, and continues:

> He will therefore again attend at 69, Cornwall Gardens on Aug. 27 next at 9 a.m. to serve you with the said bankruptcy notice.

Then it suggests that some alternative appointment shall be made, otherwise the application will be made for substituted service. But the sending of that letter to 69, Cornwall Gardens—an address, as I have already said, for which there is no explanation in the affidavit at all—is not a proceeding which, as far as the affidavit shows, is calculated to bring any notice to the mind of the debtor. There is no statement that he is known to be there, or expected to be there. All that is stated in the affidavit is that to this address the clerk went, could not get a reply to repeated rings and knocks, and thereupon he sends a registered letter, which, as far as can be seen, is no more likely to bring the matter to the mind of the debtor than the knocks and rings. Then again, in para. 4 of the affidavit, the clerk says that he again attended at 69, Cornwall Gardens, was unable to obtain a reply to repeated rings, and that he was then informed by the female servant next door that the people were away—which seems to be what had been stated so far. Then he goes on to say that she told him that a charwoman called every day and forwarded all letters to them. That is hearsay evidence twice removed. Then the affidavit goes on to say: "The said letter has not been returned to my firm." That is to say, between Aug. 24 and Aug. 27. He does not say that he has made any inquiry at the post office about the fate of a registered letter, of which, presumably, he holds the certificate of posting. Then finally, in para. 5, he says:

> I submit that I have done all within my power to effect personal service of the bankruptcy notice upon the debtor—

which is a startling proposition in view of what I have stated. Then he says:

> I verily believe he is keeping out of the way for the purpose of evading service.

He gives no justification at all for that statement, unless justification is to be found in what I have already said. To my mind, these abortive efforts give no justification for a statement of that sort.

To my mind, that affidavit as it stands is one on which an order for substituted service cannot, and should not, properly be made. It does not seem to me to carry any indication with it that the notice will reach the mind or the attention of the person to whom it is directed. It does not justify the conclusion that there is a complete practical impossibility of an actual service, and it fails entirely, as I have said, on the probability of its being effective. The matter becomes even more striking when it is realised that, as far as is known, Mr. Lake made no attempt to exhaust all the possibilities of information which existed in the offices of the firm which employed him. We now know that the debtor, who had been a managing director of a motor business for some years in this country, and still retained an interest in that business, had gone to Paris in order to enter into partnership in a business there. It seems very probable that at least some members of the firm of solicitors acting for the petitioning creditor were aware of that circumstance, but I should have thought that, if proper inquiries had been made, the petitioning creditor's solicitors must have ascertained what the precise position of the debtor was, and indeed have ascertained the address of the business premises of his firm in Paris.

What, however, is important is this: that Mr. Lake made no attempt at all to get further information other than those which he stated. I do not attach any personal discredit to Mr. Lake, because I am afraid that the practice has grown up in the registry of accepting and acting upon affidavits of this character. All I can say is that I think that practice should be discontinued. I am only repeating what was said by this court on the previous occasion in the judgment which I have read. I think that the affidavit was entirely insufficient, for the reasons which I have indicated. That being so, the order for substituted service upon which it was based cannot be supported, and with that the whole of the subsequent proceedings in the bankruptcy must fail. The result is that the appeal from the order of MR. REGISTRAR KEAN will succeed, and the receiving order will be set aside, and the petition dismissed.

ROMER, L.J.: I agree.

SCOTT, L.J.: I agree.

Appeal allowed, with costs in both courts.

Solicitors: *Bowkers* (for the appellant); *Lazarus, Son & L. A. Hart* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

ARMSTRONG, TAYLOR & WHITTAKER *v.* OLDHAM CORPORATION.

[MANCHESTER WINTER ASSIZES (Hawke, J.), **March 18, 19, 1937.**]

Contract—Payment of solicitors' costs—Action against local government officer—Corporation undertaking to assist in paying or contributing to costs of action—Settlement of action—Enforceable contract—Vagueness.

The chief clerk of a hospital conducted by the defendant corporation wrote a letter to the proper quarter in respect of the conduct of the steward of the hospital, as a result of which the steward was dismissed. The steward thereupon brought an action for libel against the chief clerk, who approached certain solicitors with a view to their acting for him. The chief clerk was not in a position to pay the costs of an action. The solicitors received a letter from the town clerk of the defendant corporation in the following terms: "As I understand that you are acting for [the chief clerk] in this action, I beg to inform you that the Town Council . . . confirmed the recommendation of the health committee . . . to assist [the chief clerk] in paying or contributing to his costs in defending the action." Shortly before the trial of the action, upon the advice of counsel, and after consulting the town clerk, a settlement was effected, the chief clerk consenting to judgment against him with costs and undertaking to withdraw his allegations :—

HELD : the terms of the letter were not too vague to be enforced and there was a contract by the corporation to pay the whole of the solicitors' costs, or such part thereof as was not obtainable elsewhere, and the fact that the action was settled did not relieve the corporation from its liability. A

[**EDITORIAL NOTE.** There are difficulties in establishing a contract with a corporate body when acting by a resolution which is subsequently embodied in a letter written by their officer. Here the difficulties are increased because the corporation are voluntarily undertaking a liability for the costs to be incurred in an action for tort brought against one of their servants, and the resolution was necessarily in the most general terms. The main question is, therefore, whether the letter was so vague in its terms that it did not amount to an enforceable contract. B

AS TO UNCERTAINTY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 281-283, paras. 349-351 ; and FOR CASES, see DIGEST, Vol. 17, pp. 359-362, Nos. 1705-1736, and Vol. 42, pp. 129, 130, Nos. 1234-1243.] C

Cases referred to :

(1) *Loftus* v. *Roberts* (1902), 18 T.L.R. 532 ; 12 Digest 54, *307*.

(2) *Roberts* v. *Smith* (1859), 4 H. & N. 315 ; 12 Digest 411, *3314* ; 28 L.J. Ex. 164 ; 32 L.T.O.S. 320.

(3) *Robinson* v. *Robinson* (1851), 1 De G.M. & G. 247 ; 17 Digest 132, *391* ; 21 L.J. Ch. 111 ; 18 L.T.O.S. 293. D

(4) *Deverill* v. *Burnell* (1873), L.R. 8 C.P. 475 ; 17 Digest 132, *392* ; 42 L.J.C.P. 214 ; 28 L.T. 874.

(5) *Abrahams* v. *Reiach (Herbert), Ltd.*, [1922] 1 K.B. 477 ; 17 Digest 135, *411* ; 91 L.J.K.B. 404 ; 126 L.T. 546.

(6) *Breay* v. *Royal British Nurses' Assocn.*, [1897] 2 Ch. 272 ; 13 Digest 359, *942* ; 66 L.J. Ch. 587 ; 76 L.T. 735. E

ACTION for a bill of costs.

In Jan., 1935, one Barbrook, chief clerk of a municipal hospital conducted by the defendant corporation, wrote a letter to the proper quarter in respect of the conduct of Evans, the steward of the hospital, as a result of which Evans was dismissed from his employment. Evans thereupon brought an action for libel against Barbrook. Barbrook approached the plaintiffs with a view to their acting for him in defending the action. Barbrook's means were insufficient for him to defend an action at the Manchester Assizes without financial assistance. On July 5, the plaintiffs received a letter from the town clerk in the following terms : F G

> *Evans* v. *Barbrook.*
>
> As I understand that you are acting for Mr. Barbrook in this action, I beg to inform you that the town council at their meeting last evening confirmed the recommendation of the health committee at their meeting of the 24th ultimo to assist Mr. Barbrook in paying or contributing to his costs in defending the action. H

The action came into the list at the Manchester Assizes, but shortly before trial a settlement was effected, upon the advice of counsel, and after the town clerk had been communicated with by telephone. By the terms of the settlement, Barbrook consented to judgment against him, with costs, and undertook to withdraw the allegations. The corporation refused to reimburse the plaintiffs in respect of their costs.

W. Gorman, K.C., and *C. T. B. Leigh* for the plaintiffs.

J. W. Morris, K.C., and *J. Addleshaw* for the defendant corporation.

Morris, K.C.: The words are too vague to show a contract at all. The letter of July 4 says "paying or contributing to his costs of defending the action." Who is to decide how much? This is left to the corporation. See *Loftus* v. *Roberts* (1) and *Roberts* v. *Smith* (2). "Contributing" is so open, vague and in the discretion of the signatory of the letter, that it is too vague to support a contract. The words show an option which should be in favour of the defendant corporation, allowing it to take which alternative interpretation it will. See *Robinson* v. *Robinson* (3), *Deverill* v. *Burnell* (4) and *Abrahams* v. *Reiach* (*Herbert*), *Ltd.* (5). The phrase "in defending the action" is used. Barbrook did not defend the action. He consented to judgment against him, and withdrew the allegations about Evans's conduct. The corporation, by the Public Health Act, 1875, s. 265, can pay only if in fact Barbrook acted, in his report about Evans, in good faith. This could be decided only by trial at the assizes. But he consented to judgment and this could be only on the assumption that there was no good faith. The word "assist" is only an expression of the corporation's intention, and cannot be construed as a promise to the solicitors. The work done by the plaintiffs was not done for the corporation. The bill of costs is headed "under indemnity under resolution of Oldham Corporation, July 3," and Barbrook is treated as the client throughout.

Gorman, K.C.: As to the contract here, one is entitled to consider the surrounding circumstances. The town clerk knew all about this action. "Assist" means assist as far as necessary, and the corporation let the solicitors know this. "Contributing" means joining with someone else if necessary. As to vagueness, in none of the cases cited was there an option to do something, but rather an option to do something or nothing. Here they can "assist" only by doing something. There is no voidness for vagueness where the option is not to do nothing. On the Public Health Act, 1875, s. 265, see *Breay* v. *Royal British Nurses' Association* (6). Good faith does not cover the particular act alone (sending the report on Evans), but the act may involve the doer in liability, and in such circumstances the corporation should pay.

Morris, K.C., in reply.

HAWKE, J.: [His Lordship stated the facts] The question now arises whether the plaintiffs in this action have any right against the corporation to have their costs paid. It is agreed, as I understand it, that, unless the plaintiffs can found their rights upon the letter of July 4, they have no rights at all. Mr. Morris's arguments were that it is not a promise at all; that it is a mere record that the corporation has passed a resolution, a mere historical statement, or a statement of fact, and not a contract at all; that it is not contractual, because it is too vague to be contractual, and because it is a mere declaration of intention of the corporation, and nothing else, which is, of course, a repetition really of Mr. Morris's first point. Next, he says that, if it is anything at all in the way of a promise, it is a promise of an alternative, leaving the A corporation an option as to which it will do of two or more things, and that the option is to be exercised by the corporation, and it can do what it likes. It can either pay or it can contribute, and that contribution, Mr. Morris, with a generosity greater than is necessary in the circumstances, said might amount to half-a-crown. Why it need amount to B more than a farthing, if he is right, I do not know. Then he says that the document was *ultra vires* the corporation, on the grounds that it has no authority to do such a thing at all; that it cannot bear the costs of a servant who has involved himself in litigation by carrying out his duties *bona fide* and courageously, or, at any rate, it has no power to C enter into a contract which leaves the servant in a position to defeat some rights of the corporation by settling the action. Then he says it is not covered by the Public Health Act, 1875, s. 265, at all, and that there is, therefore, no means by which this corporation can pay, and it has no powers to do this sort of thing. I think that this case really comes D back finally to the point I started from, namely, what is the meaning and effect of this document of July 4? Is it intended to be contractual? If intended to be contractual, is it intended to be an agreement? Is it too vague to be enforced?

The first question I have to make up my mind on is, was this an E agreement to pay something in relation to the costs? Now, to constitute an agreement there must be two or more persons addressing each other in terms which show a contracting mind in both. What was the position at the moment when this document was written? Everybody knew that Barbrook could not stand the costs of these proceedings; F that it was absurd to suppose that he could pay these costs out of his own pocket. Everybody knew that, and everybody wanted to help him about it. The corporation certainly did, and the plaintiffs did, and of course the plaintiffs had an interest in getting these costs paid somehow, and, that being so, the corporation caused this letter to be written. G I have come to the conclusion that it is something more than a mere statement of fact that the corporation has passed a particular resolution. I think it is an intimation to Messrs. Armstrong, Taylor & Whittaker of the corporation's intention. Now if it be true that the town clerk merely meant it to be an historical statement, or a statement of fact, as to the H passing of a particular resolution, I am quite satisfied that Messrs. Armstrong, Taylor & Whittaker did not so regard it at all. Whether they were wise or not, they thought this was intended to be a statement by the corporation, through its proper officer, that Barbrook's costs would be provided for. I think the form of this letter was such, and the circumstances were such, that Messrs. Armstrong, Taylor & Whittaker were entitled to think that it was so intended. I think they were entitled to think that this was a matter on which they could spend their industry and their money in conducting this defence. If the town clerk did not so intend, I think he should have made it plain that he did not. I do not think he has. I think he used expressions from which any reasonable person might assume that he was making a promise to be acted upon by the promisee, and the promisee, the solicitors, accepted it. I think it was contractual.

Then is it too vague ? It is a difficult thing to construe, but I have come to the conclusion finally that this is not any alternative. It is an agreement to do whatever shall prove to be necessary in the future with regard to these costs, to pay them if they are not obtainable anywhere else, and, if some of them are obtainable from somebody else, then to pay the balance to make up the amount of Messrs. Armstrong's bill. In other words, I think it is a definite promise to do one of two things, whichever shall happen. I do not think there is anything optional, and indeed Mr. Morris would not argue that the cases to which he very properly referred would prove that it is optional. The cases to which he referred are cases in which the defendant was left with a choice as to what he would do ; he made no definite promise at all. To say " I will pay you £1 or 10*s.* according to whether you could get a cheap ticket to Aintree or not," is a promise which can be made perfectly certain by simple inquiry, and in this case it was made perfectly simple by the result of the action, or would have been, but for the settlement. I think, therefore, that it is a definite contract to pay such a sum as the event shall show, and I think, therefore, the plaintiffs are entitled to recover in this action.

I want to say, before I conclude the matter, that Mr. Morris raised a point, which puzzled me a good deal, as to the effect of this settlement of the action, but if, as I think, the corporation left it in the hands of competent solicitors to do the best they could for its faithful servant, I think the corporation should have assumed that he might be advised to settle. I certainly do not think that it has the effect of depriving Messrs. Armstrong, Taylor & Whittaker of costs which were properly incurred before the settlement took place.

Solicitors : *Armstrong, Taylor & Whittaker*, Oldham (for the plaintiffs) ; *J. J. Williams*, Town Clerk, Oldham (for the defendant corporation).

[*Reported by* M. D. CHORLTON, *Barrister-at-Law.*]

DAVIES *v.* MAY.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and Singleton, JJ.), **April 13, 1937.]**

Mines—Coal mine—Statutory regulation—Provision of refuge holes—Proceedings against manager by person other than inspector of mines and without consent in writing of Secretary of State—Coal Mines Act, 1911 (*c.* 50), *ss.* 44, 75, 102 (5).

An information was laid, by a person who was not an inspector of mines and did not have the consent in writing of the Secretary of State, against the manager of a coal mine charging him with having failed to provide refuge holes as required by the Coal Mines Act, 1911, s. 44. The manager contended that the information was improperly and wrongly laid :—

Held : as the Coal Mines Act, 1911, s. 44, did not impose an express duty upon the manager to provide refuge holes, and the offence was one which he had not committed personally, the information could only have been laid, under sect. 102 (5), by an inspector of mines or by a person having the consent in writing of the Secretary of State.

[**EDITORIAL NOTE.** If a duty imposed upon a manager of a mine by the Act of 1911 is a personal one, an information may be laid by a private individual, but in other cases sect. 102 (5) requires that the information shall be laid by an inspector of mines or by some person with the consent in writing of the Secretary of State. The question here, therefore, is as to the nature of the duty to supply refuge holes, which is held not to be a personal one of the manager. The decision appears to accord with that in *Wing* v. *Dent Main Colliery Co., Ltd.*, [1924] 2 K.B. 389 ; 34 Digest 738, *1155* ; 93 L.J. K.B. 1085 ; 131 L.T. 143.

As to Refuge Holes, see HALSBURY, Hailsham Edn., Vol. 22, pp. 796, 797, para. 1643 ; and for Case, see DIGEST, Vol. 34, p. 738, No. 1155. For the Coal Mines Act, 1911, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 12, p. 82.]

Case referred to :

(1) *Hannaford* v. *May*, [1935] 2 K.B. 385 ; Digest Supp. ; 104 L.J. K.B. 606 ; 153 L.T. 380.

Appeal by way of case stated from a decision of the justices for the county of Glamorgan, sitting at Neath.

Valentine Holmes for the appellant.

F. R. Evershed, K.C., and *Joshua Davies* for the respondent.

Lord Hewart, L.C.J. : This case, which raises a neat point under the Coal Mines Act, 1911, arose in the following way. An information was preferred by the present respondent against the present appellant for that he did not, on Mar. 26, 1936, provide refuge holes on certain measures or headings in a mine which were as near as may be 3 ft. in width and not less than 4 ft. in depth, contrary to the Coal Mines Act, 1911. That information was heard in July and August of last year, and the justices then determined that the information had been properly laid by the respondent and that the appellant had a case to answer. The question, and the only question, raised by this case stated is whether it is correct to say in law that that information had been properly laid by the respondent. Now, the particular requirement of the Coal

Mines Act which was said to have been contravened was the requirement in sect. 44, which is marginally described as containing "Provision of refuge holes." Certain specific requirements are there set out, and it is essential to observe that that section is a part of the group of sections, beginning at sect. 29, which have to do with the topic of "Safety." It is quite plain, as was said in this court in *Hannaford* v. *May* (1), that this profoundly valuable legislation contemplates three quite different things. If I may be permitted to repeat the words I used at p. 396, they were:

> At one end of the scale there are offences committed by the manager personally; at the other end of the scale are offences committed by some person other than the manager. There is also an intermediate class of offences in which the offence is not personally committed by the manager, but yet is of such a kind that by an inspector or with the consent of the Secretary of State the prosecution may be against the manager.

What was urged here on the part of this appellant was that the offence alleged under sect. 44 of the Act was not an offence committed personally by him, if it was indeed committed at all, and that, under the provisions of sect. 102 (5), no prosecution could be instituted against the manager for an offence of this kind, except by an inspector or with the consent in writing of the Secretary of State. The justices in the court below seem to have been invited to hold, and they have in fact held, that the case is governed by the decision of this court already mentioned in *Hannaford* v. *May* (1), but there is a manifest and conspicuous contrast between that case and the present case, because that case depended upon a section which specifically named the manager of the mine as being required to cause certain things to be done. There is no such express mention of the manager in sect. 44, but it is argued that this question is concluded by the provisions of the Coal Mines Act, 1911, s. 75, and there was a moment when I was inclined to think that that argument was conclusive. Sect. 75 provides as follows:

> Any person who contravenes or does not comply with any of the provisions of this part of this Act shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this part of this Act by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance.

Mr. Evershed argues that, in view of the provisions of that section, no offence can be committed in contravention of any of the provisions relating to safety (that is to say, referred to in the sections from sect. 29 to the end of Part II) without personal liability and commission of the offence on the part of the manager. Once, he says, it is established that the offence referred to is an offence against some provision of this part of this Act, that is to say, Part II relating to "Safety," it follows as of course that the offence is personally committed by the manager (and by the owner and agent) unless and until he proves that he had taken all reasonable means, and so on. That is an attractive argument, and, when one reflects that the particular topic in these provisions is safety, and safety in a coal mine, it is easy enough to suppose that Parliament might have intended that, in such cases, there should be, not merely personal liability on the part of the manager, for example, but also that the offence should be deemed to be committed by the manager personally; but, on looking further into the matter, I cannot A take that view. Indeed, it seems to me to be contradicted almost in terms by the very section which provides how prosecutions may be launched. Sect. 102 (5) begins by providing that:

> No prosecution shall be instituted against the owner, agent, manager, or under-manager of a mine for any offence under this Act, not committed personally by B such owner, agent, manager, or under-manager, which can be prosecuted before a court of summary jurisdiction, except by an inspector or with the consent in writing of the Secretary of State—

then comes this significant addition:

> and in the case of any offence of which the owner, agent, manager, or under-manager of a mine is not guilty if he proves that he had taken all reasonable means C to prevent the commission thereof, an inspector shall not institute any prosecution against such owner, agent, manager, or under-manager, if satisfied that he had taken such reasonable means as aforesaid.

Now, those are the very words which are taken from sect. 75 of the Act, and, when one looks at sect. 75, it seems to me to contain within itself a clear distinction. It is divided into two parts: the first part provides D that:

> any person who contravenes or does not comply with any of the provisions of this part of this Act shall be guilty of an offence against this Act.

That is the first set of cases. There follows a second set of cases which E seem to me to be based upon circumstances in which, although the contravention or non-compliance is done by one person, another person may be held responsible. In other words, a distinction is drawn between the person committing the offence and the person who may be responsible. How do the words go on?

F

> —and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act by any person whomsoever [that person is the person who commits] the owner, agent, and manager of the mine shall each be guilty of an offence against this Act.

Scilicet, although he does not commit it. The person who commits it is liable; the owner, agent and manager is to be liable, although G he does not personally commit it, unless he proves that he has taken all reasonable means, by publishing, and, to the best of his power, enforcing, the relevant provisions. Reading that section with sect. 102 (5), I think it is clearly contemplated that offences of that nature, although they may be offences for which the manager may properly H be prosecuted, if the prescribed conditions are fulfilled, are nevertheless offences not committed personally by the manager. I think the words are as clear as one could reasonably expect in a complicated statute, and that the antithesis is pointed with sufficient clearness between "any person whomsoever," who is apparently the person committing the contravention or failing to comply, on the one hand, and the owner, agent and manager, who is constructively deemed to be guilty of another person's offence unless and until he proves suitable diligence on his own part, and I think that that scheme falls naturally and easily within the general scheme of this Act. There are manifestly, as Mr. Valentine Holmes has pointed out, various sections in this Act which in terms impose a personal liability upon the manager. In such cases contravention or non-compliance on the part of the manager amounts to an offence personally committed by him ; but there is a different class of case, where, although the offence is not personally committed by the manager, he is nevertheless held liable, and may be found guilty of an offence unless he discharges the burden of proving that he did all he was required to do, namely, publishing, and, to the best of his power, enforcing, the provisions of the Act.

Now, here the Act does not impose by sect. 44 an express duty upon the manager to do the act referred to, the act being to provide refuge holes in certain places. Undoubtedly there was an overriding responsibility on his part to see that the provisions of the statute were fulfilled, and undoubtedly, therefore, if the requirements of sect. 102 (5) had been complied with—if, that is to say, an inspector or one who had the written consent of the Secretary of State had launched the proceedings—he might have been found guilty of the offence, but he is not to be prosecuted at the instance of somebody who is neither an inspector nor a person having the written consent of the Secretary of State.

I think, therefore, that there is a clear ground of distinction between this case and *Hannaford* v. *May* (1), and that the justices came to a wrong conclusion in thinking that the information in this case had been properly laid by the respondent, who was not an inspector and who had not the written consent of the Secretary of State. For these reasons, it appears to me that this appeal by way of case stated ought to succeed, and that we ought to remit the case to the justices.

HUMPHREYS, J. : I have arrived at the same conclusion, after entertaining, in the course of the argument, some considerable doubts. I desire, in the first instance, to make an observation about a matter which has not been the subject of argument at the bar at all. It occurred to me, in reading this case, that it is an inconvenient form of procedure which has been adopted here. The justices purport to ask the opinion of this court upon a preliminary matter which arose. No doubt they did so because, in their view, what was challenged was their jurisdiction to hear the case at all. What they have found is that the information was properly laid by the respondent, and that there was a case for the appellant to answer. Speaking entirely for myself, I should have thought that the more convenient—and, I am disposed to think, the right—course for them to have adopted would have been for them to hear the case for the respondent, to hear his evidence, and, if they had then come to the conclusion that the respondent had made out that which, according to the statute, would afford a defence to him, no further question would have arisen, and no need would have arisen to state a case for this court at all. The view which I have just expressed is fortified by this consideration: the real question, it seems to me, which we have to decide is whether the offence in this case, which was, we must assume, committed by somebody, was committed personally by the manager of the mine. Now, that appears to me to be to a very large extent a question of fact, and I think it would have been very useful to this court to have had the finding of the justices upon the whole of the facts of the case when they were asking this court to say, as they would then have asked this court to say, whether they were right or wrong in coming to that conclusion. They have found nothing in regard to the matter, and the view which I have formed about this question is this. I think there may well be cases under sect. 44 of this Act in which there may be an offence committed personally by a manager. I think, on the other hand, there may be offences committed by a manager against that section which are not properly described as offences committed personally by him. I ask myself, upon the very meagre facts of this case, is this a case in which the evidence seems to show that the offence was committed personally by the manager, in which case anybody might properly prosecute him, or is it a case in which the facts seem to show that, if he was guilty at all, he was guilty vicariously, because he was the manager of a mine, and some person for whom in law he was responsible had personally committed the offence in question?

Now, turning to the case, it seems to me that there is sufficient to show that this is a case in which there was no personal commission by the manager of any wrongful act or omission: the person who was primarily responsible for that failure to comply with the provisions of the Act, and for contravening the provisions of the Act, was quite a different person, called a fireman—some person other than the manager. I then turn to sect. 75, in order to see how such matters are dealt with. Sect. 75 appears to me to deal with two quite different matters, each of which involves responsibility upon some person. It provides, first of all, that a person who himself contravenes or does not comply with the provisions of the Act shall be guilty of an offence against the Act, and then it provides that, in the event of any contravention of or non-compliance with the provisions of this part of the Act by any person whomsoever, the owner, agent or manager of the mine shall be guilty of an offence against the Act. I can read that only as meaning that, while any person, whether he is the owner, agent, manager or anybody else, who has committed the offence of contravening or failing to comply with the provisions of the Act, may be prosecuted, and where the owner, agent or manager has not personally contravened the provisions of the Act or failed to comply with the provisions of the Act, nevertheless he may be prosecuted and convicted, if some other person has committed that offence, unless he proves certain matters, such as that he had taken reasonable steps to the best of his power to enforce the provisions of the Act.

Now, that section does seem to me to create two quite different classes of offence—the offence which is committed by a person who personally does the things which are prohibited, and the offence, the liability to a fine, created on the part of the person who is responsible for the acts of others. There is nothing unusual in our law in finding that persons who are normally guiltless are caused to be fined for the acts of others. Indeed, in modern statutes it has become quite common and quite usual to make persons who are the owners, whether of vehicles or of public houses, responsible for the acts of other people; and so it is here. Then I ask myself the question: Looking at the terms of sect. 102 (5), can this manager (who, on the facts as I understand them, had nothing to do with a breach of the Act of Parliament except that as the manager liability is put upon him) be said to be a person who has committed personally the offence which is charged? In my view, no; I do not think he can be said to have committed it personally at all.

For those reasons, and for the reasons stated by my Lord, I agree with the result which he has proposed.

SINGLETON, J.: I agree, and for this reason. It seems to me that, on a true reading of the Coal Mines Act, 1911, s. 102 (5), there is no offence committed personally by the manager; consequently, the proceedings cannot be laid except by an inspector or with the consent in writing of the Secretary of State. The respondent is not an inspector of mines, nor was the prosecution instituted with the consent in writing of the Secretary of State. It is to be remembered that the charge in the information, that the appellant, Mr. Rees Davies, did not, on Mar. 26, 1936, provide refuge holes on the South Main Cross Measure and Johnsons Heading in the mine of the required dimensions, is a charge made under sect. 44 of the Act. It is not a charge based on sect. 3, alleging lack of supervision. Mr. Evershed relied upon sect. 75 of the Act. I agree with what has already been said, to the effect that that deals with two different things: (i) offences committed personally by certain people, and (ii) an offence for which an owner, agent and manager, may in certain events become responsible. I do not think, on the facts as stated in para. 4 of this case, that there is any offence committed personally by the manager; consequently, this appeal must be allowed.

Appeal allowed with costs.

Solicitors: *Furniss, Stephen & Co.*, agents for *Arthur J. Prosser*, Cardiff (for the appellant); *Smith, Rundell, Dods & Bockett*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

SAMSON *v.* FRAZIER, JELKE & CO.

[King's Bench Division (Hilbery, J.), **January, 21, 22, 26, 27, 28, March 22, 1937.]**

Stock Exchange—Course of business—Continuation on agreed cover—Implied agreement—Right to close account—Length of notice.

The plaintiff for the purpose of speculating in shares entered into an agreement in writing with his brokers which gave them, *inter alia*, power to sell for their protection all or any of his shares. By a verbal agreement the brokers were entitled to require a 15 per cent. cover where contango could be arranged and 25 per cent. cover in other cases. The plaintiff's investments depreciating in value, the brokers asked for extra cover. The plaintiff contended that he could only be asked for extra cover on settlement days, and not on the state of his account on intermediate dates. Differences having thus arisen between the parties, the brokers gave notice 10 days before the close of the current account to close the plaintiff's account on the next account day. Ultimately the brokers sold all the securities in their hands in which the plaintiff was interested and closed the account:—

Held: (i) on the facts there was no express agreement to carry the plaintiff's shares so long as he maintained a stated cover on account days, and the law would not imply such an agreement.

(ii) the notice to close the account was a reasonable one.

(iii) such notice was given in good faith and a sale being in the interest both of the brokers and of the plaintiff, the brokers were entitled to close the account as they did.

[EDITORIAL NOTE. The present case considers in some detail the practice of the Stock Exchange in carrying over or continuing shares upon an agreed margin. The main contention is whether the agreed margin is to be maintained from day to day, or whether it is only necessary that it should exist on the usual account days. In particular it was sought in the present case to establish that the law implied that such an agreement applied only to account days. This contention the court rejected. The consideration of the reasonableness (i) of the notice given to close the account and (ii) of the actual closing of the account is also of interest.

As to Continuation, see HALSBURY, 1st Edn., Vol. 27, **Stock Exchange,** pp. 231, 232, paras. 467-469; and for Cases, see DIGEST, Vol. 42, pp. 816, 817, Nos. 263-273. As to Right to Close Account, see DIGEST, Vol. 42, pp. 806-808, Nos. 144-163.]

Cases referred to:

(1) *Hilton, Gibbes & Smith* v. *Morten* (1908), *Financial Times*, July 3.

(2) *Samuel & Escombe* v. *Rowe* (1892), 8 T.L.R. 488; 42 Digest 808, *160*.

(3) *Cullum* v. *Hodges* (1901), 18 T.L.R. 6; 42 Digest 808, *162*.

Action for damages for breach of contract to carry over or continue shares bought on an agreed margin by the plaintiff through the defendants, and/or damages for wrongful selling of the plaintiff's shares. The plaintiff was an investor on the New York and London Stock Exchanges, and the defendants were a firm of stockbrokers on the New York Stock Exchange who, though having an office in London, were not members of the London Stock Exchange. The defendants agreed to act for the plaintiff in his dealings with American securities on the New York Stock Exchange on a marginal basis under a loaning authorisation, containing, *inter alia*, the following:

In consideration of your acting as brokers for the undersigned, I hereby consent

> that: All transactions are subject to the bye-laws, rules, regulations and customs of the Exchange or market (and its clearing house, if any) where executed, and actual deliveries are intended on all purchases and sales. Whenever I am indebted to you, and/or have a short position with you, all securities, commodities, and/or contracts for or in relation to securities and/or commodities now or hereafter held by you, or carried by you in any account for me (either individually or jointly with others), or deposited to secure the same, may from time to time and without notice to me, be carried in your general loan and may be pledged, re-pledged, hypothecated, or re-hypothecated or loaned by you, either to yourself as brokers or to others, separately or in common with other stocks or securities and either for the sum due to you thereon or for a greater sum. Whenever you shall deem it necessary for your protection to sell any or all of my securities or other property, or dispose of contracts for securities or commodities which be in your possession, or which you may be carrying for me (either individually or jointly with others) or to buy in any securities, commodities, or other property or dispose of any contracts for securities or commodities, of which my account or accounts may be short, in order to close out my account or accounts in part or in whole, such sale or purchase may be made according to your judgment and may be made at your discretion on the exchange or other market where such business is then usually transacted, or at public auction or private sale, without advertising the same and without notice to me and without prior tender, demand or call of any kind upon me—it being understood that a prior tender, demand or call, or prior notice of the time and place of such sale or purchase, shall not be considered a waiver of your right to buy or sell any securities and/or other property held by you at any time, as hereinbefore provided. Unless otherwise specified by me in writing all statements, demands or notices may be made by mail addressed to me at the above address. This arrangement shall continue until revoked by me in writing, such revocation to affect only transactions thereafter entered into between us.

Thereafter the defendants executed a number of transactions in American securities on behalf of the plaintiff. Later the defendants acted for the plaintiff in purchasing shares for him on the London Stock Exchange upon an arrangement as to contango, the defendants requiring a 15 per cent. cover, and, in the case of a failure to arrange contango, 25 per cent. cover. From then onwards, the plaintiff was gambling as a "bull" of very speculative shares. On July 2, 1935, the agent of the defendants informed the plaintiff on the telephone that they required margin on the purchases made on the previous day, and, in a subsequent letter, asked for a remittance from the plaintiff, making it clear that, in arriving at the figure asked, they had taken into account the depreciation from day to day. The plaintiff did not object to the basis of calculation, and promised by letter to forward the money on his return home. After some delay the amount asked for was paid. The defendants then notified the plaintiff that they had received instructions from their head office that they could not in future carry private clients in transactions on Stock Exchanges other than those operating in the United States or Canada and asked the plaintiff to have his securities taken up on the next account day. If that arrangement were inconvenient they offered to carry on on a 50 per cent. marginal basis. On July 19, the plaintiff having given no further instructions, they sold some of the securities to provide cover and threatened immediately to sell further securities to provide cover up to the 50 per cent. margin. The plaintiff making no arrangements to transfer his securities, the defendants disposed of the balance of his securities and closed his account. On July 15 the plaintiff had in a letter denied that under his agreement with the defendants he was liable to put up cover during an account, and alleged that he was only liable to put up cover on " make up " prices at the end of each account.

Serjeant Sullivan, K.C., *Reginald T. Sharpe* and *Charles Butterfield* for the plaintiff.

F. van den Berg, K.C., and *Clive Burt* for the defendants. A

HILBERY, J.: On Aug. 7, 1935, the plaintiff issued his two writs, which now form the consolidated actions before me. By each writ the plaintiff claimed damages for breach of a contract to carry over, or continue to carry, shares bought on agreed margin by the plaintiff through B the defendants on the London Stock Exchange, or for damages for the wrongful sale by the defendants of the plaintiff's shares. In each of the statements of claim, the plaintiff pleads, first, that, in Feb. or Mar., 1935, the defendants agreed with the plaintiff that, so long as he maintained the margin of 15 per cent. in respect of C shares not picked up, and 25 per cent. (plus stamp and fee) in respect of shares picked up, settlement only to arise on the London Stock Exchange account days, the defendants would continue to carry all shares (being shares quoted on the London Stock Exchange) in respect of which the plaintiff should give them orders, or, D alternatively, the defendants agreed to act as his agents in the purchase and/or sale of such shares, or in arranging, and continuing to arrange, for the carrying over thereof. This contract was pleaded by the plaintiff as being one which was partly oral, partly in writing, and partly to be implied from the course of dealing between the parties. E The plaintiff pleaded, secondly, that by their conduct, in the circumstances, the defendants impliedly agreed to continue to carry the shares in respect of which they had executed the orders of the plaintiff in regard to carrying over, or arranging to carry over, unless and until they gave the plaintiff reasonable notice of their intention to terminate the agreement. F Thirdly, in the alternative, the plaintiff puts his case on an implied term of the agreement which he alleged had been made as set out in para. 1 of the statement of claim, that, in the event of the plaintiff being in default under the agreement, the defendants should have the right to close the plaintiff's account with them by ceasing to carry, alter- G natively by selling, all the shares then open, but not by ceasing to carry, or, alternatively, by selling, some only of the shares. He complained that, by the letter of July 15, the defendants repudiated their contract with him, and, on July 19, 22, 23, without his orders, so ceased and failed to continue to carry certain of the shares then open on the H agreement between the defendants and the plaintiff which the plaintiff had asserted in para. 1 of each of his statements of claim. The defendants set out in para. 6 of their defences to each of these statements of claim a number of answers which they asserted were sufficient to justify the action which they took, and, in para. 1 of each of their defences they deny the agreement which the plaintiff alleges. The matter to be considered is, was there such an agreement as the plaintiff relies on, constituted partly by what was said, partly by what was written, and partly by what must be implied from the course of dealing between the parties? On behalf of the plaintiff, it was contended that, out of a mixture of all these elements, there emerged a contract between the parties that the defendants would buy for the plaintiff any number of shares required by the plaintiff for carry over by the plaintiff, and would continue to carry them over so long as the plaintiff provided the defendants with a cover of 15 per cent. of the "make up" prices of his shares as fixed on each Stock Exchange settlement day. It was urged further that the result of this being the contract was (i) that no cover could be called for, except at the end of a Stock Exchange account, after make up prices had been fixed; (ii) that on July 15, and thereafter during the whole time the defendants were selling the plaintiff's shares, the plaintiff was never in default; (iii) that, by demanding cover during an account on the basis of closing bid prices of the plaintiff's shares on any particular day, the defendants were acting in breach of and contrary to the contract with the plaintiff. Before looking at what the course of dealing indicates, it is necessary to decide what was expressly agreed. In my view, the evidence falls far short of proving an express bargain in the terms which the plaintiff relies upon. It is of the essence of the plaintiff's case that his only liability to find cover arose at the end of each Stock Exchange account when the "make up" prices were ascertained. It is because the plaintiff says this was his contract that he asserts there was no justification for the defendants closing his account in July, as they did. It is upon the basis of this being the contract between the parties that he contends that he never was in breach. I turn, therefore, to the course of the dealings between the parties to see if there is there material on which a court ought, according to the well known principles of law, to imply such a term. In my view, there is not.

It will be observed, by a reference to one or two examples, that, when showing the plaintiff's margin position during the currency of a Stock Exchange account, as on the date when a statement was sent to the plaintiff, the defendants, as a matter of course, arrived at the figure for which the plaintiff in his margin position was in debt or in credit on that particular day by taking into account the appreciation or depreciation on the last carry over price shown by the closing bid prices on the day of the particular statement. The accounts show that the plaintiff was not treated as having merely to provide 15 per cent. on the make up prices ascertained on settlement days, or to provide 15 per cent. on the purchase price of his shares, and then to meet or receive whatever difference there was on settlement day, as was urged at one stage in the trial. The fact is that, obviously, neither party interpreted the arrangement between them as being limited in that way. When one sees that, as early as May and June, during the running of a Stock Exchange account, the defendants are calling for further sums of money as margin or cover from the plaintiff on the basis of valuations of shares held as security at "closing bid prices," and one finds that the plaintiff is providing the money required on this basis, it is not, I think, unreasonable to infer that certainly neither party A was interpreting the bargain between them as meaning what the plaintiff now asserts it did mean. It would be wholly wrong, in my view, as a matter of law, to imply any such term. In the face of the defendants' evidence, I do not believe that they would have made any such agreement if they had been invited to do so in express terms. I doubt if B any broker would, or does, do so.

In the ordinary way, with shares that do not fluctuate very violently, if the 15 per cent. on the purchase price of the shares is provided, and the difference on carry over when the account ends, the client enjoys the position of a buyer of the shares without paying the purchase price. C But during the account the shares may fluctuate violently. If they do, and they fall more than 15 per cent.—say from 100 to 70—the broker regards the cover as having run off, and requires £15 paid or secured to restore the situation. The client is getting the benefit always of the shares being kept open. He puts up £15 cash or securities, instead of D £100 for every £100 of purchase price, and gets the benefit of not having to pay purchase price in full so long as, during the running of an account, he pays whatever more may become necessary to meet a fall in the value of the shares greater than 15 per cent., and so long as the brokers are willing and able to go on arranging contango. If the client does E not put up the 15 per cent. in cash, but provides it either wholly or partly by securities, of course these securities may themselves depreciate during an account, so that the broker will call for cash or for securities to maintain the 15 per cent. cover. In either of the cases I have instanced, the broker may require further money for cover during an F account. It was because of this that the plaintiff's shares were valued at closing bid prices in statements sent to the plaintiff between account day and account day in May and June, showing his margin position. It was because of this that the defendants called for the £751 on July 2 during the running of an account. The plaintiff, therefore, G on this part of his claim, fails on the threshold. If the defendants were entitled, as I think they were, to call for cash from the plaintiff for margin not merely on Stock Exchange settlement days, but also during the running of a Stock Exchange account, and if the defendants might, properly, as I think they might, ascertain the plaintiff's margin H position during an account by valuing his share securities on the basis of closing bid prices, then the plaintiff's actions and attitude in July were not merely unjustified, but were also failures to carry out his obligations to the defendants.

Serjeant Sullivan urged that the speeches in the House of Lords in

Hilton Gibbes & Smith v. *Morten* (1) had no application to this case, because the plaintiff was not in any way in default. I think he was, beginning with his failure to provide money for cover, and ending with his refusal of the necessary instructions to enable the defendants to transfer his shares to another broker on the London Stock Exchange after the defendants had agreed to pay the costs of the transfer.

The position had become very similar to what it was in the case cited. In that case the Lord Chancellor said:

> After the various stocks had been carried over for some months, the brokers, who were almost entirely unsecured, grew anxious. I will not narrate at length what passed. Mr. Morten would not close the account or give security, or even attempt to transfer the account to some other broker's care. He demanded that the brokers should again carry over the speculative account beyond March, alleging falsely that they had agreed to do so. Mr. Morton Smith could not, of course, justify this claim, that a principal was entitled to speculate at the risk of his agents. In the end, the brokers closed the account in Hudson's Bay and Rio Tinto shares on Saturday, Mar. 11. As to the remaining stock, they did make contracts, carrying it over in order to oblige Mr. Morten, as they thought. When he repudiated both of these pieces of business, they closed the whole account, and brought this action to recover the differences. I will only further observe that when these things were done the brokers were under the personal liability for the bargains they had made, and were left without any instructions whatever as to what they should do, except the demand that they should continue liability on Mr. Morten's behalf, which, like sensible men, they refused to do. In these circumstances, the appellant's counsel made two points against the brokers' claim for differences. In the first place, he urged that the brokers, although entitled to close the whole account at the proper day in March, were not entitled to close part of it and carry over the remainder. For this proposition, he relied upon the decision of SMITH, J., at *nisi prius*, in *Samuel & Escombe* v. *Rowe* (2) and a supposed endorsement of that decision by the Court of Appeal in *Cullum* v. *Hodges* (3). I do not think that the Court of Appeal did endorse it. They mentioned it without disapproving, but did not regard it as applicable to the facts before them. It appears to me quite an untenable proposition to affirm broadly that a broker cannot close part of an account and carry over the remainder when his principal is in default. It must depend upon the circumstances, and I doubt if SMITH, J., intended to lay down this sweeping proposition. So far as the present case is concerned, I am not satisfied that the account was one, and indivisible. Even if it were, I think the brokers, left without proper instructions, would be entitled to do what was reasonable in their own interests and those of their principal, which were largely identical, and, in such a situation as the principal had here created, their action, if in good faith, ought not to be lightly condemned.

Those observations and conclusions, in my view, apply here. The defendants sold as they did in good faith. They did what was reasonable in their own interests, and in the interests of their principal, the plaintiff. The way in which they sold was reasonable, in the circumstances. They carried out the sales in the way they honestly thought was most to the advantage of their principal and themselves. These conclusions answer as well the third pleaded contention of the plaintiff on this part of the case.

It was said that there was an implied term of the contract between the parties that the defendants should give the plaintiff a reasonable notice if they decided to put an end to the arrangement and no longer to carry the plaintiff's account, and that the notice given in the letter of July 15 was not reasonable notice. Assuming, for the moment, that the plaintiff was entitled to reasonable notice to transfer his account, the notice given in the letter of July 15 was, in my opinion, reasonable. The defendants in that letter gave the plaintiff notice to transfer his account at the end of the then current Stock Exchange account, which would be July 25. This notice gave the plaintiff sufficient time in fact to arrange a transfer. This contention therefore also fails. Moreover, the plaintiff was not prevented from arranging a transfer by the shortness of the notice. He declined flatly to transfer at all. I need, therefore, say no more about this point.

Apart from these considerations, I think the defendants are right in their contention that they had full authority to sell as they did under the powers given to them in the letter of authorisation of Aug. 28, 1934. It is true that that authority was originally obtained because the plaintiff was proposing to carry out, through the medium of the defendants' firm, transactions on the New York Stock Exchange, and that the defendants then obtained it from the plaintiff because they were required to do so by the rules of the New York Stock Exchange. But in terms its scope was not confined to transactions on the New York Stock Exchange. Indeed, it expressly provides that transactions are subject to the bye-laws, rules, etc., of the Exchange or market where executed, a statement hardly consistent with an intention that it should govern transactions on the New York Stock Exchange only. The defendants, of course, knew they had this authorisation from the plaintiff in its general terms, and had the additional safeguards it afforded them, when they agreed to act in the capacity of brokers for the plaintiff in his transactions on the London Stock Exchange. No stipulation was then made that his transactions on the London Stock Exchange should not be subject to that authorisation. The terms of the authorisation, known to both parties, were wide enough to be applicable to transactions on the London Stock Exchange.

Judgment for the defendants, with costs.

Solicitors: *Wrentmore & Son*, agents for *Phœnix, Levinson & Walters*, Cardiff (for the plaintiff); *Linklaters & Paines* (for the defendants).

[*Reported by* J. MacGillivray Asher, Esq., *Barrister-at-Law.*]

Re CLARK, SON & MORLAND, LTD.'S, TRADE MARK.

[Court of Appeal (Lord Wright, M.R., Romer and Greene, L.JJ.), **January 11, 12, 13, 1937.**]

Trade Marks—Rectification of register—Geographical word—"Adapted to distinguish"—"Glastonburys"—Trade Marks Acts, 1905 *to* 1919, *ss.* 3, 9, 11, 19, 44.

The appellants, who traded in Glastonbury in articles made of sheepskin, registered the word "Glastonburys" as a trade mark. The respondents who dealt in similar goods in the same town applied to rectify the register of trade marks by expunging this mark on the grounds that it was a geographical mark and not adapted to distinguish the goods of the appellants and was calculated to lead to deception. At the trial it was held that the addition of the letter "s" to Glastonbury did not alter its geographical character, and that the evidence fell very far short of what was required to show that the mark was adapted to distinguish the goods of the appellants and that the register should be rectified by expunging the mark. The appellants appealed to the Court of Appeal :—

Held : (i) the word " Glastonburys " had become distinctive of the goods of the appellants, and was rightly registered as a trade mark.

(ii) to exhibit to an affidavit a large number of letters received as answers to a circular is an improper method of bringing such evidence before the court. The correct method is to notify the other side that these answers have been received and can be inspected.

Decision of Clauson, J. ([1936] 2 All E.R. 1125) *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal, in adopting a conclusion opposite to that of Clauson, J., have carefully stated the operation of the sections of the Trade Marks Acts which deal with distinctive geographical names. It was sought to be established that once you find more than one maker making the same type of goods in the same place, the geographical name ceases to be distinctive, and that this is more particularly so where the goods in question are goods for which the particular town has a reputation. This argument was rejected by the Court of Appeal as not warranted by the Act and because other makers are protected by sect. 44 of the Act.

As to Geographical Names as Trade Marks, see HALSBURY, 1st Edn., Vol. 27, Trade Marks, p. 691, para. 1257 ; and for Cases, see DIGEST, Vol. 43, pp. 146, 147, Nos. 72-78.]

Cases referred to :

(1) *Re J. & P. Coats, Ltd.'s, Application,* [1936] 2 All. E.R. 975 ; Digest Supp.

(2) *Re Crosfield (J.) & Sons, Ltd.,* [1910] 1 Ch. 130 ; 43 Digest 153, *114* ; 79 L.J. Ch. 211 ; 101 L.T. 587.

(3) *Re Liverpool Electric Cable Co., Ltd.'s Application* (1928), 46 R.P.C. 99 ; Digest Supp.

Appeal from a decision of Clauson, J., given on July 14, 1936, and reported in [1936] 2 All E.R. 1125. The facts are fully set out in the judgment of Clauson, J.

R. E. Burrell for the appellants.

K. E. Shelley for the respondents.

Lord Wright, M.R. : The question turns, of course, so far as the law goes, on certain sections of the Trade Marks Acts, 1905 to 1919. At the outset, I want to say that what is essential in these cases is to consider, very carefully and very precisely, the exact words of the Act. I have noticed that, in technical cases of this sort, there is always a tendency to overlay the language of the Act by a very elaborate citation of authorities.

I should have hesitated to complain of that merely on my own authority, but a judge of much greater experience in these matters than myself stated the same thing, as I understand it, very clearly indeed in a recent case. I refer to the observations of Romer, L.J., my colleague here, in a case recently before this court, *Re J. & P. Coats, Ltd.'s Application* (1). He was there dealing, perhaps more specifically, with the circumstance that the Act of 1905 did introduce a change as contrasted with the earlier Trade Marks Acts—a change which I shall indicate in a moment; but, as I read his observations, they are directed to pointing out that you have to look at the plain words of the Act. I intend to do that in this case, and I do not feel disposed to do more than refer very shortly and summarily to the authorities which have been cited before us. I will, however, refer again to the sections. There is a definition of "trade mark" in sect. 3 of the Act, where it is provided: A

> A "trade mark" shall mean a mark used or proposed to be used upon or in connection with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with, or offering for sale.

With that definition in mind, I turn to sect. 9, which provides: B

> A registrable trade mark must contain or consist of at least one of the following essential particulars.

I think I need refer only to subsect. (4), which is in these terms:

> A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname— C

that is to say, those particular things which are often compendiously referred to as descriptive words, though the word "descriptive" is not found in the Act, are so far excluded, and they are not registrable. That was the position before 1905, when subsect. (5) was added. That does introduce into the category of registrable marks a wider class. It says: D

> Any other distinctive mark [the word "distinctive" is defined, as I shall show in a moment] but a name, signature, or word or words, other than such as fall within the descriptions in the above paras. (1), (2), (3) and (4) shall not be registrable under the provisions of this paragraph, except upon evidence of its distinctiveness. E

I read it in the form in which the subsection was put by the amending Act of 1919. There is then a proviso, which I think I may ignore. Then come some words of very great importance:

> For the purposes of this section "distinctive" shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. In determining whether a trade mark is so adapted [that is, adapted to distinguish, and so on] the tribunal may, in the case of a trade mark in actual use [that is to say, it is dealing with the first category referred to in the definition: a mark used as contrasted with one proposed to be used] take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered. F G

I shall have to refer to three other sections, sects. 11, 19, and 44; but I shall reserve that reference for the moment, in order to consider exactly what is meant by those words in the section, as I understand them. "Adapted to distinguish" is a somewhat peculiar phrase. In another connection, one finds the phrase "capable of distinguishing." H It is not necessary here, and I do not feel able, to indicate what exactly is the difference between these two phrases; but the words "adapted to distinguish the goods" would apply, I think, either to a trade mark actually used or to a trade mark proposed to be used. The language is capable of applying to either, and if in fact the trade mark has actually

been used and it appears on the evidence that it has served its purpose of distinguishing, I think, subject to some other qualifications, it is registrable, because, if it has proved to be distinctive in fact, obviously it must have been adapted to distinguish. Where one is dealing with an unused trade mark, one which is only proposed to be used, obviously
A one's only criterion must be "adapted"—its suitability or not, as the
court decides. Then the section goes on to say:

> In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered.

B That puts the criterion as a criterion of fact and it obviously contemplates the possibility that, though there has been some user and some distinctiveness established, that may not be sufficient. The stress in that sentence is, I think, on the words "the extent."

I do not, however, ignore the fact that there may be, in special cases,
C other matters to be considered. For instance, under sect. 11, one has
to consider whether the trade mark or part of the trade mark contains:

> any matter, the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a court of justice, or would be contrary to law or morality, or any scandalous design.

D I think those words speak for themselves. Then, under sect. 19, one may have to consider the problem of competing marks. Subject to an exception which is stated in the section, it is provided that:

> no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the register with respect to such goods or description of goods, or so nearly
> E resembling such a trade mark as to be calculated to deceive.

There is then sect. 44, which is not, as I think, in the first instance a restriction on registration, but which rather deals with what is to happen after the trade mark has been registered. It provides:

> F No registration under this Act shall interfere with any *bona fide* use by a person of his own name or place of business or that of any of his predecessors in business, or the use by any person of any *bona fide* description of the character or quality of his goods.

That is a warning to a court not to allow a registered trade mark to be
used to interfere with *bona fide* uses by a person of proper modes of
G description. In a sense, however, that may afford some guide to a
court when it is deciding the question of whether a trade mark should
be registered. If the distinctiveness of the mark has been, to the full
extent and completely, established from all points of view, sect. 44 in
itself will not interfere with its registration; but, in examining, as the
H court must, under sect. 9 (5), what effect is to be given to the extent
of actual user of a used mark, sect. 44 may afford some guidance. That
was pointed out in a passage which was quoted in the *J. & P. Coats*
case (1). In his judgment in the *Perfection* case (2), FLETCHER
MOULTON, L.J., said, at p. 148:

> In this connection the provisions of sect. 44 afford, in my opinion, useful guidance

The registration is not to affect the use of the words by other traders in any *bona fide* description of the goods. The court will therefore do well to ask itself the question, Will the registration of the trade mark cause substantial difficulty or confusion in view of these rights of user by other traders ?

Every trader is entitled to use his own description, his own name or any appropriate description. A

If the answer is in the affirmative, the court will probably hesitate to allow the word to be registered. But if the answer be in the negative, either by reason of the nature of the words, or because past user has limited the possibility of other traders safely or honestly using the words [I specially emphasise that alternative] the court may well grant the desired permission.

Those are all the sections of the Act to which I desire to refer. B

In this case the registrar allowed registration. It is not said that that allowance by him prevents the court from going into the facts again; they are required to do it, and they are required to examine the facts upon the material put before them, which may or may not be the same as the registrar had. In this case, there is no C question of what is called the discretion of the registrar as a material matter to be considered, though I confess that I do not quite understand the use of the word " discretion " in this connection, or what effect it has. I should have thought that it was a determination of a question depending upon issues of fact, and, like any other question, open to review, though, D as has often been said, the court will not interfere with the decision of the registrar unless the court is satisfied that it is clearly wrong.

That being the state of things, I think it convenient now to refer to a final statement which was made by Mr. Shelley, in which he made certain concessions in order to emphasise the point upon which he primarily E relied. He conceded what, I think, is clear on the authorities, that whether a mark ought or ought not to be registered is a practical question, depending on facts, though, of course, every question of fact may involve the consideration of some general principles. He said : " If it is proved, first, that the mark in fact indicates the appellants' goods, and, F secondly, that the mark has lost its *prima facie* geographical significance, so that it more or less completely identifies the appellants' goods in fact, then I do not contend that the mark is not registrable " ; that is to say, if the registered mark has lost its primary significance as a mere reference to a geographical position, and has achieved a secondary meaning (as G indicated in the words of sect. 3, that the goods to which it is applied, and for which it is registered, are the goods of the appellants by virtue of their manufacture, which is all that is material here), the decision of that issue of fact is fatal to his claim.

In addition to his contention that the appellants had not established in H fact the secondary meaning for which they contended, as I follow the argument, Mr. Shelley's main contention was a principle apart from that overriding argument, namely, that Glastonbury was a place in which these particular goods were in fact manufactured not only by the appellants but also by the respondents ; and, as I followed his argument, he relied on that, not necessarily as involving an issue of law, but as a circumstance which, in effect, would render it impossible for any court to arrive at the conclusion of fact that the appellants had a monopoly of the particular trade mark which consisted of the word "Glastonburys." Mr. Shelley said: "Glastonbury has a reputation for sheepskin goods in general; these are sheepskin goods which come within the general definition; you have another person manufacturing these goods and selling them, and, therefore, it is impossible to find that there is a distinctiveness, which is what the Act requires, in favour of the appellants." He went so far as to say that, where there were two persons making the same thing in the same place, the court would have no option but to find lack of distinctiveness. Put in that way, I find the distinction between the proposition as one of law and as a decisive guide in the ascertainment of the conclusion of fact very tenuous. I do not think it necessary to dwell on that very technical point. I will, however, point out that, if it is put as a question of law, it would involve reading into the section which I have read a limitation which is not there, because the section says in terms what are the conditions which may be considered by the court in order to ascertain what is described as the conclusion in fact when one is dealing with a trade mark in actual use.

So far as the other makers in this case, Messrs. Baily, are concerned, they, of course, have the protection of sect. 44. They can do as they have always done in branding their shoes. They can say that the goods were made in Glastonbury; they can put their own trade mark on their goods, and they can say that they are sheepskin slippers. If, in fact, the appellants have established their case of distinctiveness, it seems to me that sect. 44 would give Messrs. Baily all the help and all the protection which they need. As I have already pointed out, FLETCHER MOULTON, L.J., considers that past user may have "limited the possibility of other traders safely or honestly using" the word in question, in this case "Glastonburys"; and, indeed, that is the case which is put forward.

It is said, on behalf of the appellants, that they have established such a monopoly or prescriptive right to use this word "Glastonburys," and to have it registered, that any other manufacturer, present or prospective, making these goods in Glastonbury, must be content with the very substantial rights which are reserved to him by sect. 44. That seems to me to be the true position.

There was a good deal of discussion about a case which, I confess, I find very difficult to understand in all its stages; that is *Re Liverpool Electric Cable Co., Ltd.'s Application* (3). To some extent, in so far as it was necessary to discuss that case, it was referred to in the *J. & P. Coats* case (1), which I have already mentioned; but I am relieved from examining the *Liverpool Cable Co.'s* case (3) in detail, and I am very glad to be relieved of examining it in detail, because Mr. Shelley has very fairly said he cannot treat the present case as on the same footing as the

Liverpool Cable Co.'s case (3). That is rather assuming that the size and importance of Liverpool as an industrial centre are to be regarded as decisive features. I am not sure how that may be in a matter of this sort. Anyhow, those considerations do not apply to a place like Glastonbury, which is limited in extent and limited in its industrial operations, even though it has some reputation in connection with the manufacture of goods out of sheepskins; nor can "Glastonbury," as a geographical expression in connection with sheepskin goods, be put on the same footing as the names of places like Nottingham in connection with lace, or the name of Sheffield in connection with cutlery. It seems quite clear that no maker of lace at Nottingham in these days could achieve a trade mark monopoly of the word "Nottingham" in connection with the lace that he made, and the same would be true of the word "Sheffield" in connection with cutlery. These geographical expressions in connection with the well known classes of goods which are attached to those places would be as incapable of monopoly by any one trader making such goods as would be descriptive words like "blue," "good," "cotton" or "all wool"—words which, from their very nature, are incapable in fact of being appropriated *simpliciter* by any particular trader. There are well known authorities, to which I need not refer; but the distinctiveness in fact, which is predicated in the sections of the Act which I have read, could not, in my opinion, as a matter of fact, be established. It is not necessary to say that that is a question of law; it is much the same as the other point to which I have referred; but, if a man or a number of people came and said that the words "Nottingham lace" conveyed to them the fact that the goods to which those words were applied were the products of a particular Nottingham manufacturer, all I can say is that I do not believe that any court would accept that contention. On that balance of evidence it seems to me absolutely to confirm the view that the mark was registrable, because it had become distinctive in fact, because it had achieved a secondary meaning as indicating the appellants' goods. I think that the registrar was right in the conclusion at which he arrived, and that the objections to the registration fail. In those circumstances, with the greatest respect to Clauson, J., I think that the appeal should be allowed, and that the mark should remain on the register. The result of allowing the appeal will be that the motion to expunge the mark will be dismissed, with costs here and below.

Romer, L.J.: Mr. Shelley has I think rightly conceded that the question that has to be dealt with on this appeal is purely a question of fact. The question is this: To persons engaged in transactions in slippers, whether as wholesale or retail dealers or as individual purchasers, does the word "Glastonburys" or "Glastonbury" (I do not know that there is any distinction really between the two), when used for the purposes of designating a pair of slippers, indicate that the slippers are made by a particular manufacturer, or does it merely indicate that they are made at Glastonbury? When I refer to persons engaged in transactions in slippers, I necessarily refer only to such persons as desire to distinguish between one maker of slippers and another. Those are the only persons, really, that we may consider. Put in other words, the question is: A Not to a man in the street, but to a person to whom the name of a pair of slippers is of some importance, what does "a pair of Glastonburys" or "Glastonbury slippers" mean? I think that the evidence that has been given points to one answer, and one answer only, namely, the answer that "a pair of Glastonburys" means a pair of slippers made B by Messrs. Clark, Son & Morland.

I desire only to add this: that question of fact receiving that answer, the mark "Glastonburys" is registrable under sect. 9 of the Act; but I agree that it does not necessarily follow from that that the mark should be registered, because it always has to be considered whether the mark, C when registered, would be calculated to deceive, within the meaning of sect. 11, or whether confusion would be caused by reason of the fact that, under sect. 44 of the Act, notwithstanding the registration of the word "Glastonburys," it will still be open to every manufacturer of slippers at Glastonbury to refer to the fact that Glastonbury is the place D where he carries on business, and that his slippers are manufactured at Glastonbury. I have omitted all reference to sect. 19, because obviously that is not relevant in the present case.

It is perfectly true that, if an application were made to register the word "Glastonbury" as a trade mark, without any evidence at all E of prior user of the word "Glastonbury" or "Glastonburys" as an unregistered trade mark, it might be a fatal objection to the application, and probably would be, to point out that, if Messrs. Clark, Son & Morland removed their factory from Glastonbury to some other town and used their trade mark "Glastonbury" in connection with their slippers, it F might lead to confusion, and would be a misrepresentation; but that would be because the word "Glastonbury" might be understood as referring to the place of manufacture. Once, however, one has arrived at the conclusion, on evidence, that the word "Glastonbury," in the trade, refers to a particular maker, and not to the place of manufacture, G it is impossible to say that the use of the word "Glastonburys" hereafter, even should the appellants change their place of manufacture, could possibly be calculated to deceive, or lead to any confusion at all.

So far as sect. 44 is concerned, Messrs. Baily & Co. will be able, and so will any other manufacturer of slippers at Glastonbury, to continue H to refer to the fact that they carry on business at Glastonbury, and that the slippers are made at Glastonbury. For myself, I cannot think that the registration of this word "Glastonburys" can in any way interfere with any *bona fide* exercise of that power. It is very obvious how the power given by sect. 44 might be used in a way that is *mala fide*. The section is dealing only with a *bona fide* use. One can readily conceive of cases in which great prominence would be given to the word " Glastonbury " and the words " made in " might be almost illegible. I only instance that as a way in which a use, not a *bona fide* use, could be made of the powers conferred by sect. 44.

Clauson, J., thought that sect. 44 was a fatal obstacle in the way of registration or continued registration of this word " Glastonburys." I think he arrived at that conclusion because of some misapprehension in his mind as to what had taken place in the action brought by Messrs. Clark, Son & Morland against Messrs. Frederick Gorringe & Co. In that case, the complaint made against Messrs. Frederick Gorringe & Co. was not that they indicated that slippers which they were selling, which were not Messrs. Clark, Son & Morland's slippers, were made at Glastonbury. If the statement of claim in that action be examined carefully, it will be found that the allegation against the defendants was a very different one. It was an allegation of passing off; and not passing off by means of a statement that the slippers offered for sale by the defendant were made in Glastonbury.

I agree that this appeal should succeed, with the consequences which Lord Wright, M.R., has indicated.

Greene, L.J.: I agree, and, after the full judgments that have been delivered, I only propose to add a few observations of my own.

Mr. Shelley's initial proposition was to this effect: Wherever one finds a manufacturer, other than the applicant for registration, carrying on a similar business in the locality the name of which is the subject of the trade mark, the court must decline to register the mark. Mr. Shelley stated that that proposition was a proposition not of law but of fact. Speaking for myself, I do not agree with him; but, however that may be, the result is precisely the same, and it is this, that it would involve placing upon the language of the Act a limitation which the legislature has not thought fit to express. I for one decline to read into the language of the section any such limitation.

On that footing, the matter resolves itself into a pure question of fact, and I do not wish to add anything to what has been said on the subject of the general evidence as to whether or not the word " Glastonbury " or " Glastonburys " has acquired a meaning which has made it distinctive of the appellants' goods. For the purpose of answering the question whether the mark is adapted to distinguish, it is also necessary to examine the effect of sect. 44 in the light of all the circumstances of the case. That examination of sect. 44 is not conducted for the purpose of answering the question: Is the use of the mark calculated to deceive? That is a question which arises under sect. 11. The object for which sect. 44 is looked at in this connection is to test the correctness of the proposition that the mark is adapted to distinguish the goods. If the answer to the question formulated under sect. 44 is to the effect that the *bona fide* use by another trader of the name of the place as part of his address or as part of the description of his goods will be interfered with, that enables one to say that the mark is not adpated to distinguish, and, indeed, it cannot be adapted to distinguish if it is going to clash with a *bona fide* description of, for example, the other manufacturer's place of business.

In examining that question under sect. 44, it is, I think, of great importance to consider all the relevant facts connected with it, and one of those relevant facts in the present case appears to me to be what has in the past been the *bona fide* use by the respondents of the word " Glastonbury " as describing the place of business or as describing the character or quality of the goods. I find it helpful to notice that the method which was adopted by the respondents, the other traders in Glastonbury, to indicate the place of manufacture of their goods, was one which, to them, appeared to be, for several years, completely and entirely satisfactory, consisting, as it did, of the perfectly plain, perfectly clear, and perfectly truthful statement that their goods were made in Glastonbury, and that their own business address was Glastonbury.

It so happened that, when the mark had been registered, and also, I think, to some extent, in connection with the action against Messrs. Gorringe, for some reason the respondents were minded to change the way in which the place of manufacture of their goods was to be described, because, whereas the previous description had down to then appeared to be adequate, they then desired to use the words " Glastonbury slippers," and they say: To describe our slippers as " Glastonbury slippers " would be a perfectly *bona fide* use of the name, as indicating our place of business or the quality or character of our goods, and we should therefore be entitled to use it, and, if we do use it, there will be confusion. That was the substance of the complaint. Be it observed that never, in the course of the time during which the respondents have been manufacturing these goods, have they received one single order for goods described as " Glastonbury slippers " ; nor is there a particle of evidence that any person, either in the trade or a member of the public desiring to obtain the respondents' goods, has asked for them under any such name.

I find very great assistance, in view of these facts, in the precise language used by Fletcher Moulton, L.J., in the passage in the *Perfection* case (2) to which Lord Wright, M.R., has referred. I would like, in order to make clear the point to which I desire to call attention, to read one sentence. Having formulated the question: " Will the registration of the trade mark cause substantial difficulty or confusion, in view of these rights of user by other traders ? " Fletcher Moulton, L.J., says at p. 148:

> If the answer be in the negative, either by reason of the nature of the words, or because past user has limited the possibility of other traders safely or honestly using the words, the court may well grant the desired permission.

I call attention to the words " so using the words." That refers back to this sentence :

> The registration is not to affect the use of the words by other traders in any *bona fide* description of the goods.

What Fletcher Moulton, L.J., is saying there, is that past user may have produced the result that, whereas the section entitles the rival trader A to use the words *bona fide* in describing his goods or place of business, the precise method in which he chooses to use the words may be limited, because he must not adopt a method of describing them which would, in fact, be dishonest.

A very good example of that appears in the present case. In the B abstract, a manufacturer whose place of business is Glastonbury would be acting perfectly *bona fide* and reasonably in stamping his goods " Glastonbury " as indicating that they come from Glastonbury. That particular use of " Glastonbury " is now denied to Messrs. Baily, on their own admission, because, to use the words of Fletcher Moulton, C L.J., past user has limited the possibility of their honestly so using the word " Glastonbury." Similarly with the word " Glastonburys." When one comes to consider the phrase " Glastonbury slippers," which is the one which Messrs. Baily desire to use, the same principles appear to me to apply ; but that does not mean, and the language of Fletcher Moulton, D L.J., does not mean, that every method of describing the place of business is to be denied ; the statute expressly preserves it ; but what is preserved is the right to use the words *bona fide* as part of the description. As I have already said, there is nothing that I can see in this legislation which will prevent the respondents using the words in precisely the same way E that they have found satisfactory in the past.

The only other matter on which I wish to add a word, is the question of certain evidence that was put before the court on behalf of the respondents. A number of letters were written and a number of answers were obtained. Certain of the writers of these answers deposed, in F affidavits, to the correctness of the answers that they had given, and that evidence, of course, was evidence properly brought before the court ; but the remaining letters (and there was a very large number of them) were exhibited to an affidavit, and in that affidavit were contained statements which, I must confess, to my mind, convey a clear impression G that the letters were being exhibited in order that the court might attach some evidential value to them. In my humble judgment, it is quite improper to bring matters of that kind, which are not evidence at all, before the court. It is said by Mr. Shelley that it would be improper, if certain answers only were referred to, not to disclose the fact that H there were other answers as well. To my mind, that is a matter which is irrelevant for the court to know, at any rate unless the other side chooses to bring it out. I regard it as highly embarrassing that the court should have before it documents of that kind, which have no evidential value at all, and, indeed, cannot be looked at as a matter of evidence.

I take the view that, if it is desired to satisfy anybody that the deponents, or the witnesses called to verify the answers, have been honestly and fairly selected, it is sufficient for the other side to be notified that so many other answers have been received and can be inspected, and the other side can then, if they wish, make use of the result of their inspection in cross-examination.

LORD WRIGHT, M.R.: I desire to say that I fully agree with what has just fallen from my brother GREENE, L.J. I think that the course taken in regard to this affidavit was a very undesirable course to adopt. I did myself strike out entirely the final paragraph. I agree entirely with what GREENE, L.J., has said.

ROMER, L.J.: I also agree.

Appeal allowed, with costs. Leave to appeal to the House of Lords refused.

Solicitors: *Bridges, Sawtell & Co.*, agents for *Gould & Swayne*, Glastonbury (for the appellants); *Woodham Smith & Borradaile* (for the respondents).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

CLELLAND *v.* EDWARD LLOYD, LTD.

[KING'S BENCH DIVISION (Goddard, J.), **March 22, 23, 1937.**]

Master and Servant—Loan of servant—What amounts to loan—No request for services—Liability of master.

Negligence—Occupier of premises—Scaffold erected by servant of occupier—Injury to employee of independent contractor.

The defendant company was the owner and occupier of premises on which certain work was being done by an electrical company as an independent contractor. The defendant company, following its custom when electrical work was being done on its premises by other contractors, instructed one of its apprentices to work with the electrical company's foreman. The electrical company had not asked the defendant company to provide a workman, but the defendant company thought it would be a good thing for the apprentice to work with the foreman in order to learn the work. On the instructions of the foreman the apprentice erected a scaffold for the use of the electrical company's workmen. While a workman in the employ of the electrical company was standing on the scaffold, a board broke, and the workman fell and was injured:—

HELD: (i) as the defendant company had no control over the way in which the electrical company did its work, it was not liable as being the occupier of the premises.

(ii) in the circumstances, the apprentice had remained a servant of the defendant company, and the defendant company was, accordingly, liable for his negligence.

[**EDITORIAL NOTE.** When a servant is lent to a third person, the latter is responsible for his negligence. In order to establish this liability, however, a loan of the servant must be proved, and the present case shows that it is not enough that the master allows or orders his servant to work with the employee of a third person; there must also be a request or acceptance of the servant by the third party.

As to Loan of Servant, see HALSBURY, Hailsham Edn., Vol. 22, pp. 242, 243, para. 422; and for Cases, see DIGEST, Vol. 34, pp. 22-27, Nos. 23-61.]

Cases referred to:

(1) *Bain* v. *Central Vermont Ry. Co.*, [1921] 2 A.C. 412; 34 Digest 27, *54*; 90 L.J. P.C. 221.

(2) *Donovan* v. *Laing, Wharton & Down Construction Syndicate*, [1893] 1 Q.B. 629; 34 Digest 26, *49*; 63 L.J. Q.B. 25; 68 L.T. 512. A

Action for damages for personal injuries sustained by the plaintiff while he was working at the defendant company's premises on certain electrical work.

Edward Lloyd, Ltd., was the owner and occupier of certain paper B mills near Sittingbourne, and in 1934 and 1935 it was erecting a new power house, where electrical machinery was to be installed for the working of the mills. Edward Lloyd, Ltd., built the actual building, but the electrical apparatus was installed by English Electric Co., Ltd., and Electroflo Meters Co., Ltd. Whether Electroflo Meters Co., C Ltd., was a sub-contractor of English Electric Co., Ltd., or whether it was a direct contractor of Edward Lloyd, Ltd., did not appear, and was not material to the case, but Electroflo Meters Co., Ltd., and its workmen, while on the premises of Edward Lloyd, Ltd., were, it was held, invitees. Electroflo Meters Co., Ltd., was short of men, and, by arrange- D ment with Edward Lloyd, Ltd., some men, including the plaintiff, were borrowed from the Kent Electric Power Co. to assist Electroflo Meters Co., Ltd., in its work. On Aug. 17, 1935, the plaintiff, while he was temporarily in the service of Electroflo Meters Co., Ltd., was wiring an instrument board, when a board on a scaffold on which he was standing E broke, and the plaintiff fell, and sustained the injuries which gave rise to this action. The scaffold had been erected by an apprentice of Edward Lloyd, Ltd., named McLeod, on the instructions of Jackson, the foreman of Electroflo Meters Co., Ltd. When electrical work was being done on its premises by other contractors, Edward Lloyd, F Ltd., was accustomed to instruct its electrical apprentices to go and work with the other electricians, and McLeod was working with Jackson in that manner when he erected the scaffold.

H. Glyn-Jones for the plaintiff.

F. A. Sellers, K.C., and *James MacMillan* for the defendant company. G

Goddard, J.: [His Lordship stated the facts and assessed the damages, if the plaintiff was entitled to recover damages, at £3,000, in addition to special damage of £325.] Is there liability in Edward Lloyd, Ltd.? Mr. Glyn-Jones's first point is this. He says that there was a H scaffold, or a platform, on the premises of Edward Lloyd, Ltd., which was composed of improper material, and, therefore, *prima facie*, that company is liable, because it is the occupier of the place where the platform was. I think that is putting it a great deal too high. It is quite true that Edward Lloyd, Ltd., was the occupier and had the legal control of the building, but it had employed competent contractors—it is not suggested that they were not competent contractors—to do some work in its building. In the course of doing that work, those contractors made use of some planks which were not supplied by Edward Lloyd, Ltd., for that purpose, and there is no suggestion that they asked Edward Lloyd, Ltd., to put them there. The planks were obviously there for the purposes of this electrical work. Edward Lloyd, Ltd., would not interfere with the electrical work; the electrical contractors were left to do their work as they chose; Edward Lloyd, Ltd., does not control them in doing the work, and say whether a scaffold must be put here or there. It does not put up scaffolding for anybody to work on, and I cannot find any ground on which I can say that, because some boards are found on a man's premises in a certain position when work is going on under two contractors in the place, and those boards are unsafe, there is a liability on the owner of the premises. As I put it in argument, if I have two lots of workpeople working in my house, a builder and decorator doing the painting in my drawing-room and an electrical contractor doing electrical work, and the builder erects a stage in the drawing-room, and the electrical contractor's man comes in and sees it and gets on to it and uses it and it breaks, it seems to me it would be an extraordinary doctrine if it were said that, because I had control of the premises, I was liable. I do not find here any grounds upon which, on that part of the case, I can infect Edward Lloyd, Ltd., with liability.

Now comes the other point. Assuming I am justified in finding, as I have found, that this board was put there by McLeod at the instance of Jackson, is McLeod to be regarded as the servant of Electroflo Meters Co., Ltd., or as the servant of Edward Lloyd, Ltd.? He was an apprentice, and Edward Lloyd, Ltd., sent him to work by the side of and under Jackson, in which case he would naturally do what Jackson told him. But can I say that, in those circumstances, he had become the servant of Electroflo Meters Co., Ltd.? It is quite true that some authorities say that, if one man lends his servant to another, even gratuitously, then, for the purpose of responsibility arising out of the servant's acts, the person who has control of the servant at the time—that is to say, the contractor, the employer, or the master, whichever word you like to use, to whom the servant is lent—is responsible for that servant's act. In *Bain* v. *Central Vermont Ry. Co.* (1), at p. 415, LORD DUNEDIN quoted with approval a passage from the judgment in the Canadian court, in which it was said:

> It is well established that the master, in whose general service a man is, is not responsible for the tortious act of the man if the control of the master has been, for the time being, displaced by the power of control of another master into whose temporary service the man has passed by being lent (even gratuitously) or sub-contracted. In such a case, it is the *patron momentané* and not the *patron habituel* who is responsible.

Donovan v. *Laing, Wharton & Down Construction Syndicate* (2), a leading case on this branch of the law, was quoted in support. The judgment of Bowen, L.J., in that case, which is cited by the Judicial Committee in *Bain's* case (1), contains this sentence, at p. 633 :

> We have only to consider in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act.

In one sense, it is perfectly true to say that the person who had the A
control of the doing of the act at the moment was Jackson, who was in
the employment of Electroflo Meters Co., Ltd., but I think Mr. Glyn-Jones is right in saying that, in all the cases decided on this point, when
one examines the facts, one finds that there has been a bargain or agreement, although it may be a gratuitous one, for the servant of one person B
to be employed by another person. In this case there is not the smallest
evidence that Electroflo Meters Co., Ltd., ever asked Edward Lloyd,
Ltd., to provide it with a servant, except the men who were obtained
from the Kent Electric Power Co. I think that the evidence was that
that had been done by Edward Lloyd, Ltd., at the request of Electroflo C
Meters Co., Ltd. There, by an arrangement between the Kent Electric
Power Co. and Electroflo Meters Co., Ltd., two of the Kent Electric
Power Co.'s men entered the temporary service of Electroflo Meters Co.,
Ltd., but there is no evidence here that Electroflo Meters Co., Ltd., asked
for the services of McLeod, either by name or by asking for the services D
of another man. The truth is that the officials of Edward Lloyd, Ltd.,
thought that it would be a good thing for McLeod to go and work alongside Jackson and see how this work was being done. In other words,
they were using Jackson, so to speak, as a means of carrying out their
duties of instructing their apprentice McLeod, and they sent McLeod to E
work alongside Jackson, and, of course, McLeod did what Jackson told
him. It seems to me to be a serious thing, in those circumstances, to
say that Electroflo Meters Co., Ltd., became the employer of McLeod, and
for this reason : there is no evidence that Jackson had authority, on its
behalf, to engage him. In the circumstances, I think McLeod remained F
the servant of Edward Lloyd, Ltd., and if it chose to put him in the
position in which he was put to do work for which he was not fit, I think
that that is its misfortune. In those circumstances, I think that this
case can be distinguished from *Donovan's* case (2) and *Bain's* case (1),
and, not without some doubt, I have come to the conclusion that the G
plaintiff establishes his case against Edward Lloyd, Ltd., and I give
judgment for the plaintiff for £3,325.

Judgment for the plaintiff.

Solicitors : *Gardiner & Co.* (for the plaintiff) ; *L. Bingham & Co.* (for
the defendant company). H

[*Reported by* C. St. J. Nicholson, Esq., *Barrister-at-Law.*]

DROWN *v.* GAUMONT-BRITISH PICTURE CORPORATION, LTD.

[Chancery Division (Clauson, J.), **March 19, 23, 24, April 6, 7, 8, 9, 1937.]**

Companies—Dividends—Reserve fund used in the business—Reserve fund formed from profits and premiums on issue of shares—Whether available for dividend—Discretion of the court.

A company with a capital of some £16,000,000 and operating to a large extent through subsidiary and sub-subsidiary companies, proposed to pay a dividend on its preference shares. There had admittedly been a loss of £780,000. Against this there were available two sums of £362,000 and £500,000. The former was admittedly profits available for dividend. The £500,000 was made up in part of premiums on the issue of shares and in part of profits carried to reserve, but which had in fact been invested in the assets of the company. The plaintiff asked for an injunction to restrain the company from paying the dividend:—

Held: (i) the onus was on the plaintiff to establish that in paying such dividend the company would trench upon assets of the company representing capital paid up upon the shares.

(ii) the assets of the company, properly valued, must in such a case be treated as notionally divisible into two parts, those representing subscribed capital and those representing reserve. These two parts must be proportionately reduced in respect of any diminution of value and the reserve so reduced will be available for dividend.

(iii) that part of a reserve fund consisting of moneys paid by way of premiums on shares, unless set aside in some particular fund which has been wholly spent, is available for dividend purposes.

Re Hoare & Co., Ltd. & Reduced (1) *applied.*

[EDITORIAL NOTE. The main interest in the present case is the careful consideration of the position arising in the case of a large company operating over a wide sphere and mainly by subsidiary companies. In such a case where profits have been used in the business the principle stated in *Re Hoare & Co., Ltd. & Reduced* (1) still applies, and the same principle is applied to premiums received upon the issue of shares which have similarly been used in the business and may for some purposes have been regarded as capital. Where a shareholder seeks to show that the proposed dividend is being paid out of capital, the onus is upon him to prove his contention conclusively, and both the company and the court are entitled to rely upon the opinion of experienced accountants who have made themselves acquainted with the position of the company and its subsidiary companies.

As to Interim Dividends, see HALSBURY, Hailsham Edn., Vol. 5, p. 396, para. 652; and for Cases, see DIGEST, Vol. 9, pp. 499-502, Nos. 3278-3301.]

Case referred to:

(1) *Re Hoare & Co., Ltd. & Reduced,* [1904] 2 Ch. 208; 9 Digest 152, *863*; 73 L.J. Ch. 601; 91 L.T. 115.

Motion for an injunction restraining the company from paying dividend pending the trial of an action. The facts and arguments appear fully in the judgment.

H. A. H. Christie, K.C., and *J. G. Strangman* for the plaintiff.

Sir William Jowitt, K.C., Cyril Radcliffe, K.C., and *T. D. D. Divine* for the defendant company.

The articles of association of the company included the following:

128. Subject as hereinafter provided, and to any rights, privileges or disabilities

for the time being attached to any shares in the capital of the company having preferential or special rights or disabilities in regard to dividend, the profits or other moneys of the company which it shall from time to time be determined to distribute by way of dividend shall be applied in payment of dividends upon the shares of the company in proportion to the amounts paid up or credited as paid up thereon respectively otherwise than in advance of calls.

129. The directors may, with the sanction of a general meeting, from time to time declare dividends or bonuses, but no such dividend shall (except as by the statutes expressly authorised) be payable otherwise than out of the profits of the company. The directors may, if they think fit, and if in their opinion the position of the company justifies such payment, from time to time declare an interim dividend. A declaration by the directors as to the amount of the profits or other moneys at any time available for dividends shall be conclusive. A

130. The directors may, before recommending any dividend, set aside out of the profits of the company such sum or sums as they think proper as a reserve fund or reserve funds, which shall at the discretion of the directors be applicable for providing for depreciation of assets, meeting contingencies for effecting purchases, for the gradual liquidation of any debt or liability of the company, or for repairing or maintaining any works connected with the business of the company, or shall with the sanction of the company in general meeting, be as to the whole or in part applicable for equalising dividends, or for distribution by way of special dividend or bonus, or for any other purposes for which the profits of the company may lawfully be applied, and the directors may divide the reserve fund into separate funds for special purposes, and may invest the sums from time to time carried to the credit of such fund or funds in such investments (other than the shares of the company) as they may select. The directors may also from time to time carry forward such sums as may be deemed expedient in the interests of the company. B C

CLAUSON, J.: This is a motion by a shareholder of a company known as Gaumont-British Picture Corporation, Ltd., suing on behalf of himself and all other the shareholders in that company, and asking for an order that the defendant company and its directors may be restrained, pending the trial of this action, from paying, in respect of the financial year ending Mar. 31, 1937, a dividend on its 5½ per cent. cumulative first preference shares of £1 each. The company's financial year ends on Mar. 31, 1937, but its obligation, according to the terms of issue of the preference shares, is to pay the dividend half-yearly on Sept. 30 and Mar. 31. The dividend of Sept. 30, 1936, has been paid, and what is really in issue now is whether the plaintiff is entitled to stop the company from paying the dividend which, according to the terms of issue, would normally be paid on the preference shares on Mar. 31, 1937. It is a company of vast extent. It has debenture issues and so forth; its gross assets are somewhere between £12,000,000 and £16,000,000 or £17,000,000. It conducts an enormous business through a number of subsidiaries, and, if the expression will not be misunderstood, sub-subsidiaries, amounting in number to about 50 different companies. It is a business of wide extent geographically; it is a business of a very complicated character. The business is conducted in a number of different departments, and it appears that, during the period Mar. 31, 1936, and Mar. 31, 1937, very large losses have had to be faced in respect of difficulties in regard to certain branches of the business, which are resulting in the directors accepting the policy of, to some extent, shutting down particular departments of the business, and transferring to other places the activities theretofore carried on in those departments. I am necessarily and deliberately stating the matter in somewhat general and D E F G H vague terms. In a company of this character it is never possible to get an accurate view of the company's financial position until the audited balance sheet is produced, which must necessarily, in the case of a company of this type and character, be several months, at least, after the end of the financial year, but equally, in order that a business of these dimensions and this character should be satisfactorily and economically conducted, it is most important—and it would be affectation to pretend that even a judge does not know—that you should have elaborate accounting departments, which keep a hand upon the whole matter month by month, and even week by week, so that, from time to time, so far as revenue items are concerned, the directors, with the assistance of their very skilled staffs, are able to form a fairly accurate view of what is happening, and how far profit is being made from time to time, and as to what the likelihood is that, when the particular period of accounting comes to an end, it will be found that there will be a profit or a loss, and, if a loss, how much loss, that is, as regards what one may call the ordinary trading and revenue activities of the company. There is, of course, one item which is always uncertain, with the assets of these vast dimensions and of this complicated character, for holdings in subsidiary and sub-subsidiary companies naturally result in a number of elements of uncertainty being introduced into the value of particular assets, particular possessions, if I might so call them, and, accordingly, throughout the financial year, there is necessarily a good deal of doubt as to the actual financial position of the company, in the sense of the position which it would occupy if it were necessary, at a particular date, to ascertain with accuracy what was the value of all its various assets and interests necessary for the purpose of the balance sheet at the end of a financial year. Some sort of endeavour has to be made to get into figures a representation of the company's financial position. We are all familiar with the way in which that is done, practically the only way in which it can be done. You have certain book values which have been arrived at, in some cases by means of valuation, in some cases with reference to cost; those are, to some extent, modified, year by year, when the balance sheet is brought out, in order to make a truer picture. The modification sometimes takes the form of writing an asset down, or in some cases of writing it up; it sometimes takes the form of putting on the other side of the balance sheet some account of some kind as a reserve against what is believed or thought possibly to be a depreciation or an alteration in the value of the asset, and, of course, in modern circumstances, in concerns of this magnitude, it is impossible to do the thing in any other way. It is quite impossible, when you have £12,000,000 or £14,000,000 worth of assets, to value every time you have a balance sheet; it would be quite absurd.

Now, when the accounts for the year ending Mar. 31, 1936, were brought before the shareholders, which was in the late autumn of the year 1936, it would appear—I know nothing of the details, nor am I

concerned to know them—that questions were raised, and, as a result
of those questions, a document was produced which has played a very
large part in the proceedings during the last two or three days before
me, which has been spoken of as the combined balance sheet. I have
referred to the very complicated nature of the company's business, and
the combined balance sheet is an attempt to produce a statement of the A
financial position of the whole concern, using that word in the widest
sense, eliminating as far as possible the artificial circumstances arising
from the existence of subsidiary and sub-subsidiary companies. The difficulties
of preparing any such document are great. Properties can be
valued, and the large mass of the properties concerned in this group in B
fact were valued, by valuers of great experience, who produced a valuation
which everybody has assumed—and necessarily assumed, at all
events, for any purpose that is before me now—to be as accurate a
valuation as, in the circumstances, is possible. All sorts of adjustments
necessarily have to be made. In the case of some of the subsidiary C
companies, the share capital is not entirely owned by the parent company,
and adjustment has to be made from that point of view. I need
not go into a number of other adjustments that have to be made, but
I have no doubt that, with the very skilled accountants concerned in
the matter, this combined balance sheet has produced something which D
gives a not unfair picture of the total financial position of the combined
concern. I am concerned with the matter at the moment for this purpose
only, that a study of that combined balance sheet, in the light of
the evidence which was given before me, leads me to this conclusion,
about which I think there is not really very much doubt, that, in the E
balance sheet of the defendant company as at Mar. 31, 1936, items of
assets must almost necessarily be treated, in view of the result shown
by the combined balance sheet and of the valuations which have been
made, as being to some extent entered at figures which are in excess
of the value now to be attributed to them. This would be the result if F
they were corrected in the light of the information which has been
gathered by the valuation which I have mentioned, and the purview
which has been put before the company of the whole position as shown
in the combined balance sheet.

I have referred to the fact that, during the last year, there have been G
losses. The amount of those losses is necessarily a matter of estimation,
to some extent of fairly close estimation, and to some extent the estimation
is difficult. I may put the matter in this way. The result of the
activities of the defendant company in departments other than those
in which these losses have been incurred is that there has been a sufficient H
profit made, after making all necessary adjustments, and after making
allowance for income tax, debenture stock interest, debenture stock
sinking fund, and so forth, and for the sum required to meet the preference
share dividends. The sum left over is, roughly, £15,000. Now,
the year began with a balance on profit and loss account of £147,000.

At the beginning of the year also there was a further £200,000 of profit
balance. The profit balance really was £347,021, but, as stated in the
report of the board, the board thought it proper to set £200,000 aside.
In effect they said: we will treat ourselves as starting the year with a
credit balance to profit and loss of £147,000. We must not act on the
A footing that the £200,000 was normally an available credit balance.
We think it is prudent to keep that by, because it may be wanted, in
view of alterations in value of our shares and other contingencies.

Now, I have spoken for the moment of the departments of the business
which have been successful. I now turn to the departments of the
B business in which this very serious loss has been incurred. We are
dealing with large figures and operations on a large scale, and, when
the motion started, very insufficient material was put before the court
as to what the loss was, and as to what provision could be made for the
loss, but, after careful cross-examination of several witnesses, the position
C as regards the loss is, within certain limits, fairly clear. The position is
this: when the accounts are finally made up to Mar. 31, 1937, there
will be a loss in these losing departments. The figure at present is a
matter of estimate, and it may be affected by a number of adjustments
which may have to be made, which are proper to be made, which auditors
D might insist on having made. That figure must amount to something
like £780,000.

It is suggested on behalf of the plaintiff that there is material before
me that ought to lead me to suppose that the figure cannot be less than
another £30,000 or so in excess of that £780,000. I am not at all satisfied
E that that would be the right view. I think that I am probably reason-
ably safe in holding that I have material before me on this motion to
lead me to believe that there is a loss of about £780,000, but I should
not be justified in holding that there is any greater loss than that. As
I say, the whole matter is estimate, and estimates are naturally mis-
F leading. It must be remembered that the nature of this proceeding is
this, that the plaintiff has said: if the company pays this preference
dividend, it is going to do something which is illegal—in a sense which
I will develop later; but a man who comes before the court and sets
up a case of that kind must, of course, give some reasonably satisfactory
G evidence that there is this illegality occurring, and, accordingly, I am
not entitled, as against the defendant company, to treat as established
anything which I do not think is, on the whole, proved, having regard,
of course, to the fact that this is an interlocutory application. On the
whole, I am satisfied it is in accordance with what will turn out ulti-
H mately, on further investigation, to be the facts. I hope I have thus
sufficiently explained why I do not see my way to hold that the loss
which is to be provided for, in order that this preference dividend may
be satisfactorily paid, amounts to more than £780,000. The directors
say: true it is we have to face the loss of £780,000, but that can be
done when the accounts are finally made up, and at the end of the year

it will turn out that we have in the company assets available to meet that loss. To put it slightly differently ; although we have lost £780,000, and our assets accordingly have diminished to that extent, it will be found that, even after making allowance for that diminution, there are still assets in the company—partly the proceeds of the subscription for share capital, and partly certain sums which from time to time have been set apart in a way which I will refer to in a moment—which will be left intact and available for future purposes of the company after meeting that £780,000 loss. Now, those assets seem to me to be sufficient to meet that loss.

I think at this point it would be well that I should explain exactly what it is suggested is the illegality which will be committed if the preference dividend is paid. It is well settled, and I do not propose to refer to any authority to establish the proposition, that dividends such as these must not be paid out of capital in this sense, that the company must not, under the guise of paying dividends, return to the shareholders any part of the money subscribed on their shares. The plaintiff can succeed in this case only, as I understand the position, if he can satisfy me that, should the preference dividend be paid, the result will have been that in that payment to the preference shareholders there is an ingredient of payment which is a return to them of the capital subscribed on their shares. That brings us to this point : where am I to find the capital which was subscribed upon the shares of the company, so that I may be quite sure that this payment of dividend can be made without trenching upon that capital so subscribed ? I return to the assets of the company. So far as the balance sheet of Mar. 31, 1936, is concerned, there was said to be at that time a balance carried to reserve of £500,000. It appeared on the face of it to be invested, as it has been called, in the assets of the company. Now, that £500,000 arose in this way : at various stages in the history of the company, shares were issued at a premium, sometimes a simple issue of shares at a premium, and sometimes the matter was a good deal complicated by shares being issued at a premium against shares in subsidiary companies and so forth, but those are all matters the details of which it is impossible for me to pursue. Shares having been issued at a premium, the premium was from time to time carried to reserve. The £500,000 was built up in part from sums so carried to that account, being premiums on the issue of shares, and in part out of revenue balances, which from time to time it was thought convenient to carry to that reserve by way of increasing the figure. It seems quite clear upon the figures, that, if, in fact, on Mar. 31, 1937, it was true that, after all the liabilities of the company had been met, there remained in the coffers of the company assets sufficient to meet the total figures of the subscribed capital, and also this £500,000, and if this proposed dividend could be paid by trenching upon that £500,000, or even totally dissipating it, but without trenching upon that part of the assets which extended to and represented in full the subscribed capital, the plaintiff could have no cause for complaint.

I will just mention parenthetically one point. It was suggested that, owing to the existence of art. 130, referring to the reserve fund, it would not be possible, or it would not be in accordance with the articles of the company, to utilise the presence of such a fund as that to justify the payment of the dividend without the sanction of a general meeting of the company. I do not take that view. It seems plain to me, on the construction of the article, that, without going to a general meeting at all, it would be quite within the sphere of the directors to deal with their accounts in the way of writing off that fund against items of depreciation and other similar items, items, in other words, of proper debit to revenue account. Further, this is, after all, necessarily only an interim dividend, and it is by no means certain, in any view of the matter, that art. 130, whatever its construction may be, has any application to the matter in hand. I do not propose to deal with that further.

Now, to return to the figures. There is the loss of £780,000, and I am not prepared to treat it as any greater loss than that. What have the directors got to meet the £780,000 ? They have got the £15,000 from other departments—an estimate, of course, but there it is—they have got the £147,000 and the £200,000 with which they began the year ; that makes a total of £362,000. That leaves them short to the extent of £418,000. If that £500,000 is £500,000, it is quite obvious that they can pay the dividend and meet all the charges without trenching upon the other part of the assets, which represents not the £500,000 but the subscribed capital. On the evidence before me, I am tempted to think that, if the figures of the 1936 balance sheet were now corrected so as to conform to the true values of all the assets as at that date, it is almost certainly true to say that the subscribed capital plus the £500,000 would not be covered in full by the value of the assets. To what extent those sums would be uncovered is a matter of conjecture. I am tempted to think that that figure might possibly be as much as about one-sixth of the deficiency ; it may be more ; it may, on the other hand, be less. The factors which have to be taken into account in correcting the figures are so complicated that it is quite impossible, on such materials as I have before me, to do more than attain some approximate view of the probabilities of the matter. I think it is agreed that, if the proper writing down would have such a result as I have indicated, the result would be this, that what is left of the £500,000, after the writing down, would cover the sum required to meet the deficiency that I have mentioned. I do not think myself there would be very much margin, but there again there may be more margin than I think. It is just possible that there might not be enough, and that the result might be that some part of this dividend might be thrown on subscribed capital. I think it is not impossible ; I do not think it is likely. It is quite impossible for me to hold that it has been proved, and I am clear that it has not been proved that that would be the result. It will be noticed, however, in what I have said, that I have assumed that, if the assets as at Mar. 31, 1936, are insufficient on a proper valuation to cover both the subscribed capital and the £500,000 reserve, the deficiency may be thrown proportionately on the subscribed capital and the reserve, in other words, I have assumed that the assets ought to be properly treated as notionally divisible into two parts, those which represent subscribed capital, and those which represent reserve, and that, if there has been a diminution in value, the diminution in value must be dealt with proportionately between those two portions of the assets. I myself do not see any other way of dealing with the matter, and that that is the right way to deal with the matter is at all events suggested, if not decided, by the well known decision of the Court of Appeal in *Hoare's* case (1) which has been cited to me. Of course, if the law is that, when capital has once been subscribed upon the shares of the company, the company must at all costs keep the capital so subscribed intact, and not treat as available to pay a dividend anything except that which remains after the whole amount of the subscribed capital has been treated as replaced in full, the position would be different, and, should the assets be found to be insufficient to meet both reserve and subscribed capital, the reserve would have to suffer first. If that were the way the matter had to be dealt with, it may well be that, on the figures that I have got here, the reserve would have to be treated as diminished to such a sum that there would not be enough to enable this dividend to be paid otherwise than out of capital, but, as the law now stands, and as far as this court is concerned (there can be no doubt about it, I think, at all), the law is different. Although it is true that, as soon as you identify which proportion of the company's assets represents the subscribed capital, or what remains of it, you must not trench upon that to pay a dividend. So long as you do not trench upon that, you may trench as much as you choose upon the remaining assets of the company, which represent, not the subscribed capital, or what is left of it, but other funds, provided from some other source, to which the disabilities which attach to the subscribed capital do not apply.

That brings me, I think, to what is the last point with which I need deal. As I have stated, the reserve fund was built up to a great extent out of premiums on shares, and it was suggested that there is some special feature about the money which has been obtained by way of premium upon the issue of shares, and there is some principle which prevents that money from being dealt with as available to pay a dividend. I am not aware of any such principle, nor can I see any ground upon which such principle could be established. Of course, I can well appreciate that there may be circumstances in which moneys which have been obtained on the issue of shares at a premium such as this are set aside in some particular fund, and that, that particular fund having disappeared in some way, it may afterwards be said that premium has disappeared and is no longer available. I can understand that, but, when the premium has once become a part of the general assets of the company, I do not see what justification the court would have for treating those particular assets as being on a footing different from that of any other assets, or as treating a reserve formed by setting aside such premiums as on any footing different from that of any reserve set aside out of what one may call normal profits. This is undoubtedly true, that, subject always to the question of whether there may be something in the articles of association that interferes with it, there is nothing legally wrong in a company dividing among its shareholders a premium obtained on the issue of shares, so long as the sum it pays out does not form part of the capital subscribed upon the shares, but the premium, of course, is something additional to the capital subscribed upon the shares.

I do not see my way to grant the injunction for which the plaintiff asks. The story is really a very simple one. The plaintiff has taken upon himself a burden which, with a company of this kind, I should have thought it would almost inevitably be quite impossible to discharge. He has taken the burden of establishing, at a date when the subject matter with which he has to deal must necessarily lie in estimate, that some estimate which he brings forward is more accurate than some estimate upon which the directors have made up their minds, after careful consideration, to act. Whether that was too bold an undertaking or not, I am satisfied, on the facts of this particular case, that he has failed entirely to establish that, by the payment of the dividend which is proposed to be paid, the directors will in fact unlawfully trench upon that which they must not trench upon, that is, so much of the assets of the company as properly represent the capital paid up upon the shares. The result is that I must refuse the motion.

That leaves another question which I have been considering, and upon which I have come to a conclusion; that is, the question of costs. When I say I have come to a conclusion, it must be subject, of course, to anything counsel may wish to say. In normal circumstances, when an interlocutory application is made for interlocutory relief, and the plaintiff fails in his application, the course usually taken by the court is to order that the defendant's costs be his costs in the action. Now, this case has taken a rather peculiar course. When the motion was started, the evidence was so extraordinarily insufficient that I felt the greatest difficulty in dealing with the matter, and it was rather at my suggestion that the parties took the view that it would be just as well that the matter should be probed at once by cross-examination of the witnesses on their affidavits, and by calling further evidence, and of course the issue which is really between the parties upon this motion is an issue as to how matters stand on estimates at the present moment; when the action comes to be tried, which cannot be for some few months, many weeks certainly, the issue may well turn out to be something quite different, namely, as to what the condition of the company is, in view of accounts which have then been taken up to Mar. 31, 1937, and are then before the court, and will be considered by auditors and so on. I think it would be wise that I should depart from the ordinary course, and, in this case, in refusing the motion, refuse it with costs.

Motion refused with costs.

Solicitors: *Nordon & Co.* (for the plaintiff); *Lawrance, Messer & Co.* (for the defendant company).

[*Reported by* Reginald Townsend, Esq., *Barrister-at-Law.*]

UNITED DAIRIES (WHOLESALE), LTD. v. LEMON.

[Court of Appeal (Lord Wright, M.R., Romer and Scott, L.JJ.), **March 5, 1937.**]

Agriculture—Marketing Scheme—Determination of prices—"Exceptional quotations"—"Average of mean prices"—Milk Act, 1934 (*c.* 51), *s.* 4.

An agreement to fix prices for a marketing scheme by reference to market quotations included the phrases "exceptional quotations being disregarded" and "the average of the mean prices for the two kinds of cheese":—

Held: (i) "exceptional quotations" did not mean quotations for goods which were in fact exceptional owing to their quality or character but to quotations so described in the market report.

(ii) the "mean" is the figure mid-way between two extremes whereas the "average" is ascertained by adding all the items together and dividing by the number of items.

Order of Branson, J. ([1936] 2 All E.R. 1652) *varied.*

[**EDITORIAL NOTE.** Restriction and control of trade necessarily requires the calculation of prices for the purposes of marketing schemes and in computing them it would seem that recourse must be had to market quotations. Though the present case applies only to a particular scheme, the matters discussed will be of general interest to those working under such schemes.

For the Milk Act, 1934, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 27, p. 7.]

Appeal of a judgment of Branson, J., reported in [1936] 2 All E.R. 1652.

Sir William Jowitt, K.C., and *J. M. Buckley* for the appellant company.

R. P. Croom-Johnson, K.C., and *L. C. Graham-Dixon* for the respondents.

Lord Wright, M.R.: The dispute here deals with the question of the price to be paid for the milk, and the problem is to ascertain what is the price to be paid in respect of milk which is not dealt with as liquid milk, but which is used for the purpose of making butter, cheese, cream, and so forth, and these are called manufacturing purposes. For milk used for manufacturing purposes there is to be paid a reduced price, for reasons which have been realised all over Great Britain and the Dominions, where the problem has been experienced of how to dispose of the surplus, that is to say, milk surplus to liquid milk requirements.

Bearing that governing issue in mind, I now turn to the provisions which are inserted in the agreement to fix the price for manufacturing milk. We are here concerned with what is called cheese-milk, that is to say, milk used for making cheese, and butter-milk, which is milk used for making butter. There is no difference, as we shall see in a moment, A under the contract, and under the arrangements between the parties, as to the amount appropriate to these two classes of manufacturing-milk. There is, however, a difference in respect of the period of time during which the problem has to be determined and the solution defined. In the case of cheese-milk, the price applies to the first six months of B the contract. I ought to have said that the contract was for one year from the period Oct. 1, 1934, to Sept. 30, 1935. During the second part of that period the difficulties which have otherwise arisen have been settled, as regards cheese, because an award has been made by the late Mr. Shortt which fixes the position as between these parties in C respect of cheese-milk. There was no such arbitration or award in respect of butter, and therefore the problem appertains, in respect of butter-milk, to the whole twelve months. It is not necessary here to consider the exact mode in which the arbitration in respect of cheese-milk came into being, and we have not been told, nor is it material to know, what D the result of the arbitration was.

The provision as to price on the face of the document is this:

> (1) The price per imperial gallon (hereinafter called the "regional price") to be paid by the purchaser for the said milk shall be the appropriate price set out in the first schedule to this agreement. (2) The purchaser shall monthly on or before the due date pay the regional price, together with any additional premiums to the Board in London or as the Board shall direct, and the Board shall apply the same E in accordance with the provisions of the scheme. Any freight, collecting or transit risk charges deducted or allowed as aforesaid shall (subject to adjustment as hereinafter mentioned) be debited to the vendor by the Board. (3) In this agreement the expression "due date" in relation to any calendar month's deliveries of milk means the tenth day of the ensuing month and in relation to any week's deliveries of milk means the Tuesday in the ensuing week.

F The only matter which I desire to emphasise on that clause is the reference to the first schedule in this agreement. The first schedule is found on the back of the contract, and I think I must read some portion of that.

> 1. The regional price per gallon shall be in all regions as follows—

and then it sets out the prices according to each month during which G the contract is current, that is, from Oct., 1934, to Sept., 1935. Then comes cl. 3, which is important:

> (1) Subject as hereinafter mentioned the regional price may after Oct. 1, 1934, from time to time during the term be varied either (*a*) by agreement between the Board and the Central Distributors Committee, or failing agreement (*b*) on the certificate of a person brought into consultation pursuant to the Agricultural Marketing Act, 1933, s. 13 (hereinafter called the "consulted person").

H It was under that section that the reference was made to Mr. Shortt, and he made his award in respect of cheese-milk for the second six months of the contract year. Then cl. 3 (3) provides:

> In the case of a variation made on the certificate of the consulted person the varied price shall be such price as may be fixed by the consulted person.

That is not material in this case.

The second schedule is peculiarly important, because it deals with the difference in price between the regional price, which is for liquid milk, and the manufacturing price, as defined, and it reads in this way :

> 1. The appropriate rebate shall be the difference between the regional price and the manufacturing price as hereinafter defined [subject to certain allowances not now materal.] 2. The manufacturing price shall be ascertained in relation to the product manufactured by reference to the scale following, namely : (1) Milk manufactured into cheese (other than soft curd cheese and cream cheese). The price per gallon to be the average price per lb. for the previous month of finest white Canadian cheese and finest white New Zealand cheese less a sum of 1¾*d.* (2) Milk manufactured into butter. The price per gallon to be the average price per lb. for the previous month of finest white Canadian cheese and finest white New Zealand cheese less a sum of 1¾*d.*

That is what is called the contract formula so-called in the proviso to sub-cl. (1).

> Provided that this formula shall be varied as from Apr. 1, 1935, in such manner as the Board thinks fit if the Board by resolution so determines and the Board undertakes to give full consideration to the question whether any such variation shall be made.

As we are told that the idea of the scheme in this connection was to enable the English producer to compete with the Canadian and New Zealand producer—that is to say, he is to pay only such an amount as will enable him to produce the cheese at a price comparable to the imported cheese—the sum of 1¾*d.* is inserted to cover the cost of manufacture, the price being that of the raw material, namely, milk. Cl. 3 is of vital importance here :

> Any manufacturing price may after Oct. 1, 1934 [when the contract began to operate] from time to time during the term be varied under the procedure and upon the conditions set out in cl. 3 of the first schedule to this agreement and the said clause shall subject to any consequential modifications be deemed to be incorporated in this schedule.

Cl. 3 of the first schedule I have already read, and it runs, as we observe, in this way, that one way of varying the agreement may be by agreement between the Board and the Central Milk Distributive Committee which was a committee representing the purchasers, who are described as distributors. That is the only part that is relevant here. It is to be noticed that there is this faculty by subsequent agreement to vary the agreement during its currency not once but from time to time. It is sufficiently obvious, I think, that the language of the formula in cl. 2 (1) of the second schedule—

> The price per gallon to be the average price per lb. for the previous month of finest white Canadian cheese and finest white New Zealand cheese less a sum of 1¾*d.*—

is a formula which it is very difficult, if not absolutely impossible, to apply, because it leaves almost all the essential elements undefined. How are we to ascertain either the average price of finest white Canadian cheese or that of finest white New Zealand cheese ? Is it the wholesale price ? Is it a matter of market quotations ? If so, what quotations ? And there are many other questions which I need not pursue further.

What happened up to the date of the contract had been that the parties had gone on, without investigating the matter with any care. They had proceeded by rule of thumb, but, just before the contract was entered into, certain attention was fixed on this question of price, and in particular a letter was written by Mr. Gosney, a gentleman to whom it seems that the distributors committee had left, or largely left, these questions of the price from month to month somehow to be settled. But, before the new contract was entered into, a letter was written by Mr. Gosney to Mr. O'Neill, representing the Milk Marketing Board, on Sept. 28, 1934, in which Mr. Gosney said:

> In the current contract, the price, as I understand, is to be based on the finest white Canadian and New Zealand. This has been the principle followed and the price agreed to the nearest farthing.

Then he refers to fractions, and says they have agreed figures, apparently month by month. He adds:

> As you are aware, the government agreed to give the Milk Marketing Board a subsidy, bringing the price of milk for manufacturing up to 5*d.* per gallon [i.e. making up the difference between the liquid price and the manufacturing price]. The Minister of Agriculture and the Secretary of State for Scotland in August last for this purpose jointly certified the following figures.

Then he gives the figures for 1934 from April to September. He goes on:

> You will notice these figures are slightly less than those agreed with the Milk Marketing Board, and I naturally inquired how the difference arose, as obviously the government must be working on a different formula, and taking each month by itself. On inquiry, I find that the Ministry of Agriculture have been working on a slightly different formula, omitting exceptional prices and bringing in new season's make, and, if the trade accept their figures, it will probably be slightly to their advantage. It makes no difference to the Milk Marketing Board, as, if the figures declared by the government are less than ours, the Treasury have to bear the burden. I recommend that for the current contract expiring Sept. 30 the old method be continued, but for the new contract, commencing Oct. 1, 1934, the method adopted by the Ministry of Agriculture be adopted.

The Ministry was drawing up its figures for the purpose of the Milk Act, 1934, s. 4 (1) (*a*), but we are not here concerned with the precise terms of that section. What we are concerned with is what is called the method adopted by the government. That is set out, as the Act requires, on every monthly certificate which the Ministry of Agriculture publishes. I must refer to at least one of these certificates, which is taken as an illustration; it was the certificate before the contract in question came into effect, and covered the period from April to Sept., 1934. He gives the month, the cheese-milk price at so much per lb.—the butter-milk price, of course, would be the same—and then it sets out the method:

> The method by which the cheese-milk price for each month as certified above has been computed is as follows: (i) The range of price quotations in respect of sales by wholesale of "New Zealand finest white" cheese and of "Canadian finest white" cheese, as published by the London Provision Exchange, Ltd., for each of the periods ended at 11.30 a.m. on each of the Fridays in the preceding month, has been examined. (ii) The average of the mean prices for the two kinds of cheese has been ascertained for each of the said periods, exceptional quotations being disregarded. The average of the periodic averages so ascertained has then been calculated to two places of decimals and expressed in pence per pound. (iii) From the figure thus obtained 1¾*d.* has been subtracted and the balance gives the figure certified above.

That is what was referred to in the two letters exchanged between the parties, one of which is dated Oct. 11, 1934, from the secretary of the Central Milk Distributive Committee addressed to the Milk Marketing Board. On the third page of that letter there is a sub-heading:

> Rebates in price of milk used in the manufacture of cheese and butter. It was unanimously decided that if the Milk Marketing Board were willing to agree to the formula adopted by the government, the Central Milk Distributive Committee would be prepared to accept it. A

That is answered on Oct. 15, 1934, by the general manager of the Milk Marketing Board in these terms:

> It is noted that your committee is prepared to agree to the formula adopted by the government for the purposes of determining the value of milk manufactured into cheese and butter. B

It is common ground here that these two letters constituted a contract to adopt what is called in these letters the formula—no doubt that word is taken from the contract—but what is called in the government certificate itself the method. Nothing, however, turns on this difference C in the use of language.

I agree with the judge, that the varied contract remains in effect over the full period, so far as butter is concerned, and over the first six months, so far as cheese is concerned. I have to consider the disputes which have arisen on this agreement and I proceed on that basis. The D disputes have now been limited to two specific points. One is what is the meaning of the words, "Exceptional quotations being disregarded" and the other is what is the meaning of the words, "The average of the mean prices for the two kinds of cheese." I shall deal with those two matters separately. E

The first question as to the meaning of exceptional quotations which are to be disregarded involves this dispute. Sir William Jowitt argues that "exceptional quotations" means quotations exceptional in fact. He has abandoned any argument that we are here dealing with what is called a weighted average. The original contract, strictly construed, F no doubt, would involve a weighted average; that is to say, you can find a strict mathematical average only if you add together all the prices obtained in whatever market was considered to be appropriate and divide the total so arrived at by the number of transactions in question, and in that way you would avoid the difficulty which must arise if you G bring in as specific figures specific quoted figures on the market, because any specific quoted figure on the market may have a particular value because it is dealing with some goods which may be of higher quality, and sold, therefore, at a higher price, and the true average could not be arrived at without giving effect to the relative proportions of any such H class of goods which, from the general view of the level of the market, might be regarded as exceptional. Sir William Jowitt has contended that "exceptional quotations" here means quotations which are exceptional in fact, that is to say, where there is a higher price, treating that as important for this case, that may have been due to the exceptional character of the goods, for which a higher price had been paid, and that these goods for which the exceptional price has been quoted may have been very small in quantity. He has argued that the phrase " exceptional quotations " has been here introduced in order to cut out from the calculations all quotations of goods which are exceptional owing to their quality or character—that " exceptional " here means exceptional in fact.

On the other hand, it is said that " exceptional quotations " here has reference to the mode in which the quotations were published by the London Provision Exchange, Ltd. These quotations, according to the document, are to be the basis of the figures which are being used, and it is pointed out that certain of these quotations have put against them the word " exceptionally." I take one which comes into my hand, the provision report of Oct. 5, 1934, under " New Zealand " finest white grade 48*s.*, 48*s.* 6*d.*, exceptionally 49*s.* BRANSON, J., found that the parties here, when they used the phrase " exceptional quotations," were referring only to those quotations which are so described in the London Provision Exchange official market report, and I think, as a matter of construction, he is right in that conclusion. One finds scattered over these market reports the word " exceptionally " from time to time, where you have a quotation which is somewhat out of the ordinary. This question was raised in a somewhat acute form in the later period of the contract, and it was mainly raised because some particular shipper or importer put on the market cheese which was old, or specially marked as made in 1933 ; higher prices are attributable to this type of cheese, and beyond question these prices would substantially affect, or might substantially affect, the prices arrived at week by week and published by the Minister of Agriculture ; and that no doubt is, or may be, a hardship, because these parcels may have been small in quantity, but they affect the estimate of the average prices. However that may be, I am convinced that, on the true construction of these words, read in their context (and that is all I am concerned with here), " exceptional " means exceptional on the face of the market report. I attach no importance, nor was the importance attached in argument, to the fact that the formula in the report is " exceptionally." The distinction between the adjective and the adverb does not seem to me to be material and I think the appellant company is wrong on this point.

That, however, leaves still another question to be considered, a question of some difficulty, which turns on the words " the average of the mean prices for the two kinds of cheese." What exactly is meant by that ? It has been argued that beyond question the government has proceeded on a wrong basis, if the true construction of these words is taken into account. What was published month by month was the price arrived at by the government, so much per pound, and similarly in other cases. We have had produced, however, a document which shows the actual calculations made by the government in order to ascertain the cheese-milk prices, based on the range of prices for New

Zealand and Canadian finest white cheese, as published by the London Provision Exchange, Ltd., and the method which it has taken has been challenged by Sir William Jowitt. I may take one illustration, which I think is sufficient for my purpose here. The document is document No. 15 (*a*), and I will take the page relating to the week ended Sept. 7, 1934, which, according to the contract, proceeds on the basis of the previous month. We have first the heading "June to September make." That refers to June to Sept. of the previous year, the period when the best cheese is produced in Canada. For that you have only one quotation, 64*s*., and the average 64*s*. is put against that. Then you have "New Season's make;" that is, the cheese made during the summer of 1934. The quotation there is 50*s*. to 52*s*., average 51*s*., and then an average of 57*s*. 6*d*.

Sir William Jowitt has contended that that method of computation is not in accordance with the language of the method or formula accepted. He says that the true construction is this. The average of the mean prices for the two kinds of cheese is to be arrived at by ascertaining a mean price for each kind of cheese, that is to say, a mean price for Canadian cheese and a mean price for New Zealand cheese. Having ascertained these two prices you then take the average of the two. That average obviously can be arrived at only by adding the two together and dividing by two, which is an average of two. Then he says each price which has so to be brought into the computation in order to get the average of the Canadian and New Zealand cheese is to be the mean price for the appropriate cheese—I will take the Canadian cheese for this purpose—and he argues that a mean price *ex termini* means the middle figure between the two extremes. That is his primary argument, the argument which he first puts forward, and he illustrated how it operates, taking the same figure which I have just taken with reference to Canadian cheese; there is no question as regards New Zealand cheese, because there are only two figures, 48*s*. 6*d*. and 49*s*., and the mean is easily ascertained to be 48*s*. 9*d*. But, in the case of Canadian cheese, the matter is more complex, because you have a figure of 64*s*. as the highest figure, a figure of 50*s*. as the lowest figure, and Sir William Jowitt says that the proper way is to take the mean between 64*s*. and 50*s*., and then the mean of the two is 57*s*. That is the mean price for Canadian cheese. You get the mean price for New Zealand cheese, which is 48*s*. 9*d*., you add the two together, and you get 105*s*. 9*d*., and that, divided by two to get the average of the two, gives you 52*s*. 10½*d*., as against 53*s*. 1·45*d*. arrived at by the method adopted by the government, as shown in this paper, to which I have been referring, and that is, of course, for the benefit of his client.

As an alternative view, he put forward this contention. Taking the same figures, 64*s*., 50*s*., and 52*s*., as a range of figures, adding them together, and dividing them by three, he gets an average of 55*s*. 4*d*., and then, applying the New Zealand figures, that produced an average of

52*s.* 0½*d.* BRANSON, J., has decided against this submission of Sir William Jowitt's. In my opinion, on the true construction of these words, I think the result is that which has been contended for by Sir William Jowitt, according to the former of his two alternative contentions. Taking the mean price in the case of each cheese, I think the A word " mean " has its ordinary significance, that is to say, the middle term between two extremes—and I have already explained what I regard as the significance of the average of the mean prices for the two kinds of cheese. I think Sir William Jowitt's submission on this point is correct. If, however, I were wrong on that, I should still think that B he was right according to his second alternative. That would involve this, that, when you are dealing with a range of prices which is really contemplated in the first words in this document, you get the average by adding the whole of the items together and then dividing them by the number of items in question. As I have already indicated, that C would give a result more favourable to Sir William Jowitt's argument; but I think, according to the best interpretation which I can give to the language used, his former alternative is the correct one.

The result will be that, although the appellant company fails on the other point which it has raised, it succeeds on this point. As we know D exactly the basis according to which the government has proceeded, and as it is clear that it has not proceeded on either of the methods for which Sir William Jowitt has contended—still less on the former of his alternative methods—I think the matter will have to be reopened by some appropriate procedure. Whether the parties may not agree, having all E the material before them, on what is the true and proper result, or whether they will proceed through some judicial determination, I do not know, but I should assume they will be able to agree. The result will be that, while the rest of the judgment stands, there will be a declaration on the point which I have just been debating, that the method should be applied F in the way which is correct by finding out the mean prices of each kind of cheese, by taking the two extreme quotations, and ascertaining the middle price between them. In that way, the figure is given for Canadian cheese, a similar figure will be arrived at for New Zealand cheese, and the average of these two figures will be arrived at by adding them G together and dividing them.

The appeal will be allowed, therefore, to this extent.

ROMER, L.J., and SCOTT, L.J., agreed.

Appeal allowed.

H Solicitors: *S. L. MacAndrew* (for the appellant company); *Ellis & Fairbairn* (for the respondents).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

SOUTHPORT BOROUGH COUNCIL *v.* LANCASHIRE COUNTY COUNCIL.

[King's Bench Division (Lawrence, J.), **April 23, 1937.]**

Income Tax—Yearly interest—Deduction—Adjustment between local authorities —Added sum called "interest."

In pursuance of the Local Government Act, 1929, the plaintiff council and the defendant council entered into an agreement on Mar. 20, 1930, providing that certain specified institutional property of a poor law authority should be transferred to and vested in the defendant council and that certain other specified institutional property of the same poor law authority should be transferred to and vested in the plaintiff council. The agreement provided that a valuation of all the said institutional properties should be made as on Apr. 1, 1930, by an officer of the Commissioners of Inland Revenue in accordance with Sched. VI of the Act of 1929 and that compensation in respect thereof should be paid by the defendant council to the plaintiff council and by the plaintiff council to the defendant council calculated as follows. The total values of all the institutional properties specified were to be apportioned between the councils in the proportion which the unreduced rateable value of the portion of the area of the defendant council situate within the area of the poor law authority bore to the unreduced rateable value of the portion of the area of the plaintiff council so situate, and the institutional liabilities were to be apportioned in the same way as the total values of the institutional properties, and, in consideration of that agreement, and the transfer and vesting of the institutional properties, the defendant council was to pay to the plaintiff council a sum equal to the portion of the total values of the institutional properties, after deducting therefrom the share of the institutional liabilities, apportioned to the plaintiff council, such sum to be payable on Oct. 1, 1930, and to carry interest as from Apr. 1, 1930, at the rate of 5 per cent. per annum. There was a similar provision with regard to the defendant council. The adjustment was not made until Aug., 1931. The defendant council, in making the payment due under the agreement, deducted income tax from that part of the payment which represented the "interest" referred to in the agreement:—

Held: the councils had no power to agree upon the payment of interest, properly so called, and the terms of the agreement did not indicate an intention to agree upon a payment of interest in the true sense of that word. The "interest" was not, therefore, liable to income tax, and the deduction should not have been made.

[**EDITORIAL NOTE.** The mere fact that parties refer to a sum as interest does not make it "interest" within the meaning of the Income Tax Act. The reality of the situation must be looked at, and, unless there can be shown to be in reality interest upon a debt due, there is no proper case for a deduction of tax. If the sum described as interest is properly described as damages or as part of a capital sum, then it is not interest for the purposes of income tax and a deduction of tax cannot properly be made.

As to Annual Interest, see HALSBURY, Hailsham Edn., Vol. 17, pp. 233-235, para. 472; and for Cases, see DIGEST, Vol. 28, pp. 63, 64, Nos. 322-328.]

Case referred to:

(1) *Inland Revenue Comrs.* v. *Ballantine* (1924), 8 Tax Cas. 595; 28 Digest 63, case *t*.

Special Case asking for a declaration that a sum of £3,463 odd, part of a sum of £55,379 odd, payable by way of adjustment under the

Local Government Act, 1929, s. 113, was not interest of money within the Income Tax Act, 1918, and that the defendant council was not entitled to deduct income tax from that sum, and claiming payment to the plaintiff council of the sum of £779 5*s.* 5*d.*, the amount deducted for income tax.

A The facts and arguments are set out in the judgment.

A. M. Latter, K.C., and *Reginald P. Hills* for the plaintiff council.

H. P. Glover, K.C., and *Ralph Etherton* for the defendant council.

LAWRENCE, J.: This case turns upon the construction of the B Local Government Act, 1929, and, particularly, of sect. 113 and Sched. VI of that Act, and upon the construction of the agreement between the plaintiff council and the defendant council dated Mar. 20, 1930. Under the Local Government Act, 1929, the old poor law authorities were to cease to exist, and the property of those authorities was to be vested, C as at the appointed day, in the councils of counties or county boroughs, of whom the plaintiff council and the defendant council are two. In this case, the Ormskirk Union had been the poor law authority, and, under the Act of 1929, certain of the properties of the Ormskirk Union were to be vested in the plaintiff council and in the defendant council D respectively. The statute, by sect. 113, provides that the institutional property of the old authority shall, on the appointed day, by virtue of the section, be transferred and vest to and in such of the councils of the counties or county boroughs into which the area of the old authority extends as may be agreed between the councils, or, if no agreement E has been arrived at two months before the day, as the Minister may by order determine. The section also provides that the institutional liabilities of the old poor law authority shall be transferred to and vest in the council or councils to which the corresponding institutional property is transferred. Sect. 113 (2) (*d*) then provides that, as soon as F practicable after the appointed day, there shall be made, in accordance with Sched. VI of the Act, an adjustment in respect of the institutional property and institutional liabilities of the authority. Sched. VI, para. 1, provides that the adjustment:

> shall be made between the councils as they may agree or in default of agreement G as the Minister may by order determine: Provided that for the purposes of any agreement or order made under this paragraph the certificate of an officer of the Commissioners of Inland Revenue of the value of any institutional property shall be conclusive.

By Sched. VI, para. 4 (1), it is provided that:

> H any sum required to be paid from one council to another for the purpose of effecting the adjustment under this schedule may be paid either by way of annual payments or by way of a single payment.

That statute was passed in 1929, and, in pursuance of its provisions, the plaintiff council and the defendant council entered into an agreement on Mar. 20, 1930, providing that the institutional property of the Ormskirk Union, specified in the first schedule, should be transferred to and vested in the Lancashire council, and that the institutional property of the Ormskirk Union certified in the second schedule should be transferred to and vested in the Southport council. The agreement went on to provide that a valuation of all the said institutional properties should be made as on Apr. 1, 1930, by an officer of the Commissioners A of Inland Revenue, in accordance with the provisions of Sched. VI of the Act, and compensation in respect thereof should be paid by the Lancashire Council to the Southport Council, or by the Southport Council to the Lancashire Council, calculated as follows. The calculation provides that the total values of all the institutional properties specified B should be apportioned between the councils in the proportion which the unreduced rateable value of the portion of the area of the Lancashire Council situate within the area of the Ormskirk Union bears to the unreduced rateable value of the portion of the area of the Southport Council so situate, and that the institutional liabilities shall be apportioned C in the same way as the total values of the institutional properties, and that, in consideration of this agreement, and the transfer and vesting of the institutional properties, the Lancashire Council would pay to the Southport Council a sum equal to the portion of the total values of the institutional properties, after deducting therefrom the share D of the institutional liabilities, apportioned to the Southport Council, such sum to be payable on Oct. 1, 1930, and to carry interest as from Apr. 1, 1930, at the rate of £5 per cent. per annum. Then there is a similar provision with reference to the Lancashire Council. The question I have to decide is whether what is, in this agreement of Mar. 20, 1930, E described as " interest " is in reality interest within the meaning of the Income Tax Act, 1918, or is in reality an element in the calculation which had to be made for the purpose of the adjustment referred to in the Local Government Act, 1929.

A number of cases has been referred to, but I do not think it is necessary F for me to go through the cases which have been cited. They show clearly that the fact that a sum of money, which has to be paid, is called interest is not enough to constitute it interest within the meaning of the Income Tax Act, and that the reality of the situation must be looked at. In *Inland Revenue Comrs.* v. *Ballantine* (1), at p. 611, the Lord G President, LORD CLYDE, points out that in all such cases, however :

> whether the allowance is wrapped up in a slump award or is separately stated in the decree—the interest calculation is used *in modum æstimationis* only. The interest is such merely in name, for it truly constitutes that part of the compensation decerned for which is attributable to the fact that the claimant has been kept out of his due for a long period of time. H

The question is, in every case, whether the sum which is called " interest " is in reality interest upon a debt due, or is a sum which has been arrived at for the purpose of calculating what is, in reality, a capital sum. In the present case, it is argued, on behalf of the defendant council, that here the statute was providing for the apportionment of these assets, and transferring and vesting these assets in the respective county council and county borough council as at the appointed date, and, as at the appointed date, the debt in respect of these properties arose, and, therefore, the sum which was to be paid by the one council to the other was, in point of law, due at the appointed date, and that there was, therefore, a debt payable at that moment, and that any sum which the parties agreed upon as interest upon that sum was interest in the true sense and interest within the meaning of the Income Tax Act, 1918. It was, I think, conceded that there was nothing in the Act which specifically entitled the councils concerned to interest as from the appointed day, but it was said that they were entitled to agree upon interest as from the appointed day, and that they had so agreed in this case. In my judgment, this argument is unsound. I am of opinion that there is nothing in the Local Government Act, 1929, s. 113, or in Sched. VI, which in any way contemplates the payment of interest by one council to another. In the first place, as was pointed out by Mr. Hills, the statute is dealing with capital assets which belonged, before the appointed day, to neither of the councils to whom they are to be transferred. The statute provides that they are to be transferred to and vested in the councils as at the appointed day, but it contemplates clearly in sect. 113 (2) (*d*) that the adjustment which is to be made in respect of those properties is not to take place at the appointed day, but is to take place as soon as practicable after the appointed day, and that adjustment is to include not only the valuation of the properties and the liabilities, but also apportionment in respect of the equitable interests which the county council is deemed to have in the properties which are to be transferred to and vested in other county councils by virtue of the Act, by reason of the fact that it has, through its ratepayers, contributed towards the cost of those properties. There is nothing in sect. 113 or in the schedule which expressly refers to interest, and the fact that the statute in terms contemplates that the adjustment will be made after the appointed day, and that the schedule contemplates that the figure adjusted may be paid either in one payment or by way of annual payments, seems to me to indicate that the adjustment was to be an adjustment which provided for a payment of a capital nature. The statute provides that, in the absence of agreement upon the adjustment, the Minister shall determine it. It appears to me to be clear that the Minister, although he might, in calculating the adjusted figure, allow something for the period of time between the appointed day and the time at which the payment of the adjusted figure was to be made, would not be entitled to give anything which was in reality interest on the sum so adjusted. In my opinion, the county councils had likewise no power to agree upon the payment of interest, properly so called, between the appointed day and the day upon which the adjustment payment was to be made.

But, apart from the question of their power so to agree, I am of opinion that the terms of the agreement do not indicate the intention to agree upon a payment of interest in the true sense of that word. The parties had to agree upon an adjustment, and they agreed upon it in the terms of cl. 3 of the agreement, which provides that :

> A valuation of all the said institutional property shall be made as at Apr. 1, 1930, by an officer of the Commissioners of Inland Revenue in accordance with the provisions of Sched. VI of the Act . . . compensation in respect thereof shall be paid by the Lancashire Council to the Southport Council or by the Southport Council to the Lancashire Council calculated as follows. A

Those words are not the words of the Act, but they are, in my opinion, used as equivalent to the words of the Act : B

> an adjustment in respect thereof shall be made between the Lancashire Council and the Southport Council upon the following basis.

Then the basis of the adjustment is set out. If that is the true interpretation of this agreement, then the provision which is contained in cl. 3 (*c*), (*d*), with reference to interest is, in the words of the Lord President, LORD CLYDE, only *in modum æstimationis*, and not in reality, interest within the meaning of the Income Tax Act, 1918. C

It is further contended, on behalf of the defendant council, that, even if that is the true view with reference to the period from Apr. 1, 1930, up till the date when it was practicable that the adjustment should be made after the appointed day, because, in cl. 3 (*c*), the parties have agreed that the sums payable thereunder should be payable on Oct. 1, 1930, and carry interest as from Apr. 1, 1930, even if it does not make what is called interest interest between Apr. 1 and Oct. 1, 1930, yet it places a contractual construction upon the time at which it was practicable to make the adjustment, and thereafter the interest is interest within the meaning of the Income Tax Act. I do not accept this contention. I think the reason why this provision was put in was, as I have said, a method of calculation at the time the agreement was made on Mar. 20, 1930, before the appointed day had come. It was probably thought that it would have been practicable by Oct. 1, 1930, to make the adjustment, and they therefore incorporated the provision that the sum should be payable on that day, but in fact it was not practicable to make the adjustment at that time, and was not practicable to make the adjustment until Aug., 1931. I am therefore of opinion that the interest which was provided for between Oct. 1, 1930, and the date when the adjustment was in fact made stands upon no different footing from the interest which was payable from Apr. 1, 1930, until Oct. 1, 1930, and that both of these sums of interest, although called "interest," are not in reality interest within the meaning of the Income Tax Act, but merely elements in the calculation of the adjustment for which the statute provides by sect. 113, which was the adjustment of a capital sum, and which provided for no payment by way of interest. D E F G H

Accordingly, I give judgment for the plaintiff council for the sum of £779 5*s.* 5*d.*, without costs.

Judgment for the plaintiff council for £779 5*s.* 5*d. without costs. Declaration as asked.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. Edgar Perrins*, Town Clerk, Southport (for the plaintiff council); *Norton, Rose, Greenwell & Co.*, agents for *Sir George Etherton*, Clerk to the Lancashire County Council (for the defendant council).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

MARTIN *v.* FINCH.

[COURT OF APPEAL (Slesser and Romer, L.JJ., and Luxmoore, J.), **April 12, 13, 1937.**]

Workmen's Compensation—Accident arising out of the employment—Epileptic riding bicycle on employer's business.

A workman, who to his employer's knowledge suffered from frequent epileptic fits, used a bicycle to go to and from his work. He had been warned by his doctor not to ride a bicycle, but had continued to do so, and his employer had on many occasions told him to use his bicycle for the purpose of carrying his tools, if he was required to work at any distance from his usual place of employment. On the day of his death, the workman had been told by his employer to leave his work early in order to take his tools to a field where he was to work on the following day. He was found dead on the road; there was no suggestion that the accident was caused by any traffic trouble, and the evidence showed that he had had an epileptic fit and had fallen off his bicycle, sustaining injuries from which he died:—

HELD: the accident arose out of the workman's employment.

[EDITORIAL NOTE. A workman may be exposed to particular risks by reason of his having to work in a particular place. If it is a condition or obligation of his employment that he is to work in that place, an accident occurring through his presence there is an accident arising out of his employment, provided always that the risk encountered is not an added peril which the workman has produced. An epileptic fit is not such an added peril.

AS TO LOCALITY RISKS, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 171, 172, para. 361; and FOR CASES, see DIGEST, Vol. 34, pp. 320-323, Nos. 2619-2641. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 84-88.]

Cases referred to:

(1) *Wicks* v. *Dowell & Co., Ltd.*, [1905] 2 K.B. 225; 7 B.W.C.C. 14; 34 Digest 266, *2265*; 74 L.J. K.B. 572; 92 L.T. 677.

(2) *Lander* v. *British United Shoe Machinery Co., Ltd.* (1933), 26 B.W.C.C. 411; Digest Supp.; 102 L.J. K.B. 768; 149 L.T. 395.

(3) *Dennis* v. *White (A. J.) & Co.*, [1917] A.C. 479; 10 B.W.C.C. 280; 34 Digest 321, *2627*; 86 L.J. K.B. 1074; 116 L.T. 774.

(4) *Lawrence* v. *George Matthews* (1924), *Ltd.*, [1929] 1 K.B. 1; 21 B.W.C.C. 345; Digest Supp.; 97 L.J. K.B. 758; 140 L.T. 25.

APPEAL from a decision of His Honour JUDGE ROOPE REEVE, given on Nov. 23, 1936, awarding compensation to the applicant, the widow of a deceased workman.

Martin, the deceased, to the knowledge of his employer, suffered from frequent epileptic fits. The deceased, who was employed as a land drainer, lived some four miles from the farm where he worked, and it was his custom to use a bicycle to go to and from his work. He had had several falls from his bicycle, and had been warned by a doctor not to use a bicycle. He continued, however, to use a bicycle, and his A employer had on many occasions told him to use his bicycle for the purpose of carrying his tools, if he was required to work at any distance from the farm. On Apr. 1, 1936, the deceased was told by his employer to leave his work half an hour earlier than usual in order to take some tools to a field in which he was to work on the following day. He was found B dead on the road which he would normally take in order to get from the farm to the field to which he was taking the tools. There was no suggestion that the accident was caused by any traffic trouble, and the evidence showed that he had had an epileptic fit and had fallen off his bicycle sustaining injuries from which he died. C

F. A. Sellers, K.C., and *R. H. Norris* for the appellant.

T. Carthew, K.C., and *K. S. Wood* for the respondent.

SLESSER, L.J. : [His Lordship stated the facts, and held that the county court judge was entitled to come to the conclusion that the D accident happened in the course of the deceased's employment.] Can it be said that this accident arose out of the man's employment ? Two cases in particular have been cited to us, both of which I think it is necessary shortly to consider. In *Wicks* v. *Dowell & Co., Ltd.* (1) the workman was employed in unloading coal from a ship. He was required E in the course of his duty to stand at the open hatchway through which the coal was being brought up from the hold. He was seized with an epileptic fit while at work, and fell into the hold, and was seriously injured. The county court judge held that the accident was due to the epileptic fit, and did not arise out of and in the course of the employment. F On appeal, however, the Court of Appeal allowed the appeal, and there are observations, particularly those of COZENS-HARDY, L.J., which I find very useful in the consideration of the present case. Both COZENS-HARDY, L.J., and SIR R. HENN COLLINS, M.R., point out that the mere fact that the man had an idiopathic disease was not conclusive G of the matter and that, therefore, the county court judge, in coming to the conclusion that it was sufficient to say that the epilepsy caused the accident, was in error. SIR R. HENN COLLINS, M.R., at pp. 229, 230, says this :

> H It will be seen that the accident was caused by the idiopathic disease from which the man was suffering, and that therefore the accident did not arise out of his employment. At that point the authorities come in, to the effect that, although the cause of the fall was a fit, the cause of the injuries was the fall itself, and they are direct authorities that the injury in the present case was caused by the accident. Then did the accident arise out of the man's employment ? When we get rid of the confusion caused by the fact that the fall was originally caused by the fit and the confusion involved in not dissociating the injury and its actual physical cause

> from the more remote cause, that is to say, from the fit, the difficulty arising from the words "out of the employment" is removed. How does it come about in the present case that the accident arose out of the employment ?

Then follow these important words :

> Because by the conditions of his employment the workman was bound to stand on the edge of what I may style a precipice, and if in that position he was seized with a fit he would almost necessarily fall over. If that is so, the accident was caused by his necessary proximity to the precipice, for the fall was brought about by the necessity for his standing in that position. Upon the authorities I think the case is clear : an accident does not cease to be such because its remote cause was the idiopathic condition of the injured man ; we must dissociate that idiopathic condition from the other facts and remember that he was obliged to run the risk by the very nature of his employment, and that the dangerous fall was brought about by the conditions of that employment.

COZENS-HARDY, L.J., after stating, at p. 231, that a man may bring into his employment a disability of age or of some other nature, says this :

> A workman who is put in a dangerous position in order to do his work is more liable to an accident by reason of the disability which he brings with him than he would otherwise be. Again, an old man is inherently more likely to meet with an accident than a young one, but an employer could not excuse himself on the ground of the man's age. The same consideration applies to a tendency to illness or to a fit, and if a man with such a tendency is told to go to work in a dangerous position and there meets with an accident, the accident none the less arises out of his employment because its remote cause is to be found in his own physical condition.

In this case it is not merely the fact that the deceased had the epilepsy which caused the accident ; it was the combination of the fact that he had this tendency to epilepsy coupled with the fact that he was in an unstable and dangerous position, being on a machine which, of its very nature, was dangerous in its state of unstable equilibrium, a bicycle travelling at speed on a road. To my way of thinking, it is the same problem as arose in *Wicks* v. *Dowell & Co., Ltd.* (1). There the probability is, if one may speculate, that the man, unless he had the misfortune to slip, would not have fallen down the hatchway. In *Wicks* v. *Dowell & Co., Ltd.* (1), the man was employed in the ordinary work of unloading coal from a ship, and was required to stand by an open hatchway, a place commonly occupied by persons required to do that work. That was considered to be a sufficiently dangerous position, in conjunction with what happened, to cause the accident properly to be described as arising out of the employment. So here I think that the county court judge was fully entitled to distinguish this case, as he did, from *Lander* v. *British United Shoe Machinery Co., Ltd.* (2), when he says it is quite a different thing to be cycling along a road in the course of the employment and going to the lavatory in the course of the employment.

If I read *Dennis* v. *A. J. White & Co.* (3) correctly, though it is true that, in that case, on the facts (where a boy was told to take a bicycle and fetch some plaster, and suffered injury through a motor car coming into collision with him), the finding that the employer had directed the lad to take a bicycle, in carrying out orders required of him, was on the basis that it was an incident of his employment to face the risks, attendant on anyone cycling through the streets of London, of being run into and injured, those incidents were by no means taken to be exhaustive of the risks which may be inherent in the use of a bicycle. In that case, the injury was actually caused by the boy being run into, but I do not think that would exclude many other injuries which might result from riding a bicycle, as, for example, the case of skidding, which might happen without the intervention of any other vehicle at all. In that A there is this important observation by LORD FINLAY, L.C., at p. 283:

> The frequency or infrequency of the occasions on which the risk is incurred has nothing to do with the question. . . .

Passing finally to the case of *Lander* v. *British United Shoe Machinery Co., Ltd.* (2), on which Mr. Sellers very naturally relies: a clerk, B who was subject to fits of epilepsy of which his employers were aware, was found badly injured in a urinal. His widow claimed compensation as a dependant. The county court judge found the fall was due solely to an epileptic fit. He further found that the floor of the urinal was not in itself dangerous, but held that it was a zone of special C danger to a person subject to epileptic fits, and that, as it was an obligation of the workman's employment to go to the urinal, the accident arose out of, as well as in the course of, the employment. The employers appealed. There it was held that, as the workman had fallen down from a cause peculiar to himself, at a place which was not dangerous D as a place, the accident did not arise out of the employment. LORD HANWORTH, M.R., draws the distinction between that case and *Wicks* v. *Dowell & Co., Ltd.* (1). He says at p. 419:

> In the case of *Wicks* v. *Dowell & Co., Ltd.* (1), which has been referred to, there the man would not have suffered injury unless his work had brought him to a place, E and he had to stand in proximity to what some people have called a precipice, but, at any rate, a place where if he fell from any cause by accident or a cause not idiopathic to himself, there was a grave risk of injury. In the present case, having regard to the finding of the perfect safety of the premises, and the cause of the fall being peculiar to the man himself, I do not think that the causal relation asked for by LORD HALDANE and explained by LORD RUSSELL appears, and, therefore, there is no liability upon the employers. F

Then, at pp. 424, 425, I distinguished *Wicks* v. *Dowell & Co., Ltd.* (1) from that case. I cite with approval the passages which I have already read from the judgments of SIR R. HENN COLLINS, M.R., and COZENS-HARDY, L.J., and I added with regard to that case:

> That seems to be a case exactly within the description which RUSSELL, L.J., G gives in *Lawrence* v. *George Matthews* (1924), *Ltd.* (4), of a person who by his employment is exposed to a danger at a particular spot. There was no exposure to danger at a particular spot on the facts of this case except because this man was an epileptic.

In my view, this present appeal can be decided entirely upon its own peculiar facts. The question is, whether, taking into account all the H facts of this man's employment, he was, in the language of LORD SUMNER, called upon to suffer, to hazard, or to do something which caused the accident and his death. I think the evidence is ample to show that he was so called upon to hazard something other than that which is common to all mankind, and not the result of the particular employment. This man, being an epileptic, was called upon to ride a bicycle, being on his employer's business during his employer's hours. I think perhaps the case has been a little complicated by this insistence upon his epileptic condition. As I read *Dennis* v. *A. J. White & Co.* (3), if he had been called upon to ride a bicycle for his employer, and acting for his employer, and had met with an accident, owing to something happening to him on the road when on that bicycle—for example, if he had been run into by any other vehicle, and, I should have thought, also if the machine itself had been at fault in some of its functions, that a wheel had come off, or it had skidded—it would not be possible to say that the accident did not arise in the course of his employment. Here you have added this particular risk, that, in addition to the risk of the machine falling, the man himself was a machine which was prone, by reason of a tendency to epilepsy, to fail. For myself, I see no difference between a man losing his power of control over his bicycle and falling, and a case of a wheel or a crank coming off the machine. The fact is that he was employed, as was the man in *Dennis* v. *A. J. White & Co.* (3), on certain work on a bicycle, being put into a position unsafe only if certain normal precautions and certain factors fail. In this case, those precautions and factors failed, owing to the man's tendency to epilepsy, and so he met with his death. This appeal fails.

Romer, L.J.: I agree. The court is once more faced with the problem of whether a particular accident has or has not arisen out of the man's employment. There have been, one knows, a great number of authorities upon that question. Those authorities, as they then existed, were summed up by Russell, L.J., in *Lawrence* v. *George Matthews* (1924), *Ltd.* (4). He deduced from the authorities four propositions, of which I think at the moment it is necessary that I should refer only to the first, which was this: If the accident results from a risk which is necessarily incident to the performance of the servant's work, the accident arises out of the employment. For the purposes of considering whether an accident comes within that category, it is necessary, I think, to consider not only the nature of the particular work which was being done, but also the nature and character of the servant who was employed to do that work. If one workman be doing a particular task, there may be no risk necessarily incident to its performance, whereas if another workman be doing precisely the same task, there may indeed be a risk necessarily incident to its performance. That was pointed out by Cozens-Hardy, L.J., in *Wicks* v. *Dowell & Co., Ltd.* (1), at p. 231. Cozens-Hardy, L.J., there said this:

> I think the truer view is that a man always brings some disability with him: it may be a disability arising from age; it may be of some other nature. A workman who is put in a dangerous position in order to do his work is more liable to an accident by reason of the disability which he brings with him than he would otherwise be. Again, an old man is inherently more likely to meet with an accident than a young one, but an employer could not excuse himself on the ground of the

man's age. The same consideration applies to a tendency to illness or to a fit, and if a man with such a tendency is told to go to work in a dangerous position and there meets with an accident, the accident none the less arises out of his employment because its remote cause is to be found in his own physical condition.

Those observations were made in a case in which a workman, who suffered from epilepsy to the knowledge of his employer, was employed to do some work just at the edge of what one of the judges I think described A as a precipice. Therefore he was necessarily submitted to a risk, because, if, as might well happen at any moment, he had a fit of epilepsy, he would almost certainly suffer a very serious injury. In *Lander* v. *British United Shoe Machinery Co., Ltd.* (2), to which reference has also been made, and upon which Mr. Sellers has very properly relied, as I under- B stand it the workman was not, although an epileptic, submitted to any necessary risk in the employment which he was called upon to do. There was nothing necessarily risky to an epileptic in crossing a floor like the floor of a lavatory where he met with his accident.

In the present case, however, for the reasons which have been given C by Slesser, L.J., I agree that, at the time of the accident, the man was doing something that he was employed to do, and, although it was something to which, had he not been an epileptic, no risk was necessarily attached, yet it was something to which, being an epileptic, a risk was necessarily attached. That risk unfortunately turned out to be one from D which he did not, in the circumstances, escape. He suffered the accident owing to that risk. That being so, I think it necessarily follows that the accident arose out of the unfortunate man's employment. For those reasons I agree that this appeal fails.

E

Luxmoore, J.: I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Berrymans*, agents for *Eustace Roberts*, Worcester (for the appellant); *Shaw, Son & Clark*, agents for *Gordon Bancks*, Pershore (for the respondent). F

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

BROOKS *v.* BRIMECOME.

[Court of Appeal (Slesser, L.J., du Parcq and Simonds, JJ.), **April 29, 1937.**]

Landlord and Tenant—Rent restriction—Decontrol—House decontrolled before 1933, *let again after* 1933—*Whether house recontrolled—Retrospective effect of statutes—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (*c.* 32), *s.* 2.

The landlord of a house, the rateable value of which on Apr. 1, 1931, was £13 a year, was in the owner's occupation when the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, was passed. Subsequently the house was leased to the respondent at a rent of 14*s*. 9*d*. a week. The respondent applied to the court to have his rent fixed, alleging that the house was a controlled house by virtue of sect. 2 (1) of the 1933 Act :—

Held : (i) the house in question, which had become decontrolled when the landlord regained possession, was not let as a separate dwelling at the time when the 1933 Act was passed ; sect. 2 (1) of this Act does not apply to such a house, and, therefore, the house was not recontrolled by it.

(ii) sect. 2 (1) of the 1933 Act has no retrospective action.

Decision of His Honour Judge Barnard Lailey, K.C. (1937, 4 L.J. N.C.C.R. 82), *reversed.*

[EDITORIAL NOTE. The question raised in this appeal has been the subject of discussion for some time and is whether a house decontrolled before 1933 can be recontrolled by the Act of 1933. The matter is one of some difficulty upon the wording of the Act, but the Court of Appeal have unanimously decided against the retrospective operation of the Act and therefore against recontrol.

As to Decontrol, see HALSBURY, Hailsham Edn., Vol. 20, pp. 319, 320, para. 379 ; and for Cases, see DIGEST, Vol. 31, pp. 585, 586, Nos. 7349-7361.]

Cases referred to :

(1) *Stokes* v. *Little,* [1935] 1 K.B. 182 ; Digest Supp. ; 104 L.J. K.B. 38 ; 152 L.T. 18.

(2) *Re Athlumney, Ex p. Wilson,* [1898] 2 Q.B. 547 ; 42 Digest 702, *1191* ; 67 L.J. Q.B. 935 ; 79 L.T. 303.

(3) *Pearman* v. *Dyer,* [1935] 2 K.B. 149 ; Digest Supp. ; 104 L.J. K.B. 660 ; 153 L.T. 43.

(4) *White* v. *Bembridge,* [1935] 1 K.B. 244 ; Digest Supp. ; 104 L.J. K.B. 256 ; 152 L.T. 62.

Appeal from a decision of His Honour Judge Barnard Lailey, K.C., dated Dec. 3, 1936, and reported in 1937, 4 L.J. N.C.C.R. 82. The facts are fully stated in the judgments.

J. Scott Henderson and *J. T. Molony* for the appellant.

The respondent was not represented.

Molony : The question here is whether the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 2 (1), has any retrospective effect. Can it nullify a decontrol which was effected under an earlier Act ? There is no authority upon this point. [Counsel referred to *Stokes* v. *Little* (1), *Pearman* v. *Dyer* (3), and *White* v. *Bembridge* (4).] There is a strong presumption against a statute being construed as having a retrospective action.

SLESSER, L.J.: In this case the position arose thus: it is a claim by a tenant, under the Rent and Mortgage Interest Restrictions (Amendment) Act, to have his rent ascertained, a right which, of course, he possesses only if the house is what is called "a controlled house." The matter has been before the registrar and the judge in the county court, and only this preliminary point has been considered and decided. The A judge, for reasons which I shall consider, has come to the conclusion that this house is, by reason of the provision of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 2 (1), a house which is controlled, and he is of opinion that this is a case where the landlord of a house is not able to avail himself of the provisions of sect. 2 (2) of the B 1933 Act, by reason of the fact that, immediately before the passing of this Act, this house was not let as a separate dwelling.

The facts of the case, so far as they are material, are agreed, and stated by the judge in his judgment thus: the rateable value of the house on Apr. 1, 1931, was £13 a year; on and before July 31, 1923, C the house was subject to the Rent Acts; at and immediately before the passing of the 1933 Rent Act the appellant was the owner in occupation of the house having bought it with vacant possession in 1932, and in Dec., 1935, the appellant vacated the house, and on Jan. 6, 1936, let it to the applicant at a rent of 14*s.* 9*d.* a week. Now, it is clear D that under the Act of 1923 the house, if the conditions which are laid down in sect. 2 are satisfied, became decontrolled. That section provides that:

> Where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house at the passing of this Act, or comes into E possession of the whole of the dwelling-house at any time after the passing of this Act, then from and after the passing of this Act, or from and after the date when the landlord subsequently comes into possession, as the case may be, the principal Act shall cease to apply to the dwelling-house.

We are told that this gentleman came into possession of the house before the passing of the Act of 1933, at some time in 1932 (the exact date is F immaterial), so that some time in 1932 the principal Act ceased to apply to the dwelling-house. In these circumstances, it is said that, nevertheless, by reason of sect. 2 of the Act of 1933, although certainly before the passing of that Act, from 1932 this house was not controlled, yet, by reason of the operation of that Act, this house once more became con- G trolled, and that that control dated back to the time when the control ceased to exist, and had a retrospective operation. The language of sect. 2 is this:

> Subject as hereinafter provided, sect. 2 of the Act of 1923 (which provides for the exclusion of dwelling-houses from the application of the principal Act in certain H cases) shall not apply to any dwelling-house of which the rateable value on the appointed day did not exceed . . . £13.

That is the case here. As I understand the case put against the landlord, it is this: no sooner did this section become law (which was on July 18, 1933), than whatever benefits the landlord had obtained under sect. 2 of the earlier Act of 1923 ceased to apply, and this house, being a house of which the rateable value did not exceed £13, became once more, and should be deemed to have been all along, a controlled house. Sect. 2 (2) mitigates, in appropriate cases, the severity of that provision, and it says:

> If the landlord of any dwelling-house let as a separate dwelling immediately before the passing of this Act, being a dwelling-house of which the rateable value on the appointed day did not exceed the respective amount mentioned in the last foregoing subsection, claims that by virtue of the provisions of the said sect. 2 of the Act of 1923 the principal Acts had ceased to apply to the dwelling-house before the passing of this Act, he shall within 3 months after the passing of this Act make to the council of the county borough or county district in which the dwelling-house is situated application in the prescribed form for the registration of the dwelling-house, and if in any proceedings with respect to any dwelling-house which is, or immediately before the passing of this Act formed part of, such a dwelling-house as aforesaid, it is proved that but for the provisions of the said sect. 2 of the Act of 1923 the principal Acts would have applied to the dwelling-house and that no such application has been made by or on behalf of the landlord within the time aforesaid, the dwelling-house shall, subject as hereinafter provided, be deemed to be a dwelling-house to which the principal Acts apply.

There is a further provision, with which we are not concerned here, to the effect that, if there is delay in registration, the court may certify there was a reasonable excuse, and it fixes the date from which the Act will apply. That provision does not apply here, although it has been discussed in certain cases earlier, but it may be that the Act would not apply to a dwelling-house if there had been that postponed registration.

The first point which arises in this case, as I understand it, is that it is said that sect. 2 (1) applies retrospectively, so that, on and after the passing of the Act of 1933, on July 18, this house can no longer be said to be within sect. 2 of the Act of 1923, even if the owner has come into possession of the whole of the house, and that consequently it is still controlled, as it would have been under the earlier Act of 1923, and, secondly, in so far as the landlord did not let it as a separate dwelling immediately before July 18, 1933—the fact being, as I have stated, that he did not let it until Jan. 6, 1936—he cannot take advantage of the provisions dealing with the registration. Those seem to have been the views which actuated the judge in coming to his conclusion in this case.

I have, however, come to the conclusion that the judge was wrong in the view he formed, and for the following reasons. It would appear, certainly upon the face of it, as a considerable injustice, assuming for the moment that sect. 2 (1) has a retrospective operation, so that, after the passing of the Act of 1933, the position which might have obtained since 1923, or at any intermediate date when the landlord came into possession, would be destroyed, and the landlord should retrospectively be deemed to have been controlled throughout as to this rent. It would be an injustice, as I have said, if sect. 2 (2), which enables him largely to obviate these difficulties, by obtaining appropriate registration, did not apply to him. The view which the judge has taken appears to me erroneous, for this reason: I think he has omitted to take into consideration the definition of a dwelling-house as contained in the Act of 1933.

There is a difficulty, I agree, in applying this definition, as there drafted, to some of the earlier Acts and the earlier provisions, but, taking the definition as we find it in the Act of 1933, it appears to me to be a definition rightly to be applied, at any rate, to the particular Act which we have here to consider. The definition is contained in sect. 16 of the Act of 1933, and is to the following effect : A

> " Dwelling-house " has the same meaning as in the principal Acts, that is to say a house let as a separate dwelling or a part of a house being a part so let.

That is a very difficult definition to construe, because if " dwelling-house " had meant something other than that stated in the principal Acts, it would appear that the definition contained in the principal Acts B has been modified by this definition, which, of course, means that it might have to be applied in cases where it is extraordinarily difficult to apply it, and where the Act has been construed and defined on the basis of perhaps a different definition. Thus, in sect. 12 of the Act of 1923 there is a definition which is, on the face of it, in slightly different C language. It is not, perhaps, directly a definition, but it operates, I think, in that way. There the provision as to the house being let is limited, on the face of it, to a part of the house, and difficulties might arise in construing that. Apparently Sargant, L.J., took one view, in a particular case, as to whether the provision is to apply to the whole D house or only to a part, and other judges took a different view. Difficulties may arise in applying the definition as it is laid down in sect. 16 of the Act of 1933 to certain cases. For example, sect. 2 of the Act of 1923 talks of the landlord of a dwelling-house to which the principal Act applies being in possession of the whole of the dwelling-house, E whereas sect. 16 of the 1933 Act seems to say that a dwelling-house means a house let as a separate dwelling or a part of a house. For myself, I do not think it is necessary on that point to decide whether, and how far, the definition of a dwelling-house in the Act of 1933 does or does not modify the earlier definition in earlier Acts. It is sufficient, for my F purpose, to point out that, in this particular Act, the word " dwelling-house " is used, and it says that as from a certain date :

> the principal Acts shall not apply to any dwelling-house unless it is a dwelling-house to which they applied immediately before the passing of this Act . . . and it is also a dwelling-house [of which the rent is a certain amount.] G

That is sect. 1 (2), and then it is provided by sect. 2 that :

> Sect. 2 of the Act of 1923 (which provides for the exclusion of dwelling-houses from the application of the principal Act in certain cases) shall not apply to any dwelling-house of which the rateable value on the appointed day did not exceed [a certain amount.]

H

Now " dwelling-house " there means a house let as a separate dwelling, and in this case it appears to me that, this house not being let as a separate dwelling, it cannot be said that sect. 2 of the Act of 1933 deals with the class of house we have to consider at all. This house having been exempted from control, under the operation of sect. 2 of the Act of 1923, whatever "dwelling-house" means in that Act, where the landlord of a dwelling-house to which the principal Act applies is in possession of the whole of the dwelling-house, the principal Act shall cease to apply to the dwelling-house, without qualification.

If sect. 2 (1) of the Act of 1933 is to be read as I think it should be read, "dwelling-house" there means a house let as a separate dwelling, or part of a house being a part so let, and it follows that the exclusion of a dwelling-house which the landlord had obtained under the Act of 1923 was not that which is referred to in sect. 2 of the Act of 1933 at all, because his house, at the time of the passing of that Act, was not a house let as a separate dwelling. If I am right in thinking that sect 2 (1) has no application, then sect. 2 (2), which deals with the case of a landlord of any dwelling-house let as a separate dwelling who wishes to register or must register, becomes a perfectly consistent provision. If I am right in my view, sect. 2 (1) of the Act of 1933 is dealing only with dwelling-houses which are let as separate dwellings, or a part of a house being a part so let, and sect. 2 (2) is the machinery to cover the whole subject matter of sect. 2 (1); both of them are dealing with houses let as a separate dwelling or in part, and there is not that inconsistency of leaving the landlord of a house which is not let without any remedy when he finds himself controlled by sect. 2.

For that reason, which I am conscious is not the reason with which the judge has dealt, or that which he has considered, I think that this appeal ought to be allowed, on the basis that this house was decontrolled under the Act of 1923, sect. 2, and has not become recontrolled, either retrospectively or prospectively, under sect. 2 of the 1933 Act, because it was not a house which was let at the time of the passing of the Act.

Of course, there is a further, and, to me, a more difficult, question, which is rather the question dealt with by the judge, as to whether, under any view of this matter, sect. 2 (1) of this Act has a retrospective operation at all, or whether the true view is not that, between the time when the decontrol started, in 1923, or whatever time the landlord came into possession, and July 18, 1933, the landlord during that period was entitled to the benefits of the earlier Act, and the house for all purposes ought to be decontrolled. This, I think, was a question not falling to be decided in *Stokes* v. *Little* (1), in which, speaking for myself, I said that I would wish to reserve this consideration. The question which was particularly affecting my mind then was the position of third parties who had purchased a private interest in houses between 1923 and 1933 on the assumption that they were decontrolled, which, of course, would considerably add to their value, finding out afterwards that, by an operation of the law, they had purchased something other than that which, in good faith, they thought they had purchased, and, of course, there are other considerations.

The general principle of the matter, as laid down in the Interpretation

Act, I think is clear. In the Interpretation Act, 1889, s. 38 (2), it is provided that:

> Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . (c) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed.

Here clearly, to my mind, the landlord has acquired a privilege, which no doubt he is possessed of in common law, of letting this house at such rent as he thought fit, and I think it would be a right approach to the problem to say that we are required by the Interpretation Act—if not by common law, on the common law principle that no one can have his right taken away without compensation—to start with the presumption that this landlord, having restored his common law right to dispose of the property, unless there is clear language to the contrary, before July was still left free, and the Act has not a retrospective operation.

It has been argued, and I think it found favour with the judge, that, under the principal Act, this house was decontrolled only in so far as this: that sect. 2 of the 1933 Act, although the house is excluded from control, can apply to it if at any time it falls into the category to be controlled, as appears from the principal Act, and that the words in the Act of 1933:

> Subject as hereinafter provided, sect. 2 of the Act of 1923 . . . shall not apply to any dwelling-house—

do deprive the landlord of the benefit of sect. 2 and throw him back into the position in which he was before 1923. Having given the matter the best consideration I can, I have come to the conclusion, though not without some hesitation, that the language here is not sufficiently strong to override the general assumptions which arise under the Interpretation Act and under the common law. I think that stronger language than is here contained would be necessary to say that this wording has a retrospective operation. It is the same consideration which caused me to pause in considering the case of *Stokes* v. *Little* (1), and, now that the matter has come up for consideration, I do not think it is such as to mean that it is to be retrospective. I think that the proper way to consider this matter is that it can be deemed to affect the operation only as and from July 18, 1933, and that, if a landlord's house was decontrolled before that time, it would continue so to be decontrolled as between the Act of 1923, or the time when the landlord came into his possession, and this Act, and that this Act has not got a retrospective operation.

For both of these reasons, one of which is contrary to the judge, and for other reasons which the judge has not dealt with, I have come to the conclusion, first, that this is not a dwelling-house falling within sect. 2 of the Act of 1933, though it does appear to be a dwelling-house falling within sect. 2 of the Act of 1923 for the purpose of the landlord maintaining the exclusion, and, secondly, because the Act is not retrospective in its operation, and I am of the opinion that this appeal should be allowed.

du Parcq, J.: I have come to the same conclusion. Speaking for myself, in this difficult case I prefer to found my judgment on the second of the two reasons suggested by Slesser, L.J. Nothing is clearer than that the courts ought to be slow to give a retrospective operation to a statute so as to disturb existing rights or obligations. There is a very well known passage to that effect in the case of *Re Athlumney, Ex p. Wilson* (2), which is cited in Maxwell on the Interpretation of Statutes, p. 186. I had better read the whole of the citation:

> No rule of construction is more firmly established than this: that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

Slesser, L.J., has pointed out already that, in the case of *Stokes* v. *Little* (1), in his judgment this question as to whether the section in question is to be regarded as retrospective or not was expressly left open. I am impressed, necessarily, by the fact that Lord Wright, in the judgment which he delivered in that case, does appear to have taken the view that the section had a retrospective effect. That was a *dictum* not binding on the court, and, finding the question left open, I am bound to come to the best conclusion I can upon it, and, looking at the words of this Act, I am clearly of the opinion that the enactment is expressly—to put it no higher—put in language which is fairly capable of either interpretation; that is to say, it might be interpreted fairly as being retrospective, and it might be interpreted with equal fairness as being prospective. If I may deal as briefly as I can with the relevant sections, it is necessary to begin with sect. 1 (2) of the Act of 1933, which removes from the ambit of the Acts certain dwelling-houses. Then comes sect. 2, which contains these words:

> Subject as hereinafter provided, sect. 2 of the Act of 1923 (which provides for the exclusion of dwelling-houses from the application of the principal Act in certain cases) shall not apply to any dwelling-house of which the rateable value on the appointed day did not exceed . . .

and then come the words which bring in the house in Portsmouth with which we are now concerned. When one looks back at sect. 2 of the Act of 1923, one finds that it refers to cases in which the landlord of a dwelling-house to which the principal Act applies is in possession of the dwelling-house. When he has become the owner-occupier, by virtue of the Act of 1923 the Rent Restrictions Acts no longer apply to the dwelling-house. If this section of the Act of 1933 has a retrospective effect, it means, of course, that the appellant in this case is now brought within the Act of 1933, but, if it is not given a retrospective effect, it appears to me to be easy to give a reasonable interpretation to the whole of the Act of 1933. The Act seems to me to be contemplating cases, first of all, in which the owner-occupier at some time was in possession and remained in possession; it contemplates also cases in which the owner-occupier was at one time in possession and has ceased to be in possession, and has left his house, and it contemplates, finally, cases in which the house is not let, but at some future time the owner may let the house. Now, treating sect. 2 as not being retrospective, the position with regard to the man whose house is at present let is that, if, in future, he becomes the owner-occupier of it, the house will not thereby become decontrolled, because, for the future, sect. 2 of the Act of 1923 is not to apply to houses which come within that exception. So far as the owner who is in occupation of his house at the time of the passing of the Act is concerned, he is perfectly safe, his house is decontrolled and always will be decontrolled, but, so far as the man is concerned who at some time in the past obtained possession of the house so that he was entitled to say he was decontrolled, but thereafter let it, he is put by the Act into this position: he would be entitled, but for the provision of sect. 2 (2), to say that his house is decontrolled, because sect. 2 (1) is not retrospective, if I am right, but the Act does not leave him quite in that position. He is told that, unless he takes certain steps, his house will be deemed to be a dwelling-house to which the principal Acts apply, and he is under the necessity of taking the necessary steps to obtain the registration which is provided for in sect. 2 (2); if he does that, then the house will be a decontrolled house, but, if he does not do that, the house will be deemed to be a dwelling-house to which the principal Acts apply.

My own view is that that interpretation which refuses to give a retrospective effect to sect. 2 (1) really is more in accordance with the words of this Act than the other suggested interpretation which has found favour with the county court judge. If sect. 2 (1) is indeed retrospective in its operation, then the landlord of a house, let as a separate dwelling-house, of which it can be said that, by virtue of sect. 2 of the Act of 1923, the principal Acts had ceased to apply, has no ground whatever for contending that his dwelling-house is not one to which the principal Acts apply, and it is not a threat that anything will happen to him which has not happened already when he is told that, in certain events, the house will be deemed to be a dwelling-house to which the Act applies, because, by sect. 2 (2), it is already a dwelling-house to which the principal Act applies. For these reasons, it seems to me that the construction I am being persuaded to put upon the Act is a possible construction, and a fair construction, and it certainly does avoid the result which the judge has himself found unsatisfactory and difficult to support. I agree, of course, with the view of the judge, which I think is expressed in his judgment, but it is not for the courts to inquire what the motive of the legislature may have been. One may sometimes find it difficult to agree with the legislation, and endeavour to legislate oneself, but, where one finds a perfectly possible construction leading to a reasonable conclusion, and another construction which leads to a conclusion which appears to strike everybody as unreasonable, there is no reason why one should not lean, as indeed I think one is bound to, to the former of those two constructions. I think, therefore, that these words in sect. 2 (2), which appear difficult to the judge, namely, " let as a separate dwelling," are really words applied to, and intended for, the protection of the landlord, who has not only resumed possession of his house, but is in fact occupying it. I take it that is the purpose of those words. I agree, if I may say so, with Slesser, L.J., that the county court judge has assisted us, and the arguments of counsel have assisted us, in this case, and, in view of the care expended upon it by the county court judge, I feel some satisfaction in the thought that our decision today is obviously, from what he says, likely to afford him considerable gratification.

Simonds, J. : I agree, and have only this to add. It is necessary to deal with one question upon which the first judgment was given as to the meaning of the words in sect. 2 (1) of the Act of 1933, which was this. This dwelling-house is a house which, having been decontrolled under sect. 2 of the Act of 1923, fell to be recontrolled under the Act of 1933 if, and only if, it was a dwelling-house within the meaning of sect. 2 (1) of the Act of 1933. Now, the Act of 1933 defines a dwelling-house as a house which is let as a separate house, and that must mean, in my view, a house which is so let at July 18, 1933, being the date on which the Act came into force. Therefore, one has to ask of any particular house whether it can be treated as being so let at that date. If it is so let, then it is a dwelling-house within the meaning of the Act ; if it is not so let, it is not a dwelling-house within the meaning of the Act, and it appears to me that the first ground upon which Slesser, L.J., gave his judgment in this case, namely, that this was not a dwelling-house within the meaning of the Act, is the correct one, the house being one which has been decontrolled, and has never been brought into recontrol, by the operative words of the 1933 Act. In regard to the retrospective operation of the Act, I have nothing further to add to what Slesser, L.J., has said.

Appeal allowed.

Solicitors : *Gibson & Weldon*, agents for *Hobson Thomas*, *Sherwell & Wells*, Portsmouth (for the appellant).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*

Followed. BISHOP *v.* CUNARD WHITE STAR, LTD. [1950] 2 All E.R. 22.

Observations of LORD WRIGHT, at p. 654, *applied.* HEATH *v.* HEATH. [1950] 1 All E.R. 877.

Applied. BANQUE DES MARCHANDS DE MOSCOU *v.* KINDERSLEY. [1950] 2 All E.R. 549.

Principle applied. BELLENDEN *v.* SATTERTHWAITE. [1948] 1 All E.R. 343.

EVANS *v.* BARTLAM.

Applied. LANCASHIRE WELDERS, LTD. *v.* HARLAND AND WOLFF, LTD. [1950] 2 All E.R. 1096.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright, Lord Roche), **April 8, 9, 30, 1937.**]

Practice and Procedure—Judgment by default—Setting aside judgment—Discretion of judge—Power of Court of Appeal to interfere with discretion exercised by judge in chambers—R.S.C., Ord. 13, *r.* 10, *Ord.* 27, *r.* 15.

The appellant owed to the respondent (a bookmaker) a certain sum in respect of unsuccessful bets on horse races, and was alleged to have agreed with the respondent's agent that, in consideration of the respondent not pressing his claim for a short period, and refraining from causing the appellant to be declared a defaulter at Tattersalls, the appellant would pay the debt within a reasonable time. The respondent later brought an action against the appellant upon this promise to pay. The writ was served personally upon the appellant, who did not enter an appearance, and judgment was signed against him in default of appearance. In response to a request by the respondent's solicitor for payment of the sum due under the judgment, the appellant asked for time to pay, which was granted. Thereafter, the appellant made an application to have the judgment set aside, and for leave to defend the action. The application was dismissed by the master; on appeal the judge in chambers granted the application and gave leave to defend upon terms. The Court of Appeal, by a majority (GREER, L.J., dissenting), directed that the order of the master be restored :—

HELD : there was no reason to interfere with the discretion of the judge in chambers, who thought it proper to set aside the judgment, and, unless it was clear that the judge's discretion was wrongly exercised, his order should be affirmed.

Order of Court of Appeal ([1936] 1 K.B. 202) *set aside, and order of* GREAVES-LORD, J., *restored.*

[**EDITORIAL NOTE.** The foundation of the doctrine of approbation and reprobation is that the person against whom it is applied has accepted a benefit from the matter he reprobates. Similarly, the foundation of estoppel by representation is that by the conduct of one party the other has altered his position to his disadvantage. To ask for a stay of execution is not a process by which the person asking obtains a benefit from the judgment nor does the opposing part if the stay is granted alter his position to his detriment. Therefore asking for time to pay the amount due under a judgment in default of defence does not prevent a party from applying to have the judgment set aside.

AS TO SETTING ASIDE JUDGMENT BY DEFAULT, see HALSBURY, Hailsham Edn., Vol. 19, pp. 263, 264, para. 562 ; and FOR CASES, see DIGEST, Practice, pp. 391-393, Nos. 948-970.]

Cases referred to :

(1) *Cooper* v. *Cooper*, [1936] W. N. 205 ; Digest Supp.

(2) *Campbell (Donald) & Co.* v. *Pollak*, [1927] A.C. 732 ; Digest, Practice, 788, *3503* ; 96 L.J. K.B. 1132 ; 137 L.T. 656.

(3) *Gardner* v. *Jay* (1885), 29 Ch.D. 50 ; Digest, Practice, 535, *1987* ; 54 L.J. Ch. 762 ; 52 L.T. 395.

(4) *Maxwell* v. *Keun*, [1928] 1 K.B. 645 ; Digest, Practice, 558, *2169* ; 97 L.J.K.B. 305 ; 138 L.T. 310

(5) *Stevens* v. *Walker*, [1936] 2 K.B. 215 ; [1936] 1 All E.R. 892 ; Digest Supp. ; 105 L.J. K.B. 683 ; 154 L.T. 550.

(6) *Watt* v. *Barnett* (1878), 3 Q.B.D. 183 ; Digest, Practice, 330, *490* ; 47 L.J. Q.B. 329 ; 38 L.T. 63 ; *affd. on appeal*, 3 Q.B.D. 363.

(7) *Hope* v. *Great Western Railway Co.*, [1937] 1 All E.R. 625 ; Digest Supp.

(8) *Jenkins* v. *Bushby*, [1891] 1 Ch. 484 ; Digest, Practice, 536, *1990* ; 60 L.J. Ch. 254 ; 64 L.T. 213.

(9) *Hyams* v. *Stuart King*, [1908] 2 K.B. 696 ; Digest, Practice, 94, *794* ; 77 L.J. K.B. 794 ; 99 L.T. 424.

(10) *Atwood* v. *Chichester* (1878), 3 Q.B.D. 722 ; Digest, Practice, 391, *951* ; 47 L.J. Q.B. 300 ; 38 L.T. 48.

Appeal from an order of the Court of Appeal, allowing by a majority (Slesser and Scott, L.JJ., Greer, L.J., dissenting) an appeal of the respondent from an order of Greaves-Lord, J. (allowing the appeal of the appellant from an order of Master Moseley), and restoring the order of Master Moseley whereby he dismissed an application by the appellant that the judgment in the action signed by the respondent should be set aside. The facts and the arguments are referred to in the judgments.

R.S.C., Ord. 13, r. 10, provides :

> Where judgment is entered pursuant to any of the preceding rules of this order, it shall be lawful for the court or a judge to set aside or vary such judgment upon such terms as may be just.

R.S.C., Ord. 27, r. 15, provides :

> Any judgment by default, whether under this order or under any other of these rules, may be set aside by the court or a judge, upon such terms as to costs or otherwise as such court or judge may think fit.

Gilbert Beyfus, K.C., and *C. L. Henderson* for the appellant.

R. P. Croom-Johnson, K.C., and *Herbert Shanly* for the respondent.

Lord Atkin : My Lords, this is an appeal by the defendant from an order of the Court of Appeal (Slesser and Scott, L.JJ., Greer, L.J., dissenting), who reversed an order of Greaves-Lord, J., sitting in chambers, setting aside on terms a judgment obtained against the defendant on default of appearance. The case came before the judge in chambers on appeal from a master who had refused the application. It appears that the defendant in 1931 had incurred losses to the plaintiff, a bookmaker, for bets on horse races to the amount of £1,336, which, by the end of 1932, had been reduced, by small payments on account, to £1,241 11*s.* 9*d.* In May, 1935, the plaintiff, not having received any further payments, gave an authority in writing to one Irving, who carried on business as the National Turf Protection Society in the name of A. Harrison Ford, to recover the amount claimed by any steps he deemed expedient by further reporting the debtor to the committee of Tattersalls or other authority. On May 13, Mr. Irving saw the defendant, and, according to an affidavit made by Mr. Irving sworn on Oct. 9, 1935, he told the defendant that the default would be reported to Tattersalls, and eventually agreed with him that the case would be withheld from Tattersalls so long as Mr. Irving was satisfied that the defendant would settle within reasonable time. No further payments were made ; there was a correspondence, in which the defendant appeared to make it clear that he had no means to pay, and that, if pressed, he would have to plead the Gaming Act. On July 19, 1935, the writ in the action was issued, the endorsement being for £1,241 11*s.* 9*d.*, the amount due to the plaintiff under and by virtue of an agreement made on May 13 between the proprietor secretary of the National Turf Protection Society acting as duly authorised agents of the plaintiff and the defendant. The writ was not served until Sept. 16, 1935, when it was A served personally on the defendant by Mr. Irving. The defendant says that he was then told by Mr. Irving that he had three or four weeks for appearance. Mr. Irving denies this. On Sept. 24, the plaintiff's solicitors signed judgment on default of appearance, and on the same day wrote to inform the defendant, and asked for a cheque. Two letters followed B which form the ground for the decision of the majority of the Court of Appeal. On Sept. 26, the defendant wrote to the plaintiff's solicitor:

> I am in receipt of yours of the 24th and note contents. I have seen Mr. Bartlam to-day and explained my position, and he is willing for the matter to stand over so that I can see if I can make any arrangement to pay. I have never refused to C pay him, but have not had any income to do it with owing to bad trade. He is writing to Mr. Ford to-night. At the moment I have nothing and no assets and know he does not want to lose his money. P.S.—Kindly hold over for me and oblige.

The solicitor's answer was on Sept. 28, 1935:

> I am in receipt of your letter of the 26th inst. I have also received a letter from D my client who states that he wishes me to do whatever may be necessary to obtain satisfaction of the judgment obtained against you. You will readily appreciate that you have brought the present position upon yourself. You have made numerous promises both to my client and to his agent, Mr. Harrison Ford, as to the settlement of the amount due. No one of such promises has been performed by you and my client was left without option but to proceed as he did. In all the circumstances, I am prepared to let the matter stand over for a further period of seven E days, but I must ask you to understand please that, unless at the expiration of that period I receive payment of the total amount due, proceedings will be taken to enforce the judgment without further notice to you.

On Oct. 3, 1935, the defendant took out a summons to set aside the default judgment, and supported it by an affidavit, in which he made the statement above-mentioned as to having been told by Mr. Irving that F he need not take any steps for a month, and stated that the alleged contract, if made at all, which was denied, was a contract by way of gaming and wagering. The master dismissed the application; the judge on appeal granted it, and set aside the judgment on terms as to costs. The power to set aside a judgment obtained on default of appearance is G given to the court or a judge under R.S.C., Ord. 13, r. 10, and a similar power, extending to judgments by default under any rule, is given by R.S.C., Ord. 27, r. 15. It is a power entrusted to the discretion of the court or judge, and by R.S.C., Ord. 54, r. 12, the master is given jurisdiction to exercise the discretion. As to the limits of the discretion, if any, H it may be necessary to say a word or two later. I stay only to mention a contention of the respondent that, the master having exercised his discretion, the judge in chambers should not reverse him unless it was made evident that the master had exercised his discretion on wrong principles. I wish to state my conviction that, where there is a discretionary jurisdiction given to the court or a judge, the judge in chambers is in no way fettered by the previous exercise of the master's discretion. His own discretion is intended by the rules to determine the parties' rights, and he is entitled to exercise it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the master, but he is in no way bound by it. This, in my experience, has always been the practice in chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in *Cooper* v. *Cooper* (1), with which I entirely agree.

On appeal to the Court of Appeal by special leave, the majority, Slesser, L.J., and Scott, L.J., came to the conclusion that the judge was precluded from exercising his discretion to set aside the judgment by the fact that, with knowledge of the judgment, the defendant had applied for the matter to stand over, for him to see if he could arrange to pay, and the plaintiff had consented to let it stand over for seven days. Slesser, L.J., preferred to put it on the ground that the defendant was seeking to approbate and reprobate. He took a benefit under the judgment, viz., seven days' time, and could not thereafter be allowed to seek to set it aside. Scott, L.J., preferred to put it on election. The defendant knew or must be presumed to know that he had the right to apply to set the judgment aside, and by asking for and obtaining time he irrevocably elected to abide by the judgment. My Lords, I do not find myself convinced by these judgments. I find nothing in the facts analogous to cases where a party, having obtained and enjoyed material benefit from a judgment, has been held precluded from attacking it while he still is in enjoyment of the benefit. I cannot bring myself to think that a judgment debtor, who asks for and receives a stay of execution, approbates the judgment, so as to preclude him thereafter from seeking to set it aside, whether by appeal or otherwise. Nor do I find it possible to apply the doctrine of election. It is a simple answer to say that, to infer election, it must be shown that the person concerned had full knowledge of the various rights amongst which he elects. There is here no evidence that the defendant, at the time he asked for and received time, had any knowledge of his right to apply to set the judgment aside. I cannot think that there is any presumption that he knew of this remedy, either sufficiently for the purposes of the doctrine as to election, or at all. For my part, I am not prepared to accept the view that there is in law any presumption that anyone, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not, and never has been, a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application. Neither of the Lords Justices expressed any intention to review the discretion exercised by the judge in chambers, except by reference to the point which, in their opinion, in law precluded him from exercising any discretion in favour of the defendant. Coming to the conclusion that this point of law is ill-founded, I think it follows that the appeal to the Court of Appeal should be dismissed. I find myself in agreement with the reasoning of Greer, L.J., except on one point. I agree that both R.S.C., Ord. 13, r. 10, and R.S.C., Ord. 27, r. 15, give a discretionary power to the judge in chambers to set aside a default judgment. The discretion is in terms unconditional. The courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that, where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a *prima facie* defence. It was suggested in argument that there is another rule, that the applicant must satisfy the court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure.

But, in any case, in my opinion, the court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not, in my opinion, exist. But, while the judge has such a discretion as I have mentioned, I conceive it to be a mistake to hold, as Greer, L.J., seems to do, that the jurisdiction of the Court of Appeal on appeal from such an order is limited, so that, as Greer, L.J., said, at p. 209, the Court of Appeal:

> have no power to interfere with his exercise of discretion unless we think that he acted upon some wrong principle of law.

Appellate jurisdiction is always statutory ; there is in the statute no restriction upon the jurisdiction of the Court of Appeal, and, while the appellate court, in the exercise of its appellate power, is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet, if it sees that, on other grounds, the decision will result in injustice being done, it has both the power and the duty to remedy it. The decision in *Campbell* (*Donald*) *&* *Co.* v. *Pollak* (2) was based upon the fact that an appeal in the matter of costs was expressly excluded from the jurisdiction of the Court of Appeal by the Act and rules.

It follows, from what I have said, that, in this case, there was no reason for interfering with the discretion of Greaves-Lord, J. The appeal should be allowed, and the order of the Court of Appeal set aside, and the order of GREAVES-LORD, J., dated Oct. 18, 1935, restored. The appellant should have the costs here and in the Court of Appeal.

LORD THANKERTON: My Lords, I concur.

A

LORD RUSSELL OF KILLOWEN: My Lords, R.S.C., Ord. 13, r. 10, in its terms is unfettered by any conditions, and purports to confer upon the court or a judge full power to set aside a judgment signed in default of appearance, and, if thought fit, to impose such terms, as a condition B of the setting aside, as may be just. It was argued by counsel for the respondent that, before the court or a judge could exercise the power conferred by this rule, the applicant was bound to prove (*a*) that he had some serious defence to the action, and (*b*) that he had some satisfactory explanation for his failure to enter an appearance to the writ. C It was said that, until those two matters had been proved, the door was closed to the judicial discretion; in other words, that the proof of those two matters was a condition precedent to the existence, or (what amounts to the same thing) to the exercise, of the judicial discretion. For myself, I can find no justification for this view in any of the authorities D which were cited in argument; nor, if such authority existed, could it be easily justified in face of the wording of the rule. It would be adding a limitation which the rule does not impose. The contention no doubt contains this element of truth, that, from the nature of the case, no judge could, in exercising the discretion conferred on him by the rule, E fail to consider both (*a*) whether any useful purpose could be served by setting aside the judgment, and obviously no useful purpose would be served if there were no possible defence to the action; and (*b*) how it came about that the applicant found himself bound by a judgment, regularly obtained, to which he could have set up some serious defence. F But to say that these two matters must necessarily enter into the judge's consideration is quite a different thing from asserting that their proof is a condition precedent to the existence or exercise of the discretionary power to set aside a judgment signed in default of appearance.

In the case now under discussion, the judge in chambers thought it G proper, in the exercise of his discretion, to set aside the judgment, and, unless an appellate court is satisfied that the discretion has been wrongly exercised, and should have been exercised in the contrary way, the judge's order should be affirmed. The Court of Appeal (by a majority) has set aside the judge's order, not upon the ground of a wrong exercise H of the discretion, but upon the ground that, on the facts of the case, the judge was unable to exercise any discretion at all, the defendant being in some way debarred from seeking relief. SLESSER and SCOTT, L.JJ., held that, because the defendant against whom judgment had been signed had asked for and obtained a promise that the judgment would not be immediately enforced, but that the matter would be allowed to stand over for seven days, he was no longer entitled to apply to have the judgment set aside. They put it on three grounds. That he had elected not to apply to have the judgment set aside. That he could not both approbate and reprobate, and could not, accordingly, accept the judgment as binding, and thereafter seek to set it aside. That his application for delay was a representation that he accepted the judgment A which estopped him from applying to set it aside.

My Lords, I confess to a feeling of some bewilderment at the theory that a man (who, so long as it stands, must perforce acknowledge and bow to a judgment of the court regularly obtained), by seeking and obtaining a temporary suspension of its execution, thereby binds himself B never to dispute its validity or its correctness, and never to seek to have it set aside or reversed. If this were right, no defeated litigant could safely ask his adversary for a stay of execution pending an appeal, for the grant of the request would end the right of appeal. The doctrine of election applies only to a man who elects with full knowledge of the facts. C There is no suggestion that the defendant knew that he could apply to set the judgment aside. The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment, cannot allege the invalidity of the judgment which conferred the benefit. To obtain a D stay of execution of a judgment is not the acceptance of any benefit conferred by the judgment. The doctrine of estoppel requires the statement of a fact, upon the faith of the truth of which another alters his position. To ask for a stay of execution is no statement of any fact. Even if it could be said (which it could not) to amount to a statement E that no application would be made to set the judgment aside, that would be only a statement of intention, and could ground no estoppel. There being no justification for the grounds upon which the majority of the Court of Appeal proceeded in setting aside the judge's order, the question remains whether any reason exists for holding that the judge exercised F his discretion otherwise than rightly. For myself, I can find no such reason. Indeed, I would go further, and say that, having read and considered the evidence and letters in the case (and there is here no question of seeing witnesses and hearing them cross-examined), I would myself have come to the same conclusion as that which was reached by G the judge. I would accordingly allow this appeal.

LORD WRIGHT: My Lords, the Court of Appeal by a majority (GREER, L.J., dissenting) have reversed an order of GREAVES-LORD, J., setting aside a judgment in default given against the appellant in favour H of the respondents. The master had, in the exercise of his discretion under R.S.C., Ord. 27, r. 15, or R.S.C., Ord. 13, r. 10, refused to set aside the judgment. But it is clear that, where the Court of Appeal is required to review a discretionary order of a judge reversing the master, the substantial discretion is that of the judge, and it is the judge's order which must particularly be considered by the appellate court: *Cooper* v. *Cooper* (1). The masters most admirably exercise their discretion in routine matters of pleading, discovery, interrogatories, venue, mode of trial, and other interlocutory directions, without any appeal being necessary. But such matters may on occasion raise questions most vital to the final issue of the case. The decision of such questions is most properly for the judge, who will no doubt consider carefully the order of the master. If a further appeal is taken to the Court of Appeal, it is the judge's discretion which that court has either to support or vary or reverse. In the Court of Appeal in the present case, Slesser and Scott, L.JJ., who formed the majority, held that the judge's order should be reversed, and leave to set aside the default judgment refused, on the ground that the appellant had by his conduct shut himself out of any right to claim to have the judgment set aside. What was relied upon was that he had requested the respondents to give him time, so as to see if he could make any arrangement to pay, and that the respondent had granted that request by agreeing to let the matter stand over for seven days. Slesser and Scott, L.JJ., held that thereby the appellant was estopped from contesting the validity of the judgment, or must be deemed to have elected not to do so, since otherwise he would be both approbating and reprobating the judgment. It was said that he had: "obtained this advantage on the basis that he did not dispute the validity of the judgment." I am not clear on what legal principle this conclusion is based. Estoppel seems to me to be out of the question, since estoppel is a rule of evidence which prevents the person estopped from denying the existence of a fact; but what is postulated here is that the appellant has barred himself from exercising a legal right to apply to the court. Election is a question of fact. I can find no facts here to show that the elements of election, such as intention, or knowledge of his legal rights, were present. Nor can I find any evidence to justify the inference that the appellant had undertaken not to dispute the validity of the judgment. Such an undertaking, if given for sufficient consideration, so as to bind the appellant, might have supported the conclusion of the Court of Appeal; nothing less would have sufficed, though even then it would, I incline to think, still be only a matter to be considered in the exercise by the court of its statutory discretion. But, from the bare evidence that the appellant had requested and been granted a few days time, I find it impossible to draw the inference necessary to justify the conclusion. The cases cited by Slesser, L.J., seem to me to deal with different circumstances. The appellant here has not taken anything under the judgment, nor has he deluded the respondent to his disadvantage. A judgment creditor may be well advised in his own interests to give a gratuitous delay to his debtor, in the hope that, to avoid publicity, or for other reasons, the debtor will not seek to impeach the judgment. There was no more than that in the present case. It may be regarded as being analogous to asking for a stay of execution. I cannot, with all respect, agree with

Slesser and Scott, L.JJ., in their conclusion that the appellant was barred from applying under R.S.C., Ord. 27, r. 15. On this footing, the order of Greaves-Lord, J., has been attacked, on behalf of the respondent, as not being a good exercise of his discretion under the rule ; on the other hand, Greer, L.J., who dissented from the other members of the court, took the view that the court ought not to interfere with the order of the A judge made in the exercise of his discretion. He said :

> I take the decision in *Donald Campbell & Co.* v. *Pollak* (2) in the House of Lords as meaning that wherever the judge in chambers is invested with a discretion the Court of Appeal has no power to set aside an order made by him in the exercise of his discretion unless the court comes to the conclusion that he exercised his discretion on grounds which were wholly irrelevant to the matters which he had to consider, or insufficient in law to support his decision. B

If that were so, it would be unnecessary to consider the contention of Mr. Croom Johnson that the judge wrongly exercised his discretion. But, with all deference to Greer, L.J., I am unable to accept what he said as a correct statement of the law or practice in this matter. *Donald Campbell & Co.* v. *Pollak* (2) is no authority for that proposition. If it C were, it would have changed the law and the practice. But in truth it did not. It is dealing merely with the judge's discretion in regard to costs, which is a statutory discretion, precisely defined by statutes and statutory rules. Thus, Viscount Cave, L.C., says, at p. 804 :

> The jurisdiction of the Court of Appeal to review an order of the trial court as to D costs depends on statutes and on rules of court which have the force of a statute.

I need not discuss in detail the examination by the House of that precisely limited right of review. But there is in that case no reference to or discussion of the duty or power of the Court of Appeal to review the general discretion of a judge in interlocutory matters, the extent of which E has been illustrated by numerous cases before and since *Pollak's* case (2). It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction, unless the court is clearly satisfied that he was wrong. But the court is not entitled simply to say that, if the judge had jurisdiction, and had all the facts before him, the F Court of Appeal cannot review his order, unless he is shown to have applied a wrong principle. The court must, if necessary, examine anew the relevant facts and circumstances, in order to exercise by way of review a discretion which may reverse or vary the order. Otherwise, in interlocutory matters, the judge might be regarded as independent of G supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and may be one which requires a careful examination by the Court of Appeal. Thus in *Gardner* v. *Jay* (3), at p. 58, Bowen, L.J., in discussing the discretion of the judge as regards mode of trial, says : H

> That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed.

Bowen, L.J., in that case held that the appellant had not satisfied the onus of showing that the discretion of the judge had been wrongly exercised. But there are many cases in the books where it has been held that the appellant has satisfied the onus of showing that the exercise of the discretion by the judge was not justified on the facts. A judge's order fixing the date of trial or refusing to grant an adjournment is a typical exercise of purely discretionary powers, and would be interfered with by the Court of Appeal only in exceptional cases, yet it may be reviewed by the Court of Appeal. Thus, in *Maxwell* v. *Keun* (4), the Court of Appeal reversed the trial judge's order refusing to the plaintiff an adjournment. That was a pure matter of discretion on the facts. ATKIN, L.J., at p. 653, said :

> I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so ; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so.

The reporter, at p. 659, adds a note that the plaintiff succeeded in the action when it came on at the adjourned date. A recent case in which the Court of Appeal set aside a judge's order remitting an action in tort to the county court was *Stevens* v. *Walker* (5), where it was held that the circumstances did not justify the order. I need not multiply authorities, save to observe that, in *Watt* v. *Barnett* (6), to which I shall refer later, the Court of Appeal, affirming the divisional court, reversed the order of the judge, who had refused to set aside a default judgment. There is reported at least one other case where this was done by an appellate court.

In my opinion, this House must consider, in all the circumstances of the case, the contentions on behalf of the respondent that the order of GREAVES-LORD, J., was wrong, and that, on the merits, the default judgment should not be set aside. For the reasons set out above, this House has no guidance in the matter from the Court of Appeal, and must determine whether the respondent has satisfied the onus of showing that the judge was wrong on the merits just as the Court of Appeal should have done. I see no reason to interfere with the judge's order. The respondent's counsel, in my judgment, has entirely failed to satisfy the onus of showing that the judge was wrong. R.S.C., Ord. 27, r. 15, gives a discretion untrammelled in terms : it does not even require an affidavit as a condition, and the discretion may be exercised on any proper material, though in practice an affidavit is generally required. To quote again from BOWEN, L.J., in *Gardner* v. *Jay*, at p. 58 :

> when a tribunal is invested by Act of Parliament or by rules with a discretion, without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the rules did not fetter the discretion of the judge why should the court do so ?

Similarly, it has been held by the Court of Appeal, in *Hope* v. *Great Western Railway Company* (7), that the discretion to grant or refuse a jury in King's Bench cases is in truth, as it is in terms, unfettered. It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the court in exercising the discretion, though in matters of discretion no one case can be an authority for another. As Kay, L.J., said, in *Jenkins* v. *Bushby* (8), at p. 495 :

> the court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion.

A discretion necessarily involves a latitude of individual choice, according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae*, once the facts are ascertained. In a case like the present, there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits, to which the court should pay heed ; if merits are shown, the court will not *prima facie* desire to let pass a judgment on which there has been no proper adjudication. This point was emphasised in *Watt* v. *Barnett* (6). Here the appellant shows merits, in that the debt was primarily a gaming debt ; he denies that he made any new contract within *Hyams* v. *Stuart King* (9), an authority which has not yet been considered by this House. He clearly shows an issue which the court should try. He has been guilty of no laches in making the application to set aside the default judgment, though, as *Atwood* v. *Chichester* (10) and other cases show, the court, while considering delay, has been lenient in excluding applicants on that ground. The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms, as to costs, or otherwise, which the court, in its discretion, is empowered by the rule to impose. The appellant here has an explanation, the truth of which is indeed denied by the respondent, but at this stage I see no reason why he should be disbelieved on what appears to me to be a mere conflict on affidavits. For all these reasons, no ground is shown to justify interference with the judge's discretion, and I think that the appeal should be allowed, and that this House should make the order which the Court of Appeal should have made.

LORD ROCHE : My Lords, I agree that this appeal should be allowed, and I have nothing to add to the reasons for that conclusion expressed by your Lordships who have given your opinions to the House.

Appeal allowed with costs.

Solicitors : *Maude & Tunnicliffe*, agents for *Stirk & Co.*, Wolverhampton (for the appellant) ; *Leslie Marrison* (for the respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

MUTUAL FINANCE, LTD. *v.* JOHN WETTON & SONS, LTD.

[KING'S BENCH DIVISION (Porter, J.), **April 26, 1937.**]

Contract—Undue influence—Third party—Contract by limited company—Suggested prosecution of brother of a director—Effect on father's health.

A J. had forged the signatures to a guarantee of a hire-purchase agreement. The payments having fallen into arrear, it was desired to transfer the agreement to a new hirer. The plaintiff company was very anxious that the guarantor of the transferred agreement should be the defendant company. The directors of the defendant company were the father and brother of J., and the father was at the time seriously ill. After interviews at which the seriousness of J.'s position was mentioned, B though no actual threat of prosecution was made, J.'s brother ultimately signed the guarantee on behalf of the company in order to avoid the danger to his father's health of the knowledge of the possibility of J.'s arrest. The plaintiff company sued upon the guarantee and the defence relied on was undue influence :—

HELD : (i) there was no common law duress.

(ii) the guarantee was unenforceable by reason of undue influence, C it having been given owing to a desire to prevent a prosecution to the knowledge of those to whom it was given and the defendant company having secured no benefit for itself from the contract.

(iii) the defendant company had not affirmed the contract, as it was always subject to the undue influence up to the issue of the writ, there being a fear of the prosecution of J. up to that time.

Williams v. *Bayley* (2) *applied.*

D

[**EDITORIAL NOTE.** Undue influence usually arises in contracts made between relatives or persons in a fiduciary position. Here the contract is between third parties. The suggested prosecution is of a brother of a director of a company, and the contract is not made by the director but by the company, though it is true the company was a family concern. Further, it is to be noted that it is not E the prosecution that is feared, but the effect of the prosecution upon the health of the father of the suggested criminal. This case therefore involves some extension of the law of undue influence, but does nothing to define the limits of the doctrine.

AS TO UNDUE INFLUENCE BY THIRD PARTY, see HALSBURY, Hailsham Edn., Vol. 7, pp. 102, 103, para. 140 ; and FOR CASES, see DIGEST, Vol. 12, pp. 98-100, Nos. 611-616, and p. 109, No. 684.]

F

Cases referred to :

(1) *Kaufman* v. *Gerson*, [1904] 1 K.B. 591 ; 12 Digest 93, *573 ;* 73 L.J.K.B. 320 ; 90 L.T. 608.

(2) *Williams* v. *Bayley* (1866), L.R. 1 H.L. 200 ; 12 Digest 92, *567 ;* 35 L.J. Ch. 717 ; 14 L.T. 802.

G (3) *Jones* v. *Merionethshire Penmanent Benefit Building Society*, [1892] 1 Ch. 193 ; 12 Digest 297, *2444* ; 61 L.J.Ch. 138 ; 65 L.T. 685.

(4) *Seear* v. *Cohen* (1881), 45 L.T. 589 ; 12 Digest 93, *570.*

(5) *Brook* v. *Hook* (1871), L.R. 6 Exch. 89 ; 12 Digest 259, *2114 ;* 40 L.J. Ex. 50 ; 24 L.T. 34.

H (6) *Flowers* v. *Sadler* (1882), 10 Q.B.D. 572 ; 12 Digest 93, *572.*

ACTION upon a guarantee alleged to have been obtained by undue influence. The facts and arguments are fully stated in the judgment.

D. P. Maxwell Fyfe, K.C., and *C. T. B. Leigh* for the plaintiff company.

G. J. Lynskey, K.C., and *T. M. Backhouse* for the defendant company.

Porter, J.: This is an action on a guarantee dated Feb. 3, 1936, signed by Percy Wetton on behalf of the defendant company. It was at one time contended that Percy Wetton had not the authority of the defendant company to sign, but at the trial of the action that defence was discarded, and the only question which I had to determine was whether the guarantee was binding on the defendant company or whether it had been obtained by duress or undue influence. The guarantee was given in the following circumstances. The defendant company was originally founded by the Wetton family, consisting of a father and two sons, i.e., William Wetton, Percy Wetton, and Joseph Wetton. The first two were directors at all material times; the last-named had been a director until 1931, but had since that date ceased to be a director, or, indeed, to be in any way connected with the business, and had started a business of his own. The defendant company owned quarries and sold stone, and for that purpose owned its own waggons, and also contracted with outside firms of carters for carriage. Joseph also carried on the business of quarrying and selling stone, and, I think, of carting, and for those purposes would find a lorry useful. I gather that he had been an unsatisfactory member of the defendant company, and generally unsatisfactory in his business relations. So much so that he had been forced to leave the defendant company, and had caused great anxiety and grief to his father.

The plaintiff company was formed for the purpose of financing, and does finance, the purchase of motor cars and lorries on the hire-purchase system. A bargain being concluded between a seller and a buyer for the sale of a vehicle on hire-purchase terms, the plaintiff company purchases it from the seller and lets it on hire-purchase to the buyer, the price including a percentage to the company for its risk and trouble. The seller in the present instance was a company named G. W. Smith (1925), Ltd., which was approached by a purchaser named Fred Clarke and Joseph Wetton at the end of 1935, Clarke desiring to purchase a Foden lorry, for which a price of £920 was charged, viz., £50 cash and 24 instalments. The plaintiff company was asked to finance the transaction, and, as a condition of doing so, it (i) required a counter-guarantee from the defendant company, (ii) required a counter-guarantee from the seller, and it agreed, with the assent of the seller, to transfer the lorry and the contract of purchase to the defendant company, in case it was called upon to fulfil its guarantee. The company was accordingly furnished by Joseph Wetton with a guarantee dated Dec. 4, 1935, purporting to be signed by William and Percy Wetton, and witnessed by Joseph Wetton. In fact, however, the whole document appears to have been concocted by Joseph Wetton without the knowledge of his father or brother. Having obtained what it imagined was a valid guarantee, the plaintiff company on the same date handed its cheque for £750 to the seller, and the lorry was handed over to Mr. Clarke. On Dec. 5, 1935, the plaintiff company sent a copy of the so-called guarantee to the defendant company, but this document was, as I find, suppressed by Joseph Wetton, who was then living at home with his father and brother, and never reached the defendant company.

Mr. Clarke almost at once fell behind with his payments, and the plaintiff company, both by letter and telephone, demanded fulfilment of the guarantee. This demand immediately brought a repudiation of liability in a letter from the secretary of the company on Jan. 9, 1936. A reiterated demand on Jan. 11 was in its turn repudiated by the defendant company on Jan. 14. On Jan. 14, the plaintiff company determined the hiring, and demanded the return of the lorry, and on Jan. 16 it issued a certificate of authority to seize the vehicle. In addition to the seizure of the lorry, the plaintiff company was minded to obtain what advantage it could from the bogus guarantee which it held. It is true that the company itself was protected by the counter-guarantee of the seller, but it desired to stand well with the seller, so as to obtain as much further business as it could. Accordingly Mr. Lopresti, the plaintiff company's local manager, arranged to visit the defendant company on Jan. 16.

At that time Mr. Clarke had found a Mr. Gregory who might take over the agreement on terms, but Mr. Lopresti was anxious that the defendant company should admit its liability, believed that Joseph Wetton had been guilty of forgery, thought that the family was unlikely to permit a prosecution, and was prepared to make use of that unwillingness in order to obtain an acknowledgment of its liability. He had not, however, made up his mind to prosecute, though Smiths were anxious to do so.

An interview took place on Jan. 16. As to this interview, I find the following facts. Mr. Lopresti and a Mr. Wales, general manager of the seller, were present, as well as Percy Wetton and J. G. Mottershead, the defendant company's secretary. Lopresti asked if the signatures were genuine, and both Percy Wetton and Mottershead refused to admit their genuineness, but, from a desire not to commit Joseph, did not say in terms that they were forgeries. Lopresti, however, had no doubt that they were forgeries, and said it was a serious matter for Joseph, and that he could take out a warrant for his arrest. Percy Wetton said that he was not himself interested, but that his father was very ill, so ill that he could not tell his father, and that, if Joseph were arrested, it might cause his father's death. Lopresti then said that Gregory was prepared to take over the agreement, and suggested that the defendant company should guarantee a substituted agreement with Gregory. Percy Wetton, after again saying he was not interested, consented to consider the matter, but stated that, in his view, the price of £800 was excessive, and left the matter for further discussion between Gregory, Smith and the plaintiff company. No definite threat in terms was used, but Lopresti knew that the defendant company was leaving the matter open for settlement only in order to save one of the family from the consequences of his action. He knew, it is true, that Percy would not have objected to his brother's being prosecuted if he alone had been concerned, but that, owing to his father's health, he was prepared to consider an agreement rather than have his brother prosecuted. No assertion of an intention to prosecute if an agreement was not come to was made, nor did the plaintiff company promise not to prosecute if the defendant company entered into a new guarantee, but both parties A had this question of prosecution in mind, and Lopresti meant and intended that the possibility of a prosecution should influence Percy in undertaking the liability, and Percy was to his knowledge so influenced. As both parties knew, the guarantee would never have been signed but for the fear of the prosecution of Joseph if the defendant company B did not agree.

A further interview took place on Jan. 22, 1936, at which Lopresti, Percy, and Mottershead were present. A conversation on the same lines took place. Again I do not find any direct threats, but the seriousness of Joseph's position and the possibility of his arrest were mentioned by C Lopresti, and all parties knew that the basis of settlement was the avoidance of the possibility of the arrest and prosecution of Joseph. At this interview, Percy Wetton agreed, on behalf of the firm, to sign a guarantee, if terms which Gregory would accept could be arranged. By Jan. 28, terms had been arranged, and the defendant company's D promise to sign a guarantee was confirmed by a telephone message on Jan. 30. On Feb. 3, Lopresti again came to Wetton's office, accompanied by Gregory, bringing with him the form of guarantee sued upon in this action. Mottershead and Percy Wetton were present. Gregory said he was prepared to take over the lorry on the terms agreed, but E Percy refused to sign. Lopresti again pointed out the seriousness of the matter for Joseph if nothing were done, and Percy said he would have to think over the matter. Accordingly the agreement was left with him. On the same day he signed, and sent it to the plaintiff company, in order to prevent his father from knowing of the possibility of F Joseph's arrest, and to avoid the danger to his father's health of such knowledge. Lopresti knew that this was the sole reason why Percy signed the document, and intended that he should be influenced by fear for his father's health. For the sake of safety, the plaintiff company endeavoured to obtain the signatures of both William Wetton, the father, G and Percy to the guarantee under the company's seal, and later asked to see the company's articles, but did not persist in this demand on receipt of a letter from Mottershead refusing to do anything further, and stating that the company had yet to repudiate its undertakings.

Between Jan. 16, when the suggestion that Gregory should take over H the lorry was first made, and the arrangement of the final terms, a considerable amount of discussion had taken place between Smiths, Gregory, and Lopresti, and the original terms had been considerably modified in favour of Gregory and the defendant company as his guarantor. Immediately on the signing of the guarantee, the lorry was in form bought back by Smiths from the plaintiff company and resold to it again, and by it let on a hire-purchase agreement to Gregory. Gregory made certain payments under his agreement to the plaintiff company, partly directly, and, later, through the medium of the defendant company, who owed him money, and, instead of paying him, discharged its indebtedness by meeting the instalments as they became due. Eventually, however, Gregory defaulted in his payments, and, on Nov. 17, 1936, the plaintiff company determined the agreement, and, on Dec. 11, called upon the defendant company to fulfil its undertaking. The defendant company failed to pay, and this action was brought.

Prima facie, the plaintiff company is entitled to recover. It has a guarantee deliberately made and in due form ; but it is said that that guarantee is voidable because it was obtained by duress or by undue influence. If the question were whether there were any such duress as the common law would recognise, I should unhesitatingly answer : no. But the right to avoid a contract is not at the present time confined to questions of duress ; it depends upon the much wider relief given on principles originally evolved in the Chancery courts under the name of undue influence. The problem is, I think, well stated in SALMOND & WINFIELD ON CONTRACTS (1927), at p. 259 :

> Assuming, then, that the common law of duress has been thus superseded by the equitable doctrine of undue influence, the question remains, What forms of coercion, oppression, or compulsion amount to undue influence invalidating a contract as between strangers between whom there exists no fiduciary relation ? How is the line to be now drawn between those forms of coercion or persuasion which are permissible and those which the law recognises as unlawful and as a ground of contractual invalidity ? To this question it is impossible, as the authorities at present stand, to give any definite or confident reply. In the case already cited of *Kaufman* v. *Gerson* (1), it is suggested that the line should be drawn by reference to general considerations of public policy, the question in each case being : " Is the coercion or persuasion by which this contract was procured of such a nature that the enforcement of a contract so obtained would be contrary to public policy ? " Just as a contract may be invalid because it is contrary to public policy in its substance or its purposes, so it may be invalid because it is contrary to public policy in respect of the coercive method of its procurement. If this is the true underlying principle, it is for the law in its future development to reduce this general principle so far as possible to the form of specific rules in respect of divers methods of coercion, just as the requirements of public policy have been similarly made specific in respect of illegal and nugatory contracts. Where the instrument to coercion is the doing or threatening of a wilfully illegal act of any description, if may be anticipated that, notwithstanding the limits of the older common law of duress, a contract so procured will in general be held invalid. But even although the instrument of coercion is not thus in itself illegal as in the case of a threat of prosecution, the enforcement of a contract so procured may nevertheless be held in appropriate cases to be contrary to public policy.

That states the problem, but by no means solves it. Duress at common law could be pleaded only where the end arrived at was achieved by the use of something in the nature of unlawful force, or the threat of unlawful force, against the person of the other contracting party ; but undue influence, in the Chancery courts, might exist where a promise was extracted by a threat to prosecute certain third persons unless the promise was given. It is not necessary that there should be any direct threat. The headnote in *Williams* v. *Bayley* (2), setting out the principle deduced from the speech of LORD WESTBURY, at p. 216, is, I think, a correct exposition of the law. Not only is no direct threat necessary, but also no promise need be given to abstain from a prosecution. It is enough if the undertaking was given owing to a desire to prevent a prosecution, and that desire was known to those to whom the undertaking was given. In such a case, one may imply (as I do here) a term in the contract that no prosecution should take place. See *Jones* v. *Merionethshire Permanent Benefit Building Society* (3). *Kaufman* v. *Gerson* (1) is another example of the principle applied in *Williams* v. *Bayley* (2), but, in the former case, the underlying threat was the prosecution of the husband, while in the latter case it was that of a son. In *Seear* v. *Cohen* (4) the same principle was applied in a case where the underlying threat was against the son of one of the defendants and the nephew of the other, and, in *Brook* v. *Hook* (5), against the brother-in-law of the defendant. Is the principle wide enough to cover the case where the persons involved are the brother and father of the alleged criminal ? I think it is. It is not necessary to determine the exact bounds beyond which the doctrine would not be applied, but I should myself be inclined to say that it extended to any case where the persons entering into the undertaking were in substance influenced by the desire to prevent the prosecution, or possibility of prosecution, of the person implicated, and were known and intended to have been so influenced by the person in whose favour the undertaking was given. Nor do I think it matters that Percy Wetton would not have cared, if he alone were concerned, whether his brother went to prison or not. In fact, he did care, and Lopresti knew that he cared, owing to his fear of the effect on his father's health. If the known object was to prevent the prosecution of his brother, for whatever reason, that, I think, is enough. But it is said that, in all the cases cited, the sole consideration was to stifle a prosecution, whereas in the present case the agreement which was made concerned four persons, viz., the plaintiff company, the defendant company, Gregory, and Smiths, and that, just as a debtor may secure his debt, though the object be to avoid a prosecution, as in *Flowers* v. *Sadler* (6), because there is a further consideration, so an agreement which results in the sale of a lorry by one person to another, the hiring by that other to a third person, and the guarantee of the hirer's debt by a fourth, is a perfectly legitimate transaction, though the result may be, and was intended to be, the stifling of a prosecution. In my view, however, the question is, what was the person giving the guarantee in substance, to the knowledge of the person to whom the guarantee was given, doing and intending to do ? In the present case, the defendant company gained no benefit for itself, and, as I find, was known by the plaintiff company to be gaining no benefit. Smiths had the same knowledge as the plaintiff company, and the fact that Gregory had a lorry delivered to him on hire-purchase at an excessive price does not, in my view, affect the right of the debtor to avoid the contract.

It was further argued before me that the defendant company's guarantee, if obtained by undue influence, was voidable, and not void, and, as it was not repudiated at the earliest possible moment, the defendant company had affirmed it. But what is the earliest possible moment? In my view, it is the earliest moment at which the undue influence has ceased to operate: *Kaufman* v. *Gerson* (1), *per* SIR R. HENN COLLINS, M.R., p. 596. In the present case, up to the issue of the writ, the defendant company was always subject to the fear of a prosecution of Joseph Wetton, and was never a free agent. I think that it did avoid the contract in time. For these reasons, I think the defendant company is entitled to avoid this guarantee, and that judgment should be given in its favour with costs.

Judgment for the defendant company with costs.

Solicitors: *Vaudrey, Osborne & Mellor*, Manchester (for the plaintiff company); *A. H. W. Wragg*, Manchester (for the defendant company).

[*Reported by* MALCOLM LOGAN, ESQ., *Barrister-at-Law.*]

ALLIED NEWSPAPERS, LTD. *v.* HINDSLEY (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), **April 7, 8, 1937.**]

Income Tax—Trade expenses—Difference between rent paid for buildings and rent received from sub-tenants—Control of buildings essential to trade—Printers of newspaper—Distribution of newspapers—Income Tax Act, 1918 (*c.* 40), *Sched. D, Cases I and II, r.* 3 (*a*).

To enable the appellant company to distribute its newspapers quickly unimpeded transport was essential in the street in which its printing works were situated. The appellant company accordingly acquired certain property opposite its printing works and erected a building thereon. The building was then sold to a subsidiary company at its cost price, and the appellant company took a lease of the whole building. The appellant company used part of the ground floor, the basement, while unlet, and the front of the building, and the remainder it sublet or endeavoured to sublet. The appellant company sought to deduct as an expense wholly and exclusively laid out for the purposes of its trade within Sched. D, Cases I and II, r. 3 (*a*), the difference between the rent which it paid for the buildings and the rents which it received from sub-tenants:—

HELD: as the control of the building was essential for the purposes of the appellant company's trade, the appellant company was entitled to make the deduction claimed.

[**EDITORIAL NOTE.** Money may, for the purposes of income tax, be wholly and exclusively expended for the purpose of the trade carried on and yet not expended of necessity and with a view to a direct and immediate benefit to the trade. In the present case for the rapid distribution of the newspaper it was necessary to secure control of the traffic within a particular area and a loss entailed thereby was allowed as a deduction.

AS TO TRADE EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 152, 153, para. 312; and FOR CASES, see DIGEST, Vol. 28, p. 45, Nos. 227-229, and p. 46, Nos. 233-236.]

Cases referred to:

(1) *Strong & Co., Ltd.* v. *Woodifield*, [1906] A.C. 448; 28 Digest 57, *290*; 75 L.J. K.B. 864; 95 L.T. 241; 5 Tax Cas. 215.

(2) *Smith* v. *Lion Brewery Co., Ltd.*, [1911] A.C. 150; 28 Digest 57, *291*; 80 L.J. K.B. 566; 104 L.T. 321; 5 Tax Cas. 568.

(3) *Usher's Wiltshire Brewery, Ltd.* v. *Bruce*, [1915] A.C. 433; 28 Digest 56, *287*; 84 L.J. K.B. 417; 112 L.T. 651; 6 Tax Cas. 399.

(4) *Inland Revenue Comrs.* v. *Falkirk Iron Co., Ltd.*, [1933] S.C. 546; Digest Supp.; 17 Tax Cas. 625.

Appeal by way of case stated from a decision of the Commissioners for the Special Purposes of the Income Tax Acts dismissing an appeal against two assessments to income tax for the years ending Apr. 5, 1935 and 1936, respectively made upon the appellant company under Sched. D, Case I. The facts are set out in the judgment.

Raymond W. Needham, K.C., and *J. S. Scrimgeour* for the appellant company.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondent.

Lawrence, J.: In this case the appellant company seeks to deduct, as an expense wholly and exclusively laid out for the purposes of its trade within the meaning of Sched. D, Cases I and II, r. 3 (*a*), the difference between the rent which it pays for certain buildings, called Chronicle Buildings, and the rents which the appellant company receives from its sub-tenants, in the following circumstances. The appellant company occupies the Chronicle printing works, and a building which is apparently used for engraving, and the Chronicle offices and engineers' shop. Some time between 1927 and 1931, the appellant company acquired the site of the Chronicle Buildings, and erected thereon the building which now stands there. Subsequently the appellant company formed a subsidiary company to which it sold the Chronicle Buildings for the sum of £204,000, the cost price of the buildings, and took a lease from the subsidiary company, which was entirely controlled by the appellant company, of the Chronicle Buildings at a rack rent of £14,000 plus certain ground rents. The case finds that the appellant company uses, under this lease, part of the ground floor of Chronicle Buildings facing Corporation Street as advertisement offices, and the basement, while unlet, for storage, and the front of Chronicle Buildings for advertising signs. The case also finds that:

> The appellant company, not requiring or intending to occupy the greater portion of Chronicle Buildings for the purposes of its trade, sublet or endeavoured to sublet such portion.

The object of the appellant company in acquiring this site and putting up this building is stated in para. 6 of the case; there the Commissioners find—because they accept the evidence stated in that paragraph—that:

> In order that the appellant company's newspapers which were printed at the printing works shown on the plan might be quickly distributed, unimpeded transport

> in Mark Lane was essential. It was therefore necessary that the appellant company should be able to control traffic as far as possible in Mark Lane, which was narrow, the carriageway being only 9 ft. 11 ins. in width at the narrowest part. This [question of access] was the reason for the acquisition of the said site, the erection of Chronicle Buildings, and the taking of the subsequent lease thereof.

The Commissioners also find in the following terms :

> We fully accept the evidence that control of the buildings was essential for the purposes of the appellant company's trade, in order that unimpeded transport might be maintained in Mark Lane. In our opinion this control was effectively obtained when the site was purchased and the buildings erected thereon.

But, notwithstanding those findings, the Commissioners have come to the conclusion that the deduction claimed to be made by the appellant company of the rent, less the amounts received from sub-tenants, is not a proper deduction, because, as I understand their decision, of the formation of the subsidiary company, the sale to the subsidiary company of the Chronicle Buildings, the subsequent lease, and the subletting of the parts not required by the appellant company for its trade. The Commissioners, after referring to the lease and sale, state their opinion in these words :

> In our opinion the operation of renting the buildings and subletting portions thereof is distinct and apart from the appellant company's trade and the result whether a profit or a loss emerges must be excluded in arriving at the computation of the Case I assessment.

My attention has been called to a number of cases, both on behalf of the appellant and on behalf of the Crown, but I do not think it is necessary for me to review all these cases, because they all appear to me to turn upon the particular facts as found by the commissioners in each particular case. *Strong & Co., Ltd.* v. *Woodifield* (1), *Smith* v. *Lion Brewery Co., Ltd.* (2), *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (3), *Inland Revenue Comrs.* v. *Falkirk Iron Co., Ltd.* (4) and other cases, have been cited to me, but, as I say, it appears to me that these cases turn upon the particular facts found. In my opinion, the finding of the Commissioners that the reason for the acquisition of the site in this case, the erection of Chronicle Buildings, and the taking of the subsequent lease of Chronicle Buildings was the commercial necessity which the appellant company had of getting quick and unimpeded access to its other buildings, really concludes the case ; because, if the site was acquired for that purpose, and the buildings were erected for that purpose, and the lease was taken for that purpose, the rent paid under that lease must, in my opinion, have been laid out wholly and exclusively for the purposes of the appellant company's trade. As was said by LORD SUMNER in the *Usher's Wiltshire Brewery* case (3) at pp. 469, 470 :

> Where the whole and exclusive purpose of the expenditure is the purpose of the expender's trade, and the object which the expenditure serves is the same, the mere fact that to some extent the expenditure enures to a third party's benefit, say that of the publican, or that the brewer incidentally obtains some advantage, say in his character of landlord, cannot in law defeat the effect of the finding as to the whole and exclusive purpose.

In my judgment, in their findings of fact in this case the Commissioners have found that the whole and exclusive purpose of the acquisition of this

site and the erection of the building and the lease from the subsidiary company was the purpose of the appellant company's trade as a newspaper company, and it cannot matter that the appellant company derives some advantage incidentally either as the owner of the Chronicle Buildings, if there had been no lease, or as the sub-lessor of the buildings, having taken this lease. The Commissioners have, in my opinion, with the A
greatest respect to them, been led into a decision which, in my view, is not consistent with their findings of fact by having regard to the formation of this subsidiary company and the taking of a lease from it. They themselves say in their findings that the control which was necessary for the purpose of the appellant company's trade was effectively obtained B
when the site was purchased and the buildings erected thereon, and, having found that, it seems to me that the subsequent formation of this subsidiary company and the taking of a lease from the subsidiary company does not substantially alter the position. A reason which is not stated in the case was suggested to me as the reason which induced C
the appellant company to form that subsidiary company, but, apart from any such reason, there is nothing in the case or in any suggestion that was made that this lease was a fictitious lease, and it is a legal document which renders the appellant company liable for the rent, and there is a finding of the Commissioners that the reason of the lease was D
the fact that it was essential that the appellant company should control Mark Lane.

In these circumstances, I am of opinion that the Commissioners must have misdirected themselves in coming to their conclusion that the appellant company was, in renting these buildings, carrying on a trade E
distinct and different from its own trade as a newspaper company. The only way in which that decision could be arrived at would, I think, be, in view of their other findings of fact, that, whenever a taxpayer takes a lease of premises for the purposes of his business, and knows at the time, or subsequently finds out, that some part of those premises F
is surplus to his requirements, and proceeds to let them off, the very fact of that letting prevents him from deducting the rent which he has to pay under the lease, and such a decision would, in my opinion, be in conflict with the principle upon which the *Usher's Wiltshire Brewery* case (3) and the *Falkirk Iron Company* case (4) were decided. G

I am, therefore, of opinion that this appeal must be allowed with costs.

Appeal allowed with costs.

Solicitors: *Slaughter & May* (for the appellant company); *Solicitor of Inland Revenue* (for the respondent). H

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

PALMER *v.* CATTERMOLE (INSPECTOR OF TAXES).

[KING'S BENCH DIVISION (Lawrence, J.), **April 16, 19, 1937.**]

Income Tax—Assessment on executrix—Untaxed income of deceased not returned by him—Assessment including deceased's wife's income—Assessment in respect of years preceding year of death—Apportionment—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, rr.* 16, 18.

A taxpayer died in 1931 without having made a proper return for income tax purposes, since 1925, of certain income from untaxed interest on foreign possessions paid to himself and his wife. His executrix, who was assessed in respect of this income, contended (i) that she could only be assessed under All Schedules Rules, r. 18, upon the taxpayer's income, excluding that of his wife, (ii) that r. 18 had reference only to the year of the taxpayer's death, and (iii) that she could not be assessed in respect of the year of the taxpayer's death upon an apportionment basis in respect of the income enjoyed by the taxpayer up to the time of his death :—

HELD : (i) the executrix was assessable under r. 18 upon the profits and gains which arose or accrued to the taxpayer in his own right and in the right of his wife by virtue of All Schedules Rules, r. 16.

(ii) there was nothing in r. 18 to suggest a limitation to the year of assessment.

(iii) the words of r. 18 were apt to entitle the commissioners to assess and charge upon the executrix the profits which arose or accrued to the taxpayer *de die in diem* up to the date of the death.

[**EDITORIAL NOTE.** The effect of the provisions relating to the wife's income is to make the husband the channel through which the collection of tax upon that income is made and has no effect upon the property in that income. The suggested limitation of r. 18 to the year of assessment would seem to have the result of making that rule conflict with Finance Act, 1923, s. 29, but is rejected upon the plain meaning of the rule. The practice has always been to apportion income up to the date of death.

AS TO COLLECTION FROM EXECUTORS AND ADMINISTRATORS, see HALSBURY, Hailsham Edn., Vol. 17, p. 875, para. 770 ; and FOR CASES, see DIGEST, Vol. 28, p. 95. FOR THE RULES REFERRED TO, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, pp. 591, 592.]

Cases referred to :

(1) *Leitch* v. *Emmott*, [1929] 2 K.B. 236 ; Digest Supp. ; 98 L.J. K.B. 673 ; 141 L.T. 311 ; 14 Tax Cas. 633.

(2) *Cowdray* (*Annie, Viscountess*) v. *Inland Revenue Comrs.* (1930), 15 Tax Cas. 255 ; Digest Supp.

APPEAL by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax Acts for the Reigate Division of the County of Surrey.

Captain R. E. Palmer died on Aug. 22, 1931, having made no proper returns of his income for the years 1925/26 to 1931/32 inclusive. His widow died in 1934. During the whole of the years 1925/26 to 1930/31 and during the year 1931/32 down to the date of Captain Palmer's death, Captain Palmer and his wife were living together. Assessments for the years in question were made upon the appellant as executrix of the will of Captain Palmer in respect of the income of Captain Palmer and of his wife from untaxed interest and foreign possessions. No question arose in respect of Captain Palmer's own income for the year

in which he died. The appellant contended (*a*) that she was not assessable to income tax in respect of the profits of the wife for any year of assessment; (*b*) that the assessment of the appellant authorised by All Schedules Rules, r. 18, was restricted to the profits or gains which arose or accrued to the deceased before his death and did not extend to the profits or gains which arose or accrued to the deceased's wife; (*c*) that A
r. 18 as extended by the Finance Act, 1923, s. 29, authorised the assessment of the appellant in respect only of those profits or gains which arose or accrued in the year of assessment within which the deceased died; (*d*) that no assessment could be made on the appellant in respect of the income of the deceased for the year 1931/32, because, by reason of the B
death of the deceased on Aug. 22, 1931, the deceased's wife was not for the whole of such year a married woman living with her husband. The respondent contended that the assessments were correct in principle and should be adjusted in conformity with the figures of the combined incomes of the husband and wife as agreed. C

The General Commissioners were of opinion that the appellant was properly assessed in respect of the wife's income for all the years in question up to and including the year to Apr. 5, 1931, and that for the year ended Apr. 5, 1932, the appellant was only liable in respect of the wife's income up to the date of Captain Palmer's death on the basis where D
the wife's income was calculated on the previous year's income to be apportioned on a time basis up to Captain Palmer's death, and so far as the wife's income was computed on actual income of that year it was to be that actual income to the date of Captain Palmer's death. The appellant appealed. E

All Schedules Rules, r. 16, provides:

> A married woman . . . being entitled to any property or profits to her separate use, shall be assessable and chargeable to tax as if she were sole and unmarried: Provided that—(1) the profits of a married woman living with her husband shall be deemed the profits of the husband, and shall be assessed and charged in his name, and not in her name or the name of her trustee. F

All Schedules Rules, r. 18, provides:

> Where any person dies without having delivered a statement of all his profits and gains chargeable to tax with a view to an assessment thereon in due course, an assessment in respect of the profits or gains which arose or accrued to him before his death may be made at any time within the year of assessment, or within three years after the expiration thereof, upon his executors or administrators, and the G
> amount of the tax thereon shall be a debt due from and payable out of his estate.

J. Millard Tucker, K.C., and *J. S. Scrimgeour* for the appellant.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondent.

H

LAWRENCE, J.: The appellant in this case is the executrix of Captain Palmer, and for some reason Captain Palmer did not return, for the purposes of income tax, certain income from untaxed interest on foreign possessions which he enjoyed. He died on Aug. 22, 1931, without having made a proper return since 1925, and this is an assessment under appeal which has been made upon his executrix in respect of the income which in that way was not returned. There are three points which are raised on behalf of the appellant, and they all turn primarily upon the meaning of All Schedules Rules, r. 18, and also upon the interpretation of r. 16. The first point that is raised by the appellant is that the only assessment that can be made upon her under r. 18 is upon the income of Captain Palmer, excluding the income of his wife. The second point is that r. 18 has reference to the year of assessment only, the year in which Captain Palmer died. The third point is that, in any event, the Commissioners had no power to do as they have done in this case and make an assessment in respect of the year of Captain Palmer's death upon an apportionment basis, assessing him in respect of the income which they found him to have enjoyed up to the time of his death. The first argument is put in this way. It is said that the words of r. 18 apply solely to the income which arose or accrued to him in his own right, and not to any income which arose or accrued to him in right of his wife. That interpretation of r. 18 is based upon the interpretation which the Court of Appeal put upon r. 16 in *Leitch* v. *Emmott* (1). The position that the Court of Appeal were then dealing with was that of a lady who had become a widow a few days after the opening of a certain tax year, and she was assessed, for that year in which she became a widow, in respect of income from War Stock not taxed at the source, and, I think, some bank interest, and she had to be taxed under the scheme of the Acts by reference to her income for the year before. Her contention was that she had no income in the year before, and therefore was not assessable to any income tax in respect of this War Stock, because, by r. 16, since she was living with her husband in that year, her profits were to be deemed the profits of her husband. The Court of Appeal rejected that contention, saying that, although r. 16 provides that the profits of a married woman living with her husband should be deemed profits of the husband, and should be charged and assessed in his name, yet that means for the purposes of assessment and collection only, and it does not prevent those profits still being the profits of the wife for the purposes of computation. They drew attention to the fact that the substantive part of r. 16 states affirmatively that a married woman shall be assessable and chargeable to tax as if she were sole and unmarried, and makes her profits assessable and chargeable in the name of the husband only by way of a proviso. In the present case, it is argued that the wife's profits did not arise or accrue to the husband within the meaning of the words in r. 18. I am unable to accept this contention. I read the judgment of the Court of Appeal in *Leitch* v. *Emmott* (1) as applying solely to what I think was actually decided, namely, the computation of tax, and here it is not a question of computation of tax, but a question of assessment for, and collection from the executrix of, tax which was assessable and chargeable upon the husband by reason of r. 16. Mr. Tucker has argued with great force that the words " which arose or accrued to him " in r. 18 are inapplicable to the income of the wife, which did not, he says, arise or accrue to him, but which arose and accrued to the wife under the charging part of Sched. D when read with the substantive part of r. 16. But I think that, in interpreting those words in what is really a machinery section, there is no reason for not giving them the liberal interpretation which will A achieve the result of taxing the estate of the deceased in respect of profits which undoubtedly ought to have been returned, and which were not returned. I therefore hold that the case of *Leitch* v. *Emmott* (1) applies only to matters of computation, and that, as this is not a matter of computation, the executrix is, under r. 18, assessable upon the profits B or gains which arose or accrued to the husband in his own right, and in right of his wife by virtue of r. 16.

As to the second question, I can see nothing in r. 18 which in any way suggests a limitation to the year of assessment. The words are perfectly general: C

> an assessment in respect of the profits or gains which arose or accrued to him before his death.

If the rule had been intended to limit it to the year of assessment, it could perfectly simply have said so, but the words " before his death " D are perfectly general, and therefore I am of opinion that the executrix is assessable in respect of all the profits or gains which arose or accrued to the testator within the meaning that I put upon those words " before his death," notwithstanding that they arose or accrued to him before the year of assessment. The words " may be made at any time within E the year of assessment or within three years " refer, not to the time at which the profits arose or accrued to the testator, but to the time at which the assessment was made.

As to the last point, it is said that there is no provision in the Income Tax Acts for apportioning the profits of a broken part of the year, and F *Cowdray* (*Annie, Viscountess*) v. *Inland Revenue Comrs.* (2) is referred to. I am, however, of opinion that that case is not in point here, and that the words of r. 18 are apt to entitle the Commissioners to assess and charge upon the executrix the profits which arose or accrued to her testator within the meaning that I have put upon those words *de die in diem* up G to the date of the death.

I therefore hold that the assessment was rightly made, and the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Stephenson, Harwood & Tatham* (for the appellant); H *Solicitor of Inland Revenue* (for the respondent).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

Distinguished. R. *v.* EAST KERRIER JJ. [1952] 2 All E.R. 144.

DAVIES *v.* GRIFFITHS.

[KING'S BENCH DIVISION (Lord Hewart, L.C.J., Macnaghten and Singleton, JJ.), **April 19, 1937.**]

Magistrates—Procedure—Conviction—Previous convictions—Justices' decision not announced before inquiry into accused's previous history.

A The appellant was charged with having (i) been guilty of conduct which might lead to breaches of the peace, contrary to the common law, (ii) obstructed a police inspector while in the execution of his duty. Having heard the evidence, the justices retired to consider their decision, and, having decided to convict on both charges, they returned into court without announcing their decision to convict, but asked if there was B anything previously known against the appellant. Thereupon his previous convictions were supplied to the justices in court, and admitted by the appellant. The justices then retired a second time to consider what penalty, if any, they should impose on the appellant, after which they returned into court and announced their decision to impose a fine of £5 and £5 5*s.* costs on the first charge, and to order him to pay costs in respect of the second charge. The appellant's solicitor objected to the C justices' procedure, in not announcing in court their decision to convict before hearing the previous convictions, as irregular, but they informed him that they had come to a decision during their first retirement, before they were informed of the appellant's previous convictions :—

HELD : (i) the only course open to the justices as regards the first charge was, if they thought fit, to bind the appellant over to keep the peace, and perhaps to find sureties, and they therefore erred in point of law D by fining the appellant on the basis that he had committed a substantive offence to which a penalty might apply.

(ii) as regards the second charge, the procedure of the justices was not sufficient to invalidate the conviction, although it would have been better if the justices had announced their decision to convict before inquiring into the previous history of the appellant.

E [**EDITORIAL NOTE.** While it is well recognised that the previous history of the prisoner should not be gone into before conviction of the offence charged, it is here held that the conviction can be supported if it is shown that the bench had decided to convict before in fact the previous convictions are disclosed. In strictness, the decision to convict ought to be announced in open court before inquiry is made into previous convictions.

F AS TO EVIDENCE TO DETERMINE SENTENCE, see HALSBURY, Hailsham Edn., Vol. 9, p. 179, para. 259 ; and FOR CASES, see DIGEST, Vol. 14, pp. 332, 333, Nos. 3487-3519.]

Cases referred to :

(1) *Hill* v. *Tothill,* [1936] W.N. 126 ; Digest Supp.

G (2) *Boughton-Leigh* v. *Moss* (1937), *Local Government Chronicle,* Jan. 16.

APPEAL by way of case stated from a decision of the justices for Glamorganshire, sitting at Bargoed.

The appellant, who was at all material times a member of the executive of the South Wales Miners' Federation, attempted, on Aug. 18, 1936, to H address a meeting near the entrance to the Taff Merthyr Colliery, and persisted in doing so, despite the protest of a police inspector. In the past, there had been breaches of the peace at the colliery, and the appellant's conduct was such as might lead to a breach of the peace.

R. M. Montgomery, K.C., and *Joshua Davies* for the appellant.

D. Rowland Thomas, K.C., and *Godfrey Parsons* for the respondent.

Lord Hewart, L.C.J.: This case raises two quite separate points. There were two informations preferred against the appellant by the present respondent. The first charged him for that on Aug. 18, 1936, he was guilty of conduct near the vicinity of the Taff Merthyr Colliery, conduct which might lead to breaches of the peace contrary to the common law. The justices, having heard the evidence, convicted upon that information, and fined the appellant the sum of £5 and ordered him to pay costs. It is quite evident that there was a misconception in that case. The only course which was open to the justices, when the facts had been proved upon that information, was, if they thought fit, to bind the appellant over to keep the peace, and perhaps to find sureties. It is common ground at the Bar that the course which the justices in fact took was a course which was not open to them. They fined the appellant for having committed the substantive offence to which a penalty might be applied, and, in so doing, in my opinion, they erred in point of law.

The second point which was raised is different. At the same time there was a second information against the appellant, which charged him with obstructing a police inspector, whilst in the execution of his duty in the neighbourhood of the colliery already mentioned, on the same day, Aug. 18, 1936. The justices found that the appellant attempted to address a meeting near the entrance to the colliery, that he persisted in that conduct, despite the protests of a police inspector, that previously there had been breaches of the peace at the colliery, and the justices found as a fact that the appellant's conduct might lead to a breach of the peace. In those circumstances, while they refrained from imposing any penalty, they ordered the appellant to pay the costs of that information. The complaint here has to do with the procedure which was observed by the justices. They describe the matter in this way:

> Having come to the conclusion that we ought to convict on both charges, we then returned into court but did not make an announcement of our decision in court and asked if there was anything known previously against the appellant. The appellant's previous convictions were then supplied to us in court and admitted by the appellant.

The justices add:

> Having received information of the appellant's previous convictions as aforesaid we then retired a second time to consider what penalty, if any, we should impose on the appellant. We then returned to the court and announced that we had decided to impose a fine of £5 and £5 5*s.* costs on the first information and to order him to pay costs in respect of the second information. The solicitor appearing for the appellant objected that the course we had adopted in not announcing in court our decision to convict before hearing the previous convictions was irregular, but we informed him that we had come to a decision during our first retirement before we had been acquainted with the appellant's previous convictions.

Now, with regard to that matter of procedure, our attention has been directed to *Hill* v. *Tothill* (1), but that case is admittedly not on all fours with the present case. In that case:

> It appeared that the justices had privately informed themselves of a previous conviction of the defendant, when deciding upon the sentence to be imposed, and that

on returning into court they convicted and pronounced sentence upon the defendant without requiring the previous conviction to be proved.

Now, that is different from the present case. What happened here was only that, before announcing the decision at which they had arrived, the justices did, in open court, inquire if there was anything known A against the appellant, and in open court the appellant's previous convictions were then supplied and admitted by the appellant. That case seems to us, on its facts, to come nearly to the case of *Boughton-Leigh* v. *Moss* (2), where it was alleged that the justices, at any rate, had an opportunity, if they looked at the licence of the defendant, of observing B that there was a conviction endorsed upon it. In that case, this court decided to uphold the finding of the justices. Although undoubtedly it would have been better if the justices here had announced their decision to convict before inquiring of the previous history of the appellant, I do not think that what was done or omitted is enough to invalidate C their finding. I think, therefore, that part of the justices' decision ought to stand, a decision which matured only in an order, so far as that information was concerned, that the appellant should pay the costs. On the major point, I think that the appeal ought to be allowed, and the conviction and order to pay the fine of £5 ought to be quashed.

D MACNAGHTEN, J.: I agree, and have nothing to add.

SINGLETON, J.: I agree.

Appeal allowed against first conviction.

Solicitors: *Russell, Jones & Co.*, agents for *Edward Roberts*, Bargoed (for the appellant); *Torr & Co.*, agents for *A. Clifford Walter* (for the E respondent).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

NOEL *v.* TRUST AND AGENCY CO. OF AUSTRALASIA, LTD.

F [CHANCERY DIVISION (Simonds, J.), **April 13, 14, 1937.**]

Income Tax—Deduction—Interest on payments in advance of calls on shares—Rate of interest fixed by articles—Payment at full rate without deduction for tax—Presumption of agreement for payment at higher rate.

G By the articles of association of a company incorporated in 1860, it was provided that the directors might receive from any of the shareholders willing to advance the same the remainder of the capital subscribed for by them beyond the sum actually called up on their respective shares, and upon such sums paid in advance of calls the shareholders were to be entitled to interest at the rate of 6 per cent. per annum. Certain shareholders paid moneys in advance of calls and interest at H the rate of 6 per cent. was paid upon such moneys, no deduction being made for income tax. In 1885 the articles were altered by special resolution and interest was to be payable at the rate of 6 per cent. or at such lower rate as the shareholders and the directors might agree upon, but nothing was to affect the rights of the shareholders then receiving 6 per cent. Certain sums were thereafter paid in advance of calls and by agreement the interest was in some cases to be 4 per cent. free of income tax and in other cases 3 per cent. free of income tax. The company duly accounted to the revenue for the income tax due on the interest paid, but no tax was deducted from such interest :—

Held : (i) in the absence of evidence, the court could not, in the cases where interest was being paid at the rate of 6 per cent., presume that the company and the shareholders had at some time entered into an agreement that interest should be payable at a rate higher than that provided for in the articles, namely, at such a rate as after deduction of tax would leave a clear rate of 6 per cent. on the moneys advanced, and the payment of 6 per cent. without deduction of tax was illegal.

(ii) there was no evidence, in the documents providing for the payment of interest at the rate of 4 per cent. free of tax and 3 per cent. free of tax respectively, of an agreement to pay at such a rate as after deduction of tax would leave a clear rate of 4 per cent. and 3 per cent. respectively, and the payment of 4 per cent. and 3 per cent. respectively without deduction of tax was illegal.

[**EDITORIAL NOTE.** This case requires to be distinguished from the recent case of *Jervis* v. *Howle* (2). There the claim was for rectification of a deed in accordance with the real agreement of the parties and an informal suggestion of a payment being made free of tax could be embodied in a rectified deed by the appropriate reference to the sum which after deduction of tax, etc. . . . The question here is not the rectification of the deed, but the construction of the deed upon words used. If a deed uses the words "free of tax," it cannot be construed as having the same effect as if the words used had been : "such a sum as after deduction of tax shall leave a sum equal to the interest at" a certain rate per cent. And this is so even where the parties have paid and accepted payment upon the footing that the deed had that effect.

As to Agreement to Pay Free of Tax, see HALSBURY, Hailsham Edn., Vol. 17, pp. 258, 259, para. 526 ; and for Cases, see DIGEST, Vol. 28, pp. 74-76, Nos. 398-417.]

Cases referred to :

(1) *Burroughes* v. *Abbott*, [1922] 1 Ch. 86 ; 28 Digest 68, *358* ; 91 L.J.Ch. 157 ; 126 L.T. 354.

(2) *Jervis* v. *Howle*, [1937] 1 Ch. 67 ; [1936] 3 All E.R. 193 ; Digest Supp. ; 155 L.T. 572.

(3) *London County Council* v. *A.-G.*, [1901] A.C. 26 ; 28 Digest 73, *392* ; 70 L.J. Q.B. 77 ; 83 L.T. 605 ; 4 Tax Cas. 265.

(4) *Blount* v. *Blount*, [1916] 1 K.B. 230 ; 28 Digest 68, *356* ; 85 L.J. K.B. 230 ; 114 L.T. 176.

(5) *R.* v. *Cresswell* (1876), 1 Q.B.D. 446 ; 27 Digest 61, *428* ; 45 L.J. M.C. 77 ; 33 L.T. 760.

(6) *Brooke* v. *Price*, [1917] A.C. 115 ; 28 Digest 75, *409* ; 86 L.J.Ch. 329 ; 116 L.T. 452.

Motion in which the plaintiff claimed (i) a declaration that the defendant Trust and Agency Co. of Australasia, Ltd., was bound to deduct income tax from the interest payable by the defendant company on the sums received by it in advance of calls on ordinary shares of the defendant company, and that any agreements to the contrary between the defendant company and the holders of such shares or any of them were illegal and void ; (ii) an injunction restraining the defendant company and the directors of the defendant company from paying any such interest without deducting income tax therefrom.

W. P. Spens, K.C., and *D. Ll. Jenkins* for the plaintiff : The practice paying interest without deducting income tax is a practice which cannot be justified, and is contrary to the provisions of the Income Tax Acts. [Counsel referred to *London County Council* v. *A.-G.* (3).]

H. Wynn Parry, K.C., and *F. H. Talbot* for Foreign and Colonial Investment Trust Co., Ltd. : As regards the shareholders who have been receiving interest at the rate of 4 per cent. per annum, it would be perfectly proper for the company to say that it would pay such a sum as would leave a clear net 4 per cent. after payment of income tax, which would imply that the income tax would be deducted by the company. That is the clear meaning of the circulars which were sent out. There is authority for the proposition that, if the court can find that the intention of the parties was a proper agreement that the recipient should have a sum at a net rate after deduction of tax, the court will give effect to it. If there is a formal document which stands in the way, the court will rectify that document. The bargain was a proper one. If the court finds that the company is going to pay the shareholder 4 per cent. and is going to account to the revenue for the income tax, it is a good arrangement. To say that the interest is paid free of tax is a compendious way of saying that the shareholder will receive a net payment, and All Schedules Rules, r. 23, is not broken. As regards the interest which is paid at the rate of 6 per cent., it has been paid free of tax since 1865. Only two explanations are possible. I put it upon the doctrine of a lost grant. If the corporators of this company had unanimously agreed that interest should be paid on these sums at such a rate as would leave a clear rate of 6 per cent., that would be perfectly legal. There is a complete absence of evidence as to what was done. The alternative is to find that people who must be presumed to know what they were doing have been paying interest in circumstances in which they were not entitled to pay it. The maxim *omnia acta præsumuntur rite esse acta* should apply. As the interest was paid in this manner for so very long, it should not be difficult to presume at this somewhat distant date that the necessary steps were taken. [Counsel referred to *Blount* v. *Blount* (4), *Burroughes* v. *Abbott* (1), *Jervis* v. *Howle* (2), *R.* v. *Cresswell* (5).]

H. B. Vaisey, K.C., and *Gordon Brown* for the defendant company and the directors of that company : The practice in question has been going on for 72 years, and an ordinary person would take the view that a practice which has continued so long is perfectly regular. There might have been some arrangement which, in the early days of the company, was not recorded. However, the practice has gone on, uncomplained of and unchallenged, all these years. The matter must have been well known to the shareholders. The doctrine of a lost grant gives rise to a presumption of validity. The revenue has lost nothing. The contract is perfectly clear. If a person was asked what rate of interest he was receiving, the answer would be " 6 per cent. tax free," and not " such a rate as leaves 6 per cent. after payment of tax." It is not a proposal to pay 6 per cent. without the deduction of income tax, but to pay at such a rate that the recipient would receive 6 per cent. net after the balance had been accounted for to the revenue. [Counsel referred to *R.* v. *Cresswell* (5); *Jervis* v. *Howle* (2); *Brooke* v. *Price* (6).]

SIMONDS, J.: This is a case which comes before me on a motion. The parties have agreed that the hearing of the motion shall be treated as the trial of the action, and therefore it has been incumbent upon me to go rather more fully into the matter than I otherwise should have done. The action is brought by Mr. Noel, who sues on behalf of himself and all other members of a company, called Trust and Agency Co. of Australasia, Ltd., except such members as are defendants or are holders of shares in the company in respect of which sums have been paid in advance of calls. The defendants are the company I have named, and the Foreign & Colonial Investment Trust Co., Ltd., which is sued on behalf of itself and other holders of shares of the defendant Trust and Agency Co. of Australasia, Ltd., in respect of which sums have been paid in advance of calls, and certain other defendants are directors of the company. The claim in the writ is for a declaration that the defendant company is bound to deduct income tax from the interest payable by the defendant company on sums received by it in advance of calls on ordinary shares of the company, and that any agreements to the contrary between the company and the holders of such shares, or any of them, is illegal and void. The reference to illegality and avoidance is, of course, a reference to the provisions of the Income Tax Acts, now found in All Schedules Rules, r. 23 (2), which superseded the Income Tax Act, 1842, s. 103. The circumstances in which the relief is sought are these. The company was incorporated so long ago as Nov., 1860. Its capital was originally £500,000, divided into 50,000 shares of £10 each. They were the only shares, and I will call them ordinary shares. That capital was from time to time increased. It was first increased in Feb., 1883, to £1,000,000, by the creation of 50,000 5 per cent. cumulative preference shares of £10 each. It was then increased in Dec., 1884, to £1,250,000, by the creation of 25,000 new ordinary shares of £10 each. It was further increased in Dec., 1856, to £1,500,000, by the creation of 25,000 further similar preference shares, and finally in Feb., 1893, it was increased to £2,000,000 by the creation of 25,000 further preference of £10 each and 25,000 further ordinary shares of £10 each. The only article I need refer to in the original articles of association is art. 6, which has given rise to the question before the court:

> The directors may, if they think fit, receive from any of the shareholders willing to advance the same the remainder of the capital subscribed for by them beyond the sums actually called up on their respective shares, and, upon so much of the moneys so paid, as from time to time shall exceed the amount of the calls then made upon the shares in respect of which such advance has been made, such shareholders shall be entitled to interest at the rate of 6 per cent. per annum.

That article stood until the year 1885, when it was altered by a special resolution of the company, which provided:

> That the following words be added to art. 6 in the articles of association following upon the words "at the rate of 6 per cent. per annum," "or at such lower rate

> as they and the directors may agree upon, but nothing herein contained shall alter or affect the rights and position of any persons who hold or shall hold shares as to which interest is now payable at the rate of 6 per cent. per annum upon capital paid beyond the sums actually called up on such shares."

That article remained until the year 1908, when new articles, in the modern form, were as a whole substituted for the old articles. By these new articles, it was provided by art. 5 in relation to the capital of the company as follows. First, it stated what the existing capital of the company was, as I have already given it. It then set out the position with regard to the preference shares and continued :

> At the date of the adoption of these articles, 87,500 of the preference shares are issued and are fully paid, and 87,500 of the ordinary shares have been issued, and the sum of £1 a share has been paid up thereon, but on 45,021 of such ordinary shares £9 a share or £405,189 in the aggregate, has been paid up in advance of calls and carries interest at various rates not exceeding 6 per cent. per annum.

By art. 22 :

> The directors may if they think fit receive from any member willing to advance the same all or any part of the money due upon the shares held by him beyond the sums actually called up thereon, either as a loan repayable or as a payment in advance of calls, but such advance, whether repayable or not, shall, until actually repaid, extinguish, as far as the same shall extend, the liability upon the shares in respect of which it is advanced, and upon the money so received, or so much thereof as from time to time exceeds the amount of the calls then made upon the shares in respect of which it has been received, the company may pay interest at such rate as the member paying such sum and the directors have agreed upon or may hereafter agree upon.

It is clear from the statement in art. 5 of the modern articles that the power contained in the original art. 6, and that article as altered, had been very largely exercised, so that a sum amounting in the aggregate to £405,189 had been paid by members in advance of calls. Except for a year, or half a year, at the very beginning of the company's existence, the company has consistently paid the whole of the interest due in respect of those calls, without deduction of tax, and the question for the court is whether it has rightly so done ; and, further, whether it is empowered to go on paying interest without deduction of tax. No question here arises as between the company or any shareholders and the directors with regard to any past payments. Nothing I am going to say in this case must be regarded as in any way fixing any liability upon the directors in respect of such past payments. But I must, for the purpose of determining this case, consider what are, and have at all times been, the rights of the parties under the documents as they are brought before me.

The question really falls into two parts. First, I have to consider what are the rights of the parties with regard to payments made by the company in respect of which, so far as the documents go, the bargain was to pay 6 per cent. interest. Then I shall have to consider what are the rights of the parties in respect of those payments where 4 per cent. free of income tax, or 3 per cent. free of income tax was expressed to be the interest payable. The position as stated in the evidence is this. It appears that for a short time interest at the rate of 5 per cent.

was paid in respect of certain advances. In para. 17 of the affidavit of Mr. Noel it is stated that:

> The interest at the rate of 5 per cent., and subsequently at the rate of 6 per cent. per annum paid down to Dec., 1864, on the sums paid in advance of calls on the shares in the original capital of the company for the time being issued was paid subject to deduction of income tax, but interest at the rate of 6 per cent. per annum on the said sums for the 6 months ending on June 30, 1865, was paid free of tax. A

He says:

> There is nothing in the records of the company to indicate why the said interest for the 6 months to June 30, 1865, was paid free of tax and not subject to deduction of tax, but the company has ever since that period continued to pay interest on all sums received in advance of calls prior to the year 1884 at the rate of 6 per cent. per annum without deduction of income tax. B

The bargain between the parties, so far as it is to be found in any document, is to be found in a circular dated June 6, 1864. It contains this statement:

> I am to remind you that the sum of . . . stands to your credit in the books of C the company, as money paid in advance of calls. On this amount interest to 30th instant will accrue . . . the rate will be increased to 6 per cent. per annum to be paid in priority to dividends.

That was in accordance with the articles, for the articles authorise nothing more than the payment of 6 per cent. interest, and it is quite clear that an authority to pay 6 per cent. interest is an authority to D pay 6 per cent. and no more. If the obligation imposed on the company is to pay 6 per cent., it discharges its obligation by paying 6 per cent. less income tax, for the law imposes upon the payer of interest the duty to deduct income tax at the current rate and to account for it if he has to account for it, to the revenue authorities. The company is E not entitled to pay a larger sum than 6 per cent. interest—namely, such a sum as after deduction of income tax will leave a clear rate of 6 per cent. Accordingly, unless some new bargain was made, superseding the authority of the articles, and substituting for the maximum rate of 6 per cent. a higher rate, the payment of that higher rate cannot be justified. Of F such a bargain there is no shred of evidence whatsoever. But I am asked to presume, and it is said I must presume, that such a bargain was made, for otherwise I am compelled to adopt the alternative view, which is said to be a fantastic view, that all this time a mistake has been made. But, if I have to adopt one or other of these alternatives, I have no G hesitation in adopting the latter one, and in saying that this payment of a higher rate of interest than was justified by the articles, or than appears to be justified by any document which is before me, was due to a mistake made first in the year 1865, repeated in the following years, and so perpetuated. I see nothing improbable, much less fantastic, in H such a thing being done, but I do see great improbability, and indeed something fantastic, in suggesting that some bargain was made binding on the corporators and binding on the company by which there was substituted for the article rate of 6 per cent. some higher rate. Of that, as I say, there is no shred of evidence. On the contrary, although it is not conclusive, I think it is of utmost importance in considering it that, when, in 1885, the article was altered to provide for a lower rate, but nevertheless preserving the rights of those with whom a bargain had been made to pay a higher rate, to which reference is made, the resolution was as follows:

A Nothing herein contained shall alter or affect the rights and position of any persons who hold or shall hold shares as to which interest is now payable at the rate of 6 per cent.

Upon the facts before me, I find it impossible to make any presumption of such a bargain as would justify payment at a higher rate than 6 per cent. B I shall, I hope, when it is necessary, give due weight to the maxim *omnia acta præsumuntur rite esse acta* which was pressed on me, but I say that on the facts of this case I find no obligation to apply such a maxim, finding sufficient explanation of what was done in an error easily made and easily perpetuated. Accordingly, so far as the 6 per cent. payments are concerned, C I hold that the payment of 6 per cent. free of tax was not justified in the past, and cannot be made in the future.

I now come to the other part of the case, namely, those payments in respect of which interest at the rate of 4 per cent. free of tax was made. The position in regard to those payments is this. D I think it is common ground between the parties that, unless I can find, upon the true construction of the document on which the bargain was founded, that that bargain is not truly an agreement to pay 4 per cent. free of tax, but an agreement to pay such a sum as after deduction of tax will amount to 4 per cent., the payment which has been made is equally unjustifiable. E For that purpose, I must look at certain of the documents. In May, 1885, the company made an offer to pay interest on sums paid by shareholders in advance of calls. These are the terms. There is a circular addressed to the shareholders:

In view of the unanimous resolve of the shareholders in special general meeting F to alter art. 6 so as to enable the directors to accede to the continuous applications of shareholders to pay up capital beyond the amount actually called up on their shares, the directors desire to state that, upon confirmation of the resolution passed on the 14th instant, they will be prepared to accept payment of shares in full, such payments to bear interest at the rate of 4 per cent. per annum to be paid free of income tax and in priority to dividend.

G That is the offer. It is followed by an explanatory statement, which I will read, because it was much relied upon by the defendants in this case:

For 21 years past the dividend on the capital called up (£1 per share) has been at the rate of 20 per cent. If to such dividend the interest at 4 per cent. on the capital uncalled (£9 per share) be added, both paid free of income tax, it will be found that the dividend and interest payable upon each fully paid share of £10 will together amount to £5 12*s*. per cent.; if freedom from income tax be taken H into account to nearly £5 15*s*. per cent.

Those were the terms of the offer, and annexed to the circular there is a form of application which, I assume, was the form used by the shareholders. It is in these terms:

Gentlemen, Referring to your circular letter of May 21, 1885, I desire to pay up the remainder of the capital uncalled upon . . . shares of the company standing

> in my name, and request that you will send me the necessary pay note to accompany the remittance to the company's bankers. It will be convenient to me to make the payment on or about the . . . next.

That, then, was the offer, and that was the acceptance. It seems to me quite plain that it was an offer and an acceptance to make payments in advance of calls, upon the terms that interest would be payable upon the advances so made at the rate of 4 per cent. per annum free of tax. That is the contract. There is no informality about it at all. I am wholly unable to find in the explanatory statement anything which would justify me in saying that, on the true construction of this document, it is not an agreement to pay interest at the rate of 4 per cent. per annum free of tax, but is an agreement to pay interest at such a rate, as, after deduction of income tax, would leave a clear rate of 4 per cent. Much reliance was placed upon the so-called informality of the document. I find nothing informal in the document at all. It is a formal document containing a letter of offer and a letter of acceptance. The argument on informality was, I think, directed to *Burroughes* v. *Abbott* (1), which came before P. O. LAWRENCE, J., and *Jervis* v. *Howle* (2), which came before CLAUSON, J. In both of those cases the question which had to be determined was whether there could be rectification of a formal deed, which had been executed, in the one case, to carry out an order of the Divorce Court, and, in the other, to give effect to an undoubtedly informal memorandum which the parties had themselves prepared. In both those cases, the judges came to the conclusion that they would be justified, as a matter of rectification, to alter the document to give effect to what they found was the intention of the parties. Nothing that I say now is in conflict with those decisions, nor is it necessary for me to distinguish them. I am in no way concerned here with a case of rectification but only with the question of what is the meaning of the document before me. It appears to me to be quite plain that the document before me means exactly what appears upon its face, namely, an agreement to pay interest at a certain rate free of tax. If it is such an agreement, then, so far as it provides for payment free of tax, it is avoided by the provisions of the Income Tax Acts. It follows that, with regard to the payments made at the rate of 4 per cent. or 3 per cent. free of tax, those payments were and are unjustifiable, and that the company can no longer make such payments without deduction of tax. The final payments which were made were made not on the faith of any circular containing such an explanatory statement as that which I have read, but *simpliciter* on an agreement for payment of interest free of tax. The argument put forward with regard to this was that the company had adopted the practice then so well known and established that it must be presumed that with regard to such payments also the bargain between the parties was that it should be the payment of such a sum as after deduction of tax should leave a clear sum of so much. There is not a shred of evidence which would justify me in coming to such a conclusion, and I cannot give effect to such an argument. Accordingly I propose, as this matter is treated as the trial of the action, to make a declaration in accordance with the writ. There will be an injunction to restrain the company from paying interest without deducting income tax.

Solicitors: *Pritchard, Englefield & Co.* (for the plaintiff); *Slaughter & May* (for the defendant company and the directors): *Norton, Rose, Greenwell & Co.* (for Foreign and Colonial Investment Trust Co., Ltd.)

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

R. *v.* WORTHING BOROUGH COUNCIL AND HORSHAM AND WORTHING ASSESSMENT COMMITTEE, *Ex p.* BURGESS. R. *v.* HORSHAM AND WORTHING ASSESSMENT COMMITTEE, *Ex p.* BURGESS.

[King's Bench Division (Lord Hewart, L.C.J., Humphreys and Singleton, JJ.), **April 29, 30, 1937.**]

Rates and Rating—Quinquennial valuation list—Amendment of current valuation list—Numerous hereditaments wrongly valued in current list—No change in conditions effecting general rise in values—Revaluation by rating authority—Whether new list—"Person aggrieved"—Rating and Valuation Act, 1925 (c. 90), *s.* 37 (1), (3).

A borough council, as the rating authority for the borough, duly caused a draft valuation list to be prepared under the Rating and Valuation Act, 1925. Objections to the list were heard and the list came into force on Apr. 1, 1934. The borough council had lodged no objections to the draft list. In Nov., 1934, the county valuation committee informed the borough council that it was not satisfied that the new valuation list complied with the requirements of the Act in relation to gross values. The borough council upon investigation was satisfied that many assessments of shops, houses and flats in the borough were inaccurate, and a revaluation of a large number of premises was accordingly carried out with a view to proposals being made to bring the revised valuations into effect as from Apr. 1, 1935. In due course certain proposals were made in the name of the borough council. Objections were lodged and disposed of by the assessment committee, and a large number of increased values was sanctioned. A ratepayer sought to have the assessment committee's decision quashed on the grounds that (i) no such proposal for the amendment of a valuation list could lawfully be made under sect. 37 of the Act of 1925, (ii) sect. 37 did not empower the rating authority to make a general revaluation of its district to take effect during the currency of a quinquennial valuation list, and (iii) the rating authority could not be "aggrieved" within sect. 37 of the Act of 1925:—

Held: (i) as the revaluation involved only the correction of inaccuracies in the list at the time the list was made, and did not create a new list on account of a change in social conditions effecting a general rise in values, the provisions of sect. 37 of the Act of 1925 had been duly complied with.

(ii) no general revaluation of the rating authority's district had in fact been made.

(iii) the rating authority could be "aggrieved" by its own valuation list, within the meaning of sect. 37 (1), as sect. 37 (3) expressly referred to proposals "made by or served on" the rating authority.

[EDITORIAL NOTE. This case considers how far a revaluation of property can be made during the course of a quinquennial period, and confirms the principle that any such revaluation must be based upon the fact that the valuation of the property is wrong having regard to its value at the beginning of the period, and not to some subsequent alteration in value. Rating authorities have in practice made proposals under sect. 37, and this practice is here confirmed.

As to Revision of Current Lists, see HALSBURY, Supp., Vol. 24, Rates and Rating, para. 93; and for Case, see DIGEST, Supp., Rates and Rating, No. 1161*a*. For the Rating and Valuation Act, 1925, s. 37, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 14, pp. 665-667.]

Cases referred to:

(1) *Camberwell Assessment Committee* v. *Ellis*, [1900] A.C. 510; 38 Digest 642, *1601*; 69 L.J. Q.B. 828; 83 L.T. 201.

(2) *R.* v. *South-Eastern Essex Assessment Committee, Ex p. Patterson* (1935), 153 L.T. 152; Digest Supp.

Application to make absolute (i) a rule *nisi* for *certiorari* directing the removal into this court of a certain decision made on the proposal of the borough council of Worthing as rating authority on Mar. 4, 1937, to increase the assessment of the hereditament occupied by one Florence Minnie Burgess from gross value £12 and rateable value £7 to gross value £18 and rateable value £11, which decision fixed the gross value at £15 and the rateable value at £9; (ii) a rule *nisi* for *certiorari* directing the removal into this court of all decisions made on proposals of the said borough council as rating authority in pursuance of the resolutions passed by the rating and valuation committee of the rating authority on Dec. 14, 1934, and May 14, 1935; and (iii) a rule *nisi* for a writ of prohibition to prohibit the rating authority from proceeding with, and the local assessment committee from hearing and determining, any further proposals made by the said rating authority in pursuance of the said resolutions of the rating and valuation committee.

The grounds on which the rules were granted were that (*a*) no such proposal for the amendment of a valuation list could lawfully be made under the Rating and Valuation Act, 1925, s. 37; (*b*) sect. 37 did not empower the rating authority to make a general revaluation of its district to take effect during the currency of a quinquennial valuation list; and (*c*) the rating authority could not be "aggrieved" within the meaning of sect. 37 of the said Act.

F. J. Tucker, K.C., and *J. Scott Henderson* showed cause on behalf of the Horsham and Worthing Assessment Committee.

A. S. Comyns Carr, K.C., and *Michael Rowe* for the rating authority (Worthing Corporation).

A. M. Trustram Eve, K.C., and *G. D. Squibb* in support of the rule.

Lord Hewart, L.C.J.: After the passing of the Rating and Valuation Act, 1925, there was established in every county a committee of the county council called the county valuation committee. That statute provided by sect. 18 (2) as follows:

> It shall be the duty of every county valuation committee to take such steps as the committee think fit for promoting uniformity in the principles and practice of

> valuation and assisting rating authorities and assessment committees in the performance of their functions under this part of this Act, and for the purpose of the performance of the said duty the committee shall have power, either alone or in conjunction with county valuation committees for other counties, to hold conferences with persons representing assessment committees (including assessment committees for county boroughs), and to bring to the notice of any rating authorities or assessment committees any conclusions arrived at or recommendations made by the committee or at any such conference.

Then there follows this provision in sect. 18 (3):

> A county valuation committee may, either alone or in conjunction with any rating authority, assessment committee or other county valuation committee, appear as a party to any objection or appeal under this part of this Act.

That novel and most important element having been introduced by the passing of the Act of 1925, it came about that, in Nov., 1934, at a meeting of the rating and valuation committee at the Town Hall, Worthing, a letter, dated Nov. 3, from the clerk to the West Sussex council was submitted, stating:

> From information supplied by the county valuer, my committee are not satisfied that the new valuation list for the borough of Worthing complies with the requirements of the Act.

The letter enclosed a schedule of particular properties, exhibiting the difference between "the definition of gross value under the Act" and the assessment of particular properties in Worthing. The climax and purport of that letter was to suggest that a conference between the representatives of the county council and the Worthing council should be held to discuss the matter. That, it appears, was the inception of the course of events which developed into the present controversy. It was then resolved that certain named officials should be appointed to meet representatives of the county council for the purposes indicated in the letter, and that meeting was held. There follows in the records at Worthing the report of the town clerk upon the interview between the representatives of the committee and the county valuation committee on Nov. 30. The words which are used are of some little importance:

> According to the report presented and received, it was agreed that a revision and a consequent increase of many of the assessments at Worthing were necessary in order to bring them within the definition of gross value under the Rating and Valuation Act, 1925.

Now, that definition of "gross value," which appears in sect. 68 of the Act of 1925, is in the following terms:

> "Gross value" means the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

It is manifest, therefore, at the outset, that what was being considered by the borough of Worthing was not a suggestion for the making of a new valuation list, because of some general consideration, such as a general rise in the annual value of the properties, but a suggestion for a detailed revision of the current list because of specific incorrectness in the case of a series of individual hereditaments. That resolution having been arrived at, the appropriate steps were taken. It is not necessary to detail the course of them. It appears, from the affidavit of Mr. Allerton, the town clerk of the corporation of Worthing, and elsewhere, that there followed an effort to arrive at the correct valuation of many premises. Indeed, in order to see with clearness where the errors lay, there was what is called a revaluation of certain classes of premises. The premises which were taken first were shops, and, as a result of the examination which was made, there was a series of proposals relating to the shops, involving a very considerable increase in the rateable value, those proposals being put forward in the name of the council of the borough of Worthing. Then there followed an examination of the assessments of houses and flats, and certain investigations were made. Afterwards, as a result of those investigations, which disclosed, not the need for the application of a new principle, nor anything whatever of a general or universal kind, but only the need for particular corrections in the case of many individual hereditaments, matters came before the assessment committee, proposals were made, and, in a great many cases, there was a revision of the list. In those circumstances, it is said that there was, in the decisions which were made by the assessment committee, an excess of jurisdiction, or usurpation of jurisdiction, because in various respects the requirements of the Act of 1925 had not been complied with.

It is first of all alleged that no such proposal as is here being dealt with for the amendment of a valuation list could lawfully be made under sect. 37 of the statute. Sect. 37 (1) provides:

> Any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force, or by the inclusion therein or omission therefrom of any matter . . . may make in manner provided by this section a proposal for the amendment of the list (in this section referred to as "a proposal") . . .

Then it is provided by subsect. (2) that every proposal under this section:

> must (*a*) be made in writing and, . . . (*b*) specify the grounds on which the proposed amendment is supported.

Then sect. 37 (3) says:

> The rating authority shall, within seven days after the date on which the proposal is made by or served on them, transmit a copy thereof [in the manner provided by this section].

Those formalities having been complied with, the statute, by sect. 37 (7), enacts that the assessment committee:

> shall hear and determine any proposal as if it were an objection to a draft list, and all the foregoing provisions of this part of this Act relating to the hearing and determining of such an objection shall apply accordingly.

The real pith of the criticism directed against what is done is the proposition that, under the pretext or form of making provisional corrections in an existing valuation list, the authorities referred to in this rule in fact contrived, contrary to the provisions of the Act, to produce a new valuation list within the quinquennium. Great stress has been laid upon the decision of the House of Lords in *Camberwell Assessment Committee* v. *Ellis* (1), but I cannot help thinking that this decision, when it is carefully considered, renders no support to the argument which has been founded upon it. What was being dealt with A there, in the year 1900, long before the passing of the Rating and Valuation Act, 1925, and long before the creation of county valuation committees, was the Valuation (Metropolis) Act, 1869, which, so far as the rating of the metropolis was concerned, undoubtedly contained special and rigorous provisions. What *Camberwell Assessment Committee* v. B *Ellis* (1) decided was that, on the provisions of the Valuation (Metropolis) Act, 1869, in order to justify :

> an alteration of the quinquennial valuation of a hereditament by a supplemental or provisional valuation list—

the persons who sought to alter the assessment had to prove not only C that there had been "an alteration in the annual value of the hereditament," but also that the cause of that alteration was one directly affecting "the assessable value of that particular hereditament." That conclusion was founded upon the specific provisions, and indeed the precise vocabulary, of the Valuation (Metropolis) Act, 1869. It is to be observed D that the EARL OF HALSBURY, L.C., having carefully examined the relevant provisions of the statute, and having shown that it was not enough, for example, to allege a general rise of the annual value of a particular class of property, says at p. 520 :

> I will only say that in giving judgment in this case I am simply endeavouring to give judgment upon these facts alone. I lay down no general proposition of law E beyond this—that the statute has to be construed in each case and applied to the circumstances of each case. It appears to me that anything more dangerous, even if it were possible, than to lay down exactly where you are to draw the line it would be difficult to conceive.

Mutatis mutandis, those words, if I may respectfully say so, seem to me eminently applicable to the present case. We are dealing with a different F statute, we are dealing with different circumstances, and it is necessary to construe this statute and apply it to the circumstances of this case. A little later, at pp. 524, 525, LORD ROBERTSON added these words :

> The general scheme of the Act is that the valuation is to stand for five years, irrespective of fluctuations of general value which may occur during that period. But the legislature also deals with the case of individual hereditaments, the value G of which happens to have been altered, not by general economic or social change, but by change in their own individual conditions affecting value.

In my opinion, it is quite clear that the subject matter which was there being dealt with, and dealt with under a different statute, was not only not like, but wholly different from, the subject matter of the present H case. Nobody here suggests that the *causa causans* of the action complained of was, or was believed to be, a fluctuation of general value, occurring after the bringing into force of the valuation list. Nobody suggests that the individual hereditaments here referred to were being reconsidered because it was said that the value had been altered by general economic or social change. The topic of change, and of value

affected by change, having arisen, is not even approached in the present case. What is said here is that, *rebus sic stantibus*, the valuation list discloses a series of instances where there has been an incorrect assessment of the value of the particular hereditament at the time referred to, not that something either of a particular or of a general nature has since happened which makes it necessary or desirable to revise the former A
valuation. That seems to me to be a difference, not merely of degree but of kind. Although, of course, all the general observations contained in the judgments to which our attention has been directed have their proper force and effect, the decision in that case seems to me to help us very little in the decision of the present case. It is perfectly true, as B
Mr. Trustram Eve has reiterated, and very properly reiterated, that, in the statute of 1925, the provisions of sect. 37, relating to incorrectness, and giving to various persons large powers to deal with incorrectness in a current valuation list, are to be found in a statute which has already provided for the making of, and the operation of, a new valuation list. C
That, of course, is obvious; but I cannot follow the conclusion which is suggested, that, because in this statute you find, in sect. 19, provisions relating to the making and operation of a new valuation list, therefore the plain meaning of sect. 37 must be cut down. It seems to me, if I may say so, with all due respect to the able argument we have heard, D
that those two sections can perfectly well live side by side, and that what has been done here comes within them. First of all, sect. 19 provides that a new valuation list shall be made, to come into force on a day named; then, that a second valuation list shall be made, to come into force on Apr. 1 in another year, and thereafter a new valuation list shall E
be made from time to time, so that the interval between the dates on which one valuation list and the next succeeding valuation list respectively come into force shall be a period of 5 years. But in the very same statute you find the remedial provisions of sect. 37, whereby any person, including this newly contrived body, the county valuation committee, F
and any local authority, who is aggrieved by the incorrectness of any matter in the valuation list for the time being in force, may make a proposal, and, when that proposal has been made, it must be determined by the assessment committee.

The argument against this group of proposals has at various moments G
taken to itself different forms. At one moment it seems to be said that there were a great many of these proposals. There were, indeed. But, to return again to the able affidavit, if I may so describe it, of Mr. Allerton, I cannot help thinking that there is great force in what he says in para. 17 (3), (4), that it is the duty of the council, as rating authority, H
and its right, as ratepayer, to secure uniformity and correct valuation for all classes of hereditaments throughout the borough, and that, in the prosecution of its said duty, or of its said right, it is immaterial whether it is necessary to make proposals in respect of a few or many or all of the hereditaments in the borough.

Next, it is said, not only are these proposals many in number, but in
kind they are of such a nature as to involve, taken all together, the
creation of a new valuation list. But why ? To repeat what I indicated
a moment ago, nowhere is it suggested that something had happened to
increase the gross value of any of these hereditaments. Nowhere is it
A suggested that some general and comprehensive principle should now be
applied. All that is said is, when you look at the facts, it appears that
the gross value for the purposes of the Rating Act has been incorrectly
ascertained and stated. That is not a question of far-reaching principle :
that is a question of precise, specific and particular detail. It seems to
B me that to revise the errors traceable to that source is removed by the
whole width of the heavens from the making of a new valuation list,
a process which, if it were undertaken, would require the fulfilment of
the very particular provisions provided for by the statute. Taking the
view, then, that what was here done was not, in truth, any more than
C in form, the making of a new valuation list, or a circuitous attempt to
prevent the current valuation list from persisting for the appropriate
course of 5 years, I think that there is no ground for the first of these
allegations, that a proposal of this nature for the amendment of the
list could not lawfully be made. In my opinion, having considered the
D facts and the arguments in this case, it appears to me that here the provisions
of sect. 37 were duly complied with.

The second ground is really a re-statement, in slightly different terms,
of the first ground. It is said that sect. 37 of the Act of 1925 did not
empower the rating authority to make a general revaluation of its
E district, to take effect during the currency of the quinquennial valuation
list. That proposition is of the nature, if I may respectfully say so, of
a *petitio principii*. The rating authority was not engaged upon any
such enterprise as the making of a general revaluation to take effect
during the currency of the quinquennial valuation list. What was being
F done in the matter of revaluation was to ascertain what the true gross
value of the groups of hereditaments was, in order that with all due
promptitude there might be a correction of the errors which had been
made. I am not in the least attracted by the argument, from the ratepayers'
point of view, of the possible utility of error, or the importance
G of prolonging its life. If errors are made, it is desirable, if it is possible,
that they should be speedily corrected. Nor am I in the least alarmed
by the suggestion that, if this course can be taken, there might be an
infinite series of fussy interferences and needless revisions, year in and
year out, at the hands of unwise and foolish authorities. I am not aware
H that such authorities exist, but I am not going to assume that any
authority, corporation or assessment committee, rating authority or
county valuation committee, is intentionally going to seek to apply the
provisions of this Act otherwise than in the spirit and for the purposes
of the Act. That second ground therefore seems to me to be a restatement
of the first, and to be subject to the same observations.

Finally, it is said that in any event the rating authority could not be aggrieved within the meaning of the Rating and Valuation Act, 1925, s. 37. Now the rating authority which is there referred to is the corporation of Worthing, in whose name these proposals were originally put forward. That local authority is, under the Act of 1925, a rating authority. "Local authority," in sect. 37 and elsewhere, means : A

> any body having power to levy a rate or to issue a precept to a rating authority.

There are various observations to be made upon this ground specified in the rule. As was pointed out in the course of the argument, by sect. 37 (3) it is provided : B

> The rating authority shall, within 7 days after the date on which the proposal is made by or served on them, transmit a copy thereof.

It is clearly contemplated that the proposal there being dealt with may be a proposal, not served upon the rating authority, but made by the rating authority. But, when the proposal is made, the whole matter C is still in process of being developed. The proposal does not mature into an obligation on the ratepayer until the assessment committee has approved. I see no difficulty in taking the view that the rating authority which makes the proposal, or the county valuation committee itself, might not be aggrieved by the formal ratification of that which, in its D inception, was merely a proposal. I do not find any support in the case to which reference has been made, *R.* v. *South-Eastern Essex Assessment Committee, Ex p. Patterson* (2), for the proposition that a rating authority, in such circumstances, cannot be a person aggrieved. Rather I think it tends the other way. I feel no doubt that, in the circumstances of E this case, and in view of the provisions of this Act, it was quite open to this rating authority to appear as, and to be treated as, a person aggrieved, within the meaning of the section.

In my opinion, on a fair view of what has happened here, notwithstanding the number of hereditaments which within one period has F been dealt with, it is wrong to say that there has been an attempt, successful or not, to make a new valuation list. There has been undoubtedly, on a large scale admittedly, in a considerable number of instances, a correction of a former incorrectness, but, I think, for the reasons contemplated by this statute, and I see nowhere any sign of excess or usurpa- G tion of jurisdiction. I think, therefore, that this rule ought to be discharged.

HUMPHREYS, J. : I agree that the rule ought to be discharged, and, as I also agree with the reasons for that decision which appear from the judgment of LORD HEWART, L.C.J., there is nothing which I can H usefully add.

SINGLETON, J. : I agree and, in view of the judgment of LORD HEWART, L.C.J., I wish to add only a few words. The object of all rating is to secure uniformity. That is shown by an examination of the

Union Assessment Act, 1862. The principle is carried further, and, indeed, is extended, by the Rating and Valuation Act, 1925, the title to which includes the words "to promote uniformity." Sect. 18 of the Act of 1925 establishes a new body, called the county valuation committee; and it is clear from sect. 18 (2), (3), that the purpose of the setting up of the county valuation committee is to promote uniformity in the principles and practice of valuation. The same object is shown in the constitution of the central valuation committee, by sect. 57 of the Act. Sect. 19 deals with the making of the first and subsequent valuation lists, and provides:

> And thereafter new valuation lists shall be made from time to time, so that the interval between the dates on which one valuation list and the next succeeding valuation list respectively come into force shall be a period of 5 years.

There thus came into existence quinquennial valuation lists for the whole of the country. Sect. 37 of the Act deals with "revision of current lists." A right to make a proposal for the amendment of the list is given to:

> any person (including the county valuation committee and any local authority) who is aggrieved by the incorrectness or unfairness of any matter in the valuation list for the time being in force.

I read no further. By sect. 37 (7), the assessment committee must hear and determine any proposal as if it were an objection to the list. In the present case, the county valuation committee formed the view that a great number of assessments within the area of the Worthing rating authority were wrong, in that they were too low, and, consequently, were unfair and incorrect. In those circumstances, it was its duty, under sect. 18 (2), to take such steps as it thought fit to promote uniformity in the practice of valuation, and to assist the rating authority. It took such steps. It held a meeting with the rating authority, and it allowed the rating authority the help and advice of the county valuation officer. The rating authority adopted the view of the county valuation committee after full examination, and after having valuations made. Nothing is said against its good faith. It might have taken a different view; but it saw that a great number of the values in the valuation list were too low and it sought to have them put right. It adopted the procedure laid down by sect. 37 of the Act. If the proposals had been the proposals of the county valuation committee, I do not see that any objection could have been taken. Certain duties are put upon the county valuation committee by the statute and, if it had become necessary for it to lodge proposals in order to promote uniformity, it would clearly have been within its rights. That applies whether it was one proposal or many thousands of proposals, so long as it was taking such steps as it thought fit for promoting uniformity in the principles and practice of valuation. That, I think, is sufficient to dispose of this case, for the issue of the writ is discretionary, and clearly the court ought not lightly to interfere, merely on the ground that the proposal was made by the wrong party, if the correct result has been obtained.

Further, I think the point that the rating authority could not make a proposal fails. The proposal was in fact in the name of the local authority, and the local authority as a ratepayer itself might be aggrieved within sect. 37. In saying this, I do not intend to say anything which might be construed as meaning that the rating authority as a rating authority can make a proposal for the amendment of the list. The right A given by sect. 37 is in general terms, and is to any person :

> who is aggrieved by the incorrectness or unfairness of any matter in the valuation list.

The provision is quite different from that which has been referred to in the Valuation (Metropolis) Act, 1869, s. 47. The argument that what B took place was the making of a new valuation within the quinquennial period fails on the facts. No new list was made, but a very large number of amendments were made to the current list. If something was done which was in fact the making of a new list, it might well be said to be contrary to the spirit of the Act, and, in particular, to that of sect. 19, C but that did not take place. There is no need to consider such a case unless and until it arises, and it may then turn out really to be a question of fact. No doubt assessment committees in general will not encourage wide departures from the system of quinquennial valuation. It is always open to an objector, on the hearing of a proposal to amend, to D point out that there has been no change, and that the rating authority ought not to be allowed to claim a new figure. That is a matter for the assessment committee, whose duty it is in a proper case to determine whether or not there is incorrectness or unfairness.

Mr. Trustram Eve argued further that sect. 37 of the Act cannot be E applied unless the assessment has become unfair, in other words, that it cannot be used to correct what was wrong in the original valuation list, and he relied on sect. 20 of the Act in support of his argument. I find nothing in sect. 37 to lead me to take that view. The section is drawn in the widest possible terms. It is not without interest to note that the F learned editor of the last edition of RYDE ON RATING, p. 670, takes the same view. Having dealt with the position under the Valuation (Metropolis) Act, 1869, he adds :

> Outside London there are no such restrictions : any matter which might have been raised either by a ratepayer or by the rating authorities by way of an objection to G the draft list may be raised by way of a proposal for the amendment of the valuation list for the time being in force.

That, I think, correctly states the position.

Rules discharged with costs.

Solicitors : *Waller, Neale & Houlston*, agents for *Marsh & Ferriman*, H Worthing (for the assessment committee) ; *Sharpe, Pritchard & Co.*, agents for *J. Kennedy Allerton*, Town Clerk, Worthing (for the rating authority) ; *Boxall & Boxall*, agents for *Edwin Boxall & Kempe*, Brighton (for the applicant).

[*Reported by* MICHAEL MARCUS, ESQ., *Barrister-at-Law.*]

Re BALLARD'S CONVEYANCE.

[CHANCERY DIVISION (Clauson, J.), **March 16, 17, 18, April 6, May 3, 1937.**]

Sale of Land—Restrictive covenants—Land benefited—Conflicting clauses in deed—Land too extensive to be benefited.

A conveyance imposing restrictions on property contained a covenant by the vendor "her heirs and assigns and successors in title owners from time to time of the Childwickbury Estate." In cl. 7 of the restrictions the vendor was defined to include the "successors in title owners of any part of the above-mentioned estate for the time being remaining unsold." The restrictions were not such as could be for the vendor's own benefit, nor was there a building scheme. The Childwickbury Estate extended to some 1,700 acres, and the restrictions could not benefit the whole of that estate. The Childwickbury Estate had been subsequently conveyed without reference to the restrictions:—

HELD: (i) the property for the benefit of which the restrictions were imposed was the whole of the Childwickbury Estate.

(ii) the restrictions being the usual building restrictions could not possibly benefit the whole of so large an area and were unenforceable.

[**EDITORIAL NOTE.** It is the general practice now in conveyances to define as particularly as possible the land to be benefited by restrictive covenants. In the present case the matter has to be determined from conflicting passages in the conveyance, and the case turns upon the construction of these terms. The latter are, however, terms very generally employed in conveyances.

AS TO LAND BENEFITED, see HALSBURY, 1st Edn., Vol. 25, pp. 456, 457, paras. 830, 831; and FOR CASES, see DIGEST, Vol. 40, pp. 311-314, Nos. 2659-2675.]

Cases referred to:

(1) *Osborne* v. *Bradley*, [1903] 2 Ch. 446; 40 Digest 329, *2780*; 73 L.J. Ch. 49; 89 L.T. 11.

(2) *Rogers* v. *Hosegood*, [1900] 2 Ch. 388; 40 Digest 312, *2664*; 69 L.J. Ch. 652; 83 L.T. 186.

(3) *Prior's Case* (1368), cited in *Spencer's Case* (1583), 5 Co. Rep. 16*a*; 31 Digest 144, *2798*.

ORIGINATING SUMMONS asking for a declaration that no part of a certain freehold property situate at Harpenden in the county of Hertford, comprised in a conveyance dated June 28, 1906, made between Emily Harriet Ballard of the first part, Arthur Bird, Charles Hodges and Clare Henry Regnart of the second part, and Herbert Cassin Wright of the third part, is any longer affected by any of the restrictions contained in the said conveyance. In the alternative the summons asked for a declaration whether the said restrictions or any of them are now enforceable and, if so, by whom. The application was made under the Law of Property Act, 1925, s. 84 (2) and s. 203 (5). The facts and documents are fully referred to in the judgment.

Charles E. Harman, K.C., and *A. G. N. Cross* for the applicant.

Fergus D. Morton, K.C., and *E. M. Winterbotham* for the respondent.

CLAUSON, J.: This is an application by Herbert Cassin Wright for a declaration that the property comprised in a conveyance of July 28, 1906, executed in his favour by Mrs. Emily Harriet Ballard, is no longer affected by any of the restrictions contained in that conveyance, and that those restrictions are not now enforceable against him. The respondent to the summons is Childwickbury Stud, Ltd., which claims to be in a position to enforce the restrictions, should Mr. Wright seek to disregard them. A

The property in question consists of two closes of together about 18 acres, and it was, in Apr., 1906, put up for auction as Lots 2 and 3, with a property known as Bamville Farm, as Lot 1. Condition 8 of the conditions of sale provided that the several lots were sold and would be conveyed subject to certain scheduled conditions, and it was provided B that every purchaser should, in and by the assurance to him of the purchased property, enter into a proper covenant, framed so as to bind his representatives and assigns with the vendor and his heirs and assigns and successors in title owners for the time being of the Childwickbury Estate of Sir John Blundell Maple, deceased, the late owner, C to perform and observe the several conditions and stipulations so far as the same relate to affect or concern the purchased property.

The applicant was the successful bidder at the auction, and, by a conveyance dated June 28, 1906, the property was conveyed to him in fee simple by Mrs. Emily Harriet Ballard. From the recitals in the D conveyance it appears that Sir John Blundell Maple, who had died on Nov. 24, 1903, seised of the property, had, by his will of Nov. 24, 1897, devised his Childwick Estate and all other his lands and hereditaments in the county of Hertford to his wife (who had since his death become Mrs. Ballard) during her life; and by the conveyance Mrs. Ballard E was expressed to convey the property in exercise of her Settled Land Act powers. The property was described as having formed part of Bamville Wood Farm. The property was conveyed with the benefit of the conditions and stipulations set forth in the schedule, so far as the same related to or affected a certain piece of neighbouring land coloured green F upon the plan upon the conveyance (being in fact the land which had been put up for sale as Lot 1 at the sale at which the property Lots 2 and 3 had been purchased by Mr. Wright) in the event of and after the sale thereof to a purchaser or purchasers. The property was also conveyed subject to the same conditions and stipulations so far as they G related to, affected, or concerned the property so conveyed.

The conveyance contained a covenant in the following terms:

> The said Herbert Cassin Wright doth hereby covenant with the said Emily Harriet Ballard her heirs and assigns and successors in title owners from time to time of the Childwickbury Estate of the said Sir John Blundell Maple that he H the said Herbert Cassin Wright his heirs and assigns will perform and observe the conditions and stipulations set forth in the schedule hereto so far as the same relate to affect or concern the said premises hereinbefore expressed to be hereby conveyed.

As will appear later, the question which falls to be determined in this case is whether, in case of a breach, or threatened breach, by Mr. Wright of this covenant, relief, either at law or in equity, can be obtained against him by anyone, and, if so, by whom.

The schedule contains provisions, in a very familiar form, forbidding erection of buildings, other than a private dwelling-house, on the property, and forbidding erection of buildings, except garden or farm-buildings, otherwise than of red brick, and in conformity with plans, etc., previously submitted to, and approved of in writing by, the vendor or her surveyor; also provisions laying down the minimum value of the houses to be erected and the minimum area of land to be attached to each house; also provisions against user of the property, or any building erected on it, for certain specified purposes or for any purpose which shall be or tend to become a nuisance or annoyance to the vendor or the owners or occupiers of any other part or parts of "the above-mentioned estate" (an expression which I construe to mean the Childwickbury Estate mentioned in the covenant) or any of them, or for any trade or business; and condition 4 prescribes that any question as to the value of any house built or otherwise under or in connection with these stipulations shall be determined by the vendor's surveyor for the time being. Then follows a restriction against burning bricks and against permitting moveable dwellings and deposit of rubbish.

By condition 6 it is provided that nothing hereinbefore or in the conveyance contained is to oblige the vendor to enforce the foregoing stipulations or any of them in respect of any part of the property, or preclude her from waiving or varying, by licence or otherwise, such stipulations or any of them in respect of any part of the property, and she is to be at liberty, if she shall think fit so to do, effectually to release any part of the property from such stipulations or any of them.

Condition 7 provides that in these stipulations "the property" means the entire property shown in the plan (i.e., the property conveyed, and also Lot 1 already mentioned), and the expression "the vendor" is to be deemed to include Mrs. Ballard, her successors in title owners of any part of the above-mentioned estate for the time being remaining unsold, and the expression "the purchaser" includes Mr. Wright, his heirs and assigns.

It appears that at the auction at which Mr. Wright purchased the property as Lots 2 and 3, the remaining lot, already referred to as Lot 1, though knocked down to a purchaser, was not effectually sold, but remained in Mrs. Ballard's hands.

On Apr. 17, 1907, Mrs. Ballard sold and conveyed the whole of the land left to her by Sir John Blundell Maple and described in the will, with the exception of the piece of land already referred to as Lot 1, to one J. B. Joel, by a conveyance which contained no reference at all to the stipulations and conditions scheduled to Mr. Wright's conveyance, or to the covenants entered into with Mrs. Ballard by Mr. Wright. After the conveyance to Mr. Joel, the only land in the neighbourhood in which Mrs. Ballard retained any interest was Lot 1.

In the year 1908, Mrs. Ballard sold and conveyed Lot 1 to a purchaser in whose conveyance there was, as it would seem, no reference to the stipulations and conditions, or to Mr. Wright's covenant.

Mrs. Ballard died in or about the year 1919. On June 26, 1919, Mr. Joel conveyed to the respondent company, the Childwickbury Stud, Ltd., the whole of the property conveyed to him by Mrs. Ballard. A

In this state of facts, Mr. Wright applies to the court under the Law of Property Act, 1925, s. 84, making the Childwickbury Stud, Ltd., respondent, for a declaration that no part of the property in question is any longer affected by any of the restrictions contained in the conveyance of June 28, 1906, or, in the alternative, that it may be declared B whether the said restrictions, or any of them, are now enforceable, and, if so, by whom.

In *Osborne* v. *Bradley* (1), at p. 450, FARWELL, J., classified such covenants as that now in question as falling under three classes : (i) where the covenant is entered into simply for the vendor's own benefit ; C (ii) where the covenant is for the benefit of the vendor in his capacity as owner of a particular property ; and (iii) where the covenant is for the benefit of the vendor in so far as he reserves unsold property, and also for the benefit of other purchasers as part of what is called a building scheme. D

It appears to me to be reasonably clear that the covenant in the present case does not fall within the first class. It is not a covenant entered into simply for the vendor's own benefit ; it is one entered into for the benefit of the vendor in her capacity as owner of some property or other. If the covenant had to be construed as falling within the first class, it E is not easy to see how there could be any action based upon it in respect of a breach occurring after the covenantor's death. That, however, is not a point which I need pause to consider.

I gathered that it was not suggested in the present case that the covenant could be treated as falling within class (iii). It is possible that F there was an idea, when Lot 1 was put up for sale with the property now in question, to have some kind of "local law" governing this property and Lot 1 ; but the sale of Lot 1 proved abortive, and on its resale no attempt seems to have been made to subject it to any such local law. The present case proceeded, in my opinion rightly, on the G footing that the considerations which apply in the case of a covenant falling within class (iii) are absent from the present case.

I thus feel no doubt that the covenant with which I am concerned is to be construed as a covenant for the benefit of the vendor as owner of a particular property. The question as to who can be sued upon the H covenant, not being the actual covenantor, or, in the case of a breach by the covenantor, his personal representative, depends, or may depend, upon equitable consideration. When, however, the question is who can sue on such a covenant, the question becomes one of law in the strict sense. The covenant can be enforced by the covenantee while owner of the particular property in respect of which the covenant is taken; it can also be enforced by the person who becomes owner of that property by a title derived from the original covenantee, provided that the covenant is one which comes within the category of covenants the benefit of which can be made to run with the land, using that expression in the strict sense of running with the land at law.

The first question which arises for consideration is: What is the land for the benefit of which the covenant was taken? The next question will be: Is the intending plaintiff, who claims to enforce the covenant, seised of that land by title derived through or under the original covenantee? The remaining question will be: Is the covenant one which, in the circumstances of the case, comes within the category of a covenant the benefit of which is capable of running with the land for the benefit of which it was taken?

In the present case, the first question, namely, what is the land for the benefit of which the covenant was taken, is, on the documents and the facts, one of some difficulty. On reading the covenant itself, the answer would seem to be: "the Childwickbury Estate of Sir John Blundell Maple"; but, on turning to the eighth stipulation, it appears that in the stipulations the phrase "the vendor" includes Mrs. Ballard, her successors in title owners of any part of the above-mentioned estate for the time being unsold. A question of fact was raised as to whether the Childwickbury Estate included the piece of land which I have spoken of as Lot 1. The conveyance to Mr. Joel, already mentioned, was put in. It appears that Sir John Blundell Maple possessed two estates, one known as Childwick or Childwickbury, and one known as Ayres End. I am not satisfied that Bamville Farm, which comprised Lot 1, and also the property conveyed by Mrs. Ballard to Mr. Wright, was, at the date of the conveyance to Mr. Wright, part of either of those two estates. When Mrs. Ballard conveyed to Mr. Joel what is described in the conveyance to him as the Childwickbury Estate, the Childwick Estate and the Ayres End Estate were comprised in the conveyance, but Lot 1 was not so comprised, being shortly afterwards sold to another purchaser.

I do not think that I can fairly construe the phrase "Childwickbury Estate" in the conveyance to Mr. Wright as including Lot 1. I come to the conclusion, as the evidence stands, that the phrase indicates the property which was, at a later date, in fact conveyed to Mr. Joel as the Childwickbury Estate, and specifically described in detail in the schedule to the conveyance to him. I accordingly conclude that the land for the benefit of which the covenant was taken is the Childwickbury Estate, as I have indicated it, and there is no doubt that the whole of that land is now vested in the respondent company, Childwickbury Stud, Ltd., under a title derived ultimately from Mrs. Ballard, the covenantee.

It was suggested that I could read cl. 7 of the stipulations and con-

ditions in Mr. Wright's conveyance as confirming the operation of the covenant so as to restrict the benefit of it to such parts of the Childwickbury Estate as were for the time being unsold, i.e., remained the property of Mrs. Ballard, and those claiming title through or under Sir John Blundell Maple otherwise than by virtue of a purchase. The
drafting is certainly very confused, but I do not feel justified in thus A
cutting down the ambit of the covenant.

I accordingly hold that the land for the benefit of which the covenant was taken was the land (about 1,700 acres) now vested in Childwickbury Stud, Ltd., by conveyance from Mr. Joel, and that the fact that it
claims by virtue of a purchase from Mrs. Ballard would not affect its B
title to sue.

That brings me to the remaining question, namely: Is the covenant one which, in the circumstances of the case, comes within the category of a covenant the benefit of which is capable of running with the land
for the benefit of which it was taken? A necessary qualification, in C
order that the covenant may come within that category, is that it concerns or touches the land with which it is to run: see *per* Farwell, J., in *Rogers* v. *Hosegood* (2), at p. 395. That land is an area of some 1,700 acres. It appears to me quite obvious that, while a breach of the
stipulations might possibly affect a portion of that area in the vicinity D
of Mr. Wright's land, far the largest part of this area of 1,700 acres could not possibly be affected by any breach of any of the stipulations.

Counsel for the respondent company asked for an adjournment in order to consider whether it would call evidence (as I was prepared to
allow it to do) to prove that a breach of the stipulations, or of some of E
them, might affect the whole of this large area. However, ultimately no such evidence was called.

The result seems to me to be that I am bound to hold that, while the covenant may concern or touch some comparatively small portion
of the land to which it has been sought to annex it, it fails to concern F
or touch far the largest part of the land. I asked in vain for any authority which would justify me in severing the covenant, and treating it as annexed to or running with such part of the land as is touched by or concerned with it, though, as regards the remainder of the land, namely,
such part as is not touched by or concerned with the covenant, the G
covenant is not, and cannot be, annexed to it, and accordingly does not, and cannot, run with it. Nor have I been able, through my own researches, to find anything in the books which seems to justify any such course. In *Rogers* v. *Hosegood* (2), the benefit of the covenant was annexed to
all or any of certain lands adjoining or near to the covenantor's land, H
and no such difficulty arose as faces me here; and there are many other reported cases in which, for similar reasons, no such difficulty arose. But the requirement that the covenant, in order that the benefit of it may run with certain lands, must concern or touch those lands, is categorically stated by Farwell, J., in the passage I have cited, in

terms which are unquestionably in accord with a long line of earlier authority.

I would observe that the construction of the document and the intention of the parties to be gathered therefrom are material on the question what is the area of land to which the covenantor and covenantee intended to annex the benefit of the covenant, or, in technical language, what is the land with which the parties intended the covenant to run; but that, on the question whether, in the circumstances of the case, this covenant is capable of being annexed to, or of running with, the land to which it is sought to annex it, it is necessary, first, to ascertain whether, in fact, the covenant touches or concerns that particular land. If, on the facts, it appears that the covenant does not touch or concern that particular land, the only question which remains is whether, by the law in regard to annexation of a covenant to land, as recognised as long ago as 1368 in the *Prior's Case* (3), such annexation can take place unless it can be predicated of the covenant that it touches or concerns the land to which it is sought to annex it. That is a question of dry technical law, on which it would not be right, at all events for a judge of first instance, to go beyond settled authority, or, at all events, beyond that which can logically be deduced from settled authority, though, in the result, the intention of the parties to the original covenant may be frustrated. As I have not been referred to, and I cannot find, any authority for the proposition that a covenant which it has been sought to annex to a particular area of land can be enforced by the person seised of that land, not being the original covenantee, in a case where it cannot truly be said that the covenant touches or concerns the land to which it was sought to annex it, I must hold that the attempted annexation has failed, and that the covenant has not been effectually annexed to the land, and does not run with it. The consequence is that I am bound to hold that the respondent company, the Childwick Stud, Ltd., cannot sue Mr. Wright on the covenant.

As it is not suggested, nor does it appear, that the covenant in question is now enforceable by anyone, if the respondent company is not in a position to enforce it, I shall declare that the property mentioned in the title to the summons is no longer affected by any of the restrictions contained in the conveyance of June 28, 1906.

It is never possible to do quite meticulous justice in dealing with the costs of a matter of this kind; but I think the right order to make, which I believe will be reasonably fair between the parties, will be this: I shall order the applicant to pay the respondent company's costs down to and including Feb. 5, 1937, when the matter came before the master, and there will be no further order as to costs.

Solicitors: *McKenna & Co.* (for the applicant); *Page, Moore & Page* (for the respondent).

[*Reported by* W. K. Scrivener, Esq. *Barrister-at-Law.*]

ATTORNEY-GENERAL *v.* LIVERPOOL CORPORATION AND LONDON, MIDLAND & SCOTTISH RAILWAY CO.

[Chancery Division (Simonds, J.), **April 9, 22, 29, 1937.**]

Electricity Supply—Powers of undertakers—Supply outside area of supply—Amalgamated railway company—Electrification of part of railway undertaking outside area of supply—Electrified part previously owned by company absorbed into amalgamated company—Electric Lighting Act, 1909 (*c.* 34), *s.* 5 (1)—*Electricity* (*Supply*) *Act,* 1926 (*c.* 51), *ss.* 12, 47.

The defendant railway company, an amalgamated railway company, was the owner of a railway undertaking situated partly within and partly without the area of supply for electricity purposes of the defendant company, including an undertaking which was, before absorption, the undertaking of the W. railway company. No part of the W. railway passed through or was situated within the area of supply of the defendant corporation. The defendant company had adapted part of the W. railway to electric traction and the consent was obtained of the Minister of Transport under the Electricity (Supply) Act, 1926, s. 47, to the supply by the defendant corporation of electricity for the purposes of the W. railway. The defendant corporation at present supplied the defendant company with electricity, part of which was used for operating certain capstans, wagon hoists and traversers. It was contended that the defendant corporation was not competent to give, nor the defendant company competent to take, a supply of electricity for the purpose contemplated, on the grounds (i) that the W. railway did not, for the purpose of sect. 47 of the Act of 1926, form part of a railway undertaking of which the defendant company was owner and that the defendant company's power to take a supply of electricity for the W. railway remained that conferred by the W. railway's own Act, (ii) that the words "may supply" in sect. 47 referred back exclusively to the Electric Lighting Act, 1909, s. 5 (1), and the defendant corporation did not bring itself within that section, and (iii) that the words "for haulage and traction" in sect. 47 referred to a special supply for that purpose only, that there was no such supply by the defendant corporation to the defendant company, and that it could not, therefore, be said that the defendant corporation "are supplying" electricity to the defendant company within sect. 47 :—

Held : (i) sect. 47 of the Act of 1926 referred to the whole undertaking of the defendant company, including the W. railway, and the defendant company was competent to take a supply of electricity for the purpose contemplated.

(ii) the words "may supply" did not refer back exclusively to the Electric Lighting Act, 1909, s. 5 (1), and the defendant corporation came within those words.

(iii) the words "for haulage and traction" did not refer to a special supply for that purpose only, and as the defendant corporation was supplying electricity for the general purposes of the company, including all the haulage and traction involved in operating capstans, hoists and traversers, the corporation was brought within sect. 47 and was competent to supply electricity to the defendant company for the purpose contemplated.

[**EDITORIAL NOTE.** Generally speaking, an undertaker may not supply electrical energy outside his own particular area, but in the case of a supply to large undertakings such as railway companies and others providing haulage and traction the Minister may make special orders. In the present case the position is complicated by the recent amalgamation of railway companies.

As to Supply Outside Area, see HALSBURY, Hailsham Edn., Vol. 12, pp. 591, 592, paras. 1135, 1136 ; and for Cases, see DIGEST, Vol. 20, pp. 205, 206, Nos. 40-43.]

Cases referred to:

(1) *Blackpool Corpn.* v. *Starr Estate Co.*, [1922] 1 A.C. 27; 42 Digest 770, *1974*; 91 L.J.K.B. 202; 126 L.T. 258.

(2) *James* v. *Dickenson, Williams* v. *Wills, Lovering* v. *Limpany* (1863), 14 C.B.N.S. 416; 26 Digest 342, *712*.

(3) *A.-G.* v. *North Eastern Ry. Co.*, [1906] 2 Ch. 675; 42 Digest 682, *946*; 76 L.J.Ch. 5; 95 L.T. 512.

(4) *Yool* v. *Great Western Ry. Co.* (1870), 39 L.J.Ch. 562; 38 Digest 338, *492*; 22 L.T. 781.

(5) *A.-G.* v. *County of London Electric Supply Co.*, [1926] Ch. 542; Digest Supp.; 95 L.J.Ch. 357; 135 L.T. 601.

(6) *A.-G.* v. *Westminster City Council*, [1924] 2 Ch. 416; Digest Supp.; 93 L.J.Ch. 573; 131 L.T. 802.

(7) *Gas Light & Coke Co.* v. *South Metropolitan Gas Co.* (1889), 62 L.J. Ch. 123; 25 Digest 491, *114*; 62 L.T. 126.

(8) *London Electric Supply Corpn., Ltd.* v. *Westminster Electric Supply Corpn., Ltd.* (1913), 11 L.G.R. 1046; 20 Digest 217, *110*.

(9) *A.-G.* v. *Gravesend Corpn.*, [1936] 1 Ch. 550; Digest Supp.; 105 L.J. Ch. 202; 155 L.T. 409.

MOTION, treated as the trial of the action, by the Attorney-Genera at the relation of the Birkenhead Corporation, to restrain the Liverpool Corporation from supplying or entering into any agreement to supply to the London, Midland & Scottish Railway Company electricity for use by that company on or in connection with a railway owned by that company and known as the Wirral railway, and to restrain the defendant railway company from receiving or purchasing or entering into any agreement to receive or purchase from the defendant corporation a supply of electricity for that use. The facts are set out in the judgment.

Sir Stafford Cripps, K.C., *W. Craig Henderson, K.C.*, and *Anthony E. W. Ward* for the plaintiff.

W. E. Tyldesley Jones, K.C., *Alfred Tylor* and *Roger Pezzani* for the defendants.

Cripps, K.C.: By the Railways Act, 1921, s. 39, the Wirral Railway Act, 1900, is to be read as though the name of the London, Midland & Scottish Ry. Co. was in it. The result is that the London, Midland & Scottish Ry. Co. is prohibited from purchasing electricity for the Wirral Railway from the Liverpool Corporation. The Wirral Railway is an isolated piece of the L.M. & S. Ry. Co. at the present time. The Mersey Railway at one point and the Birkenhead Railway at another cut it off from the Midland system. The purpose of the Electricity Act, 1926, s. 47, was to obviate the necessity of having special orders under the Act of 1909. The Liverpool Corporation is not qualified to supply because it has never obtained powers under the Electric Lighting Act, 1909, s. 5. Also, it is not qualified to supply electricity for haulage and traction. The words "for haulage and traction" do not mean a casual supply for some device, but it is clear from the Electricity Act, 1926, s. 12, that when a supply of electricity for haulage and traction is referred to it means a supply for general purposes, and not for something fortuitous such as a motor working a capstan. The question also arises whether

the words "partly within and partly without" the Liverpool area of supply, imply a continuity of property. There are no continuous lines of railway including both the L.M. & S. Ry. and the Wirral Railway within the area of supply. The Electricity Act, 1926, s. 47, is conditional upon sect. 5 of the Act of 1909 having been previously applied. [Counsel referred to *James* v. *Dickenson* (2), *A.-G.* v. *North Eastern Ry.* A
Co. (3), *Blackpool Corpn.* v. *Starr Estate Co.* (1), *Yool* v. *Great Western Ry. Co.* (4), *A.-G.* v. *County of London Electric Supply Co.* (5) and *A.-G.* v. *Westminster City Council* (6).]

Tyldesley Jones, K.C.: As regards the application of the Electricity Act, 1926, s. 47, there is no justification for introducing the word B
"continuity." As regards the Wirral undertaking being a separate undertaking, the absorption order makes the Wirral Company a subsidiary company of the L.M. & S. Ry. Co. There is no foundation for the suggestion that sect. 47 of the Act of 1926 was contingent upon the application of sect. 5 of the Act of 1909. As regards the undertaking not C
being partly within and partly without the area of supply, the absorption order included the Wirral Railway and the L. M. & S. Ry. Co. is the owner of one railway undertaking which includes the Wirral Railway. The Liverpool Corporation is authorised to supply electricity to the L.M. & S. Ry. Co. in Liverpool. The railway company owns an under- D
taking partly within and partly without the area of the Liverpool Corporation and the corporation can supply the company with electricity for haulage and traction upon some part of its system and that is sufficient to satisfy sect. 47 of the 1926 Act. [Counsel referred to: *A.-G.* v. *North Eastern Ry. Co.* (3), *Gas Light & Coke Co.* v. *South Metropolitan* E
Gas Co. (7), *A.-G.* v. *County of London Electric Supply Co.* (5), *London Electric Supply Corpn., Ltd.* v. *Westminster Electric Supply Corpn., Ltd.* (8) and *A.-G.* v. *Gravesend Corpn.* (9).]

SIMONDS, J.: The Birkenhead Corporation and the Liverpool F
Corporation are, each of them, authorised undertakers for the supply of electricity within their respective areas of supply under the Electricity (Supply) Acts, 1882 to 1936. Pursuant to the Electricity (Supply) Act, 1926, each of those corporations is taking supplies of electricity from the Central Electricity Board for the purpose of its undertaking. The G
defendant railway company is an amalgamated railway company within the meaning of the Railways Act, 1921. It was incorporated by the North Western, Midland and West Scottish group of the Amalgamation Scheme, 1923 (S. R. & O., 1923, No. 827). It is the owner of a railway undertaking situate partly within and partly without the area of supply H
for electricity purposes of the Liverpool Corporation. By virtue of the London, Midland & Scottish Absorption (No. 1) Scheme, 1923 (S. R. & O., 1923, No. 1180), the railway is the owner of the undertaking which, prior to the absorption scheme, was the undertaking of the Wirral Railway Company, which by that scheme was transferred to and vested in

the company. I refer to it as the Wirral Railway. The Wirral Railway passes through the areas of supply of the Birkenhead Corporation, the Wallasey Corporation, and the Hoylake Urban District Council, but no part passes through or is situate within the area of supply of the Liverpool Corporation. The Wirral Railway is physically connected at West Kirby with a railway known as the Birkenhead Railway, which was constructed under the Chester and Birkenhead Railway Act, 1837, and subsequent Acts, and, by virtue of the Birkenhead (Vesting) Act, 1861, became vested in the London & North Western Railway Company and the Great Western Railway Company jointly. The Wirral Railway has no other through rail connection with the other railways of the company.

The defendant railway company has adapted to electric traction part of the Wirral Railway and, wishing, for the purpose of working it, to obtain a supply of electricity of the character and description which is set out in the first schedule to the agreed statement of facts, to be used on or in connection with the Wirral Railway for any purposes of the company's undertaking, invited and received tenders for such supply from the Liverpool Corporation and Birkenhead Corporation, both of whom were ready and willing to provide the required supply. The tenders were at prices calculated as provided by sect. 12 of the Act of 1926. The railway company was desirous of taking the supply from the Liverpool Corporation, because its tender was materially lower than the tender of the Birkenhead Corporation, and, with that object, the railway company and the Liverpool Corporation, by letters of June 5 and July 15, 1936, jointly made application to the Minister of Transport pursuant to the Electricity (Supply) Act, 1926, s. 47, for his consent to the supply being given by the Liverpool Corporation. An inquiry having been duly held, that consent was given. The intention of the defendants is set out in the agreed statement:

> 9. (*a*) The supply will be transmitted by the Liverpool Corporation along their own cables to the point marked *A* on the map annexed hereto being a point within their area of supply and will be delivered at the said point *A* to the company. (*b*) From the point of delivery at the said point *A* the company will transmit the supply along their own cables to the point marked *B* on the said map, being a point on the "Wirral Railway" upon which the supply is to be used. The said cables will be carried from the said point *A* over the property and through a tunnel belonging to the Mersey Railway Company under a wayleave agreement with that company . . . (*d*) The supply will be given by the Liverpool Corporation at a pressure of 11,000 volts and, save in so far as it may be transformed to a lower voltage and used for the lighting and heating of the said station or building, it will remain at that voltage until it reaches the said point *B* and will not be used within the area of supply of the Liverpool Corporation. (*e*) If it appears convenient to the company so to do they will instal in the said station or building a transformer and will transform a portion of the supply to a lower voltage and will use the same for the lighting and heating of the said station or building, but even if this is done such user will be very small in comparison with the user outside the area of supply of the Liverpool Corporation for the operation of the Wirral Railway. The company will use the said supply for the lighting and heating aforesaid if it be held that such user is necessary in order to comply with the requirements of the Electricity (Supply) Act, 1926.
>
> 10. The Liverpool Corporation supplies and has at all material times supplied the company at various points within the said corporation's area of supply with electricity some part of which is used for the purpose of operating certain capstans, wagon hoists and traversers or travelling cranes [particulars are set out in a schedule

to the agreed statement.] In each case the electricity so used is part of a supply which is provided by the Liverpool Corporation and used by the company for other purposes in addition to those specified above.

Finally, the statement in the agreed statement of facts is that through trains are run by the company between London (Euston) and New Brighton via Hooton, Parkgate and West Kirby, over the Wirral Railway. According to the first schedule to the statement, the electricity was to A be supplied in the form of alternating current, of a periodicity of fifty cycles, and at a pressure of 11,000 volts, and the quantity to be required by the company was limited to 4,000 kilowatts. This is relevant to a point made in the case. Particulars of the capstans, wagon hoists and traversers, are also given in the schedule to the agreed statement of B facts, and from that schedule it appears—I will take one typical instance—that one capstan of 15 h.p. located in Great Howard Street was used for hauling empty and loaded wagons for sugar traffic to and from a certain place. That may be taken as typical user of the capstans.

It is in this state of facts that the plaintiffs bring their action, alleging C that the Liverpool Corporation is not competent to give, nor the railway company competent to take, a supply of electricity for the purpose contemplated. My task, if not a simple one, is at least simplified by this, that the defendants rely for both points on a single section, the Electricity (Supply) Act, 1926, s. 47. So far as this case is concerned, D if the right both to give and to receive is not conferred by that section, the action succeeds. The Electricity (Supply) Act, 1926, s. 47, provided as follows:

> Where any authorised undertakers may supply and are supplying within their district or area of supply electricity for haulage or traction to any company or E authority being the owners or lessees of a railway, dock, harbour or canal undertaking situate partly within and partly without that district or area, such authorised undertakers may, subject to the consent of the Minister of Transport and to such limitations and conditions (if any) as he may prescribe either generally or in any particular case, so supply electricity to be used for any purposes of such undertaking, whether within or without such district or area of supply, and such company or authority may, subject to the consent of the Minister of Transport and to such limitations and conditions (if any) as he may prescribe either generally or in any F particular case, use the electricity so supplied for any purposes of their undertaking for which they are entitled to use electricity.

Then there is a proviso which is immaterial. For the present purpose, for the purpose of construing this section, the language of which appears to be reasonably clear, I have been taken, and rightly taken, through G a series of Acts which, on the one hand, conferred on authorised undertakers the right to supply electricity, and, on the other hand, conferred on railway companies the various powers necessary for them to carry on their undertakings, including the power to take a supply of electricity. Having considered them so that I am in a position to interpret sect. 47 H not in isolation but in its proper place in the legislative history of electricity and railway undertakings, I see no reason to give the section any meaning other than that which its words naturally bear.

First, I will deal with the position of the defendant railway company. Is it, for the purposes of sect. 47, owner of a railway undertaking situate partly within and partly (namely, as to the Wirral Railway) without the area of supply of the Liverpool Corporation ? If it is not, the Minister of Transport had no authority to give the consent which he in fact gave, and this action must succeed. On the part of the plaintiffs it is urged that it is not such an owner. The Wirral Railway (thus runs A the argument) does not, for the purpose of sect. 47 at least, form part of a railway undertaking of which the company is owner : it is itself a railway undertaking of which the company is the owner, just as it was, before its absorption in 1923, a railway undertaking of which the Wirral Company was the owner ; in other words, sect. 47 must be read as if B in it " railway undertaking " meant the original statutory unit, whatever it might be which could properly be called a railway undertaking, with the result that the company has no larger powers conferred on it in respect of the Wirral Railway than the Wirral Company would have had if there had been no absorption. This argument has been fortified by references C to the Railways Clauses Act, and, in particular, to Part V, which deals with amalgamations, of the Railways Clauses Act, 1863, and to the well known principle that, when Parliament in an earlier statute directed its attention to an individual case, and has made provision for it unambiguously, there arises a presumption that, if, by a subsequent statute, the D legislature lays down any general principle, that general principle is not to be taken as meant to rip up what the legislature had before provided for individually, unless an intention to do so is specially declared : see *per* Viscount Haldane in *Blackpool Corporation* v. *Starr Estate Co.* (1), at p. 34. Upon these grounds it is contended that the company's power E to take a supply of electricity for the Wirral Railway remains that which was conferred by sect. 6 of the Wirral Company's own Act of 1900, and has not been enlarged by the general language of a section of a general Act.

I am unable to give effect to this contention. It appears to me that, F from the moment when the absorption scheme became operative, by sect. 5 of which it was provided that the undertaking of, amongst other companies, the Wirral Company should be transferred to and absorbed by and form part of the undertaking of the company, a reference to the undertaking of the company in any general legislation must, in the G absence of any excluding context, be taken to mean the whole railway undertaking, including all those undertakings which may have been transferred to and absorbed in it. I see no valid reason why, for the purpose of construing sect. 47, I should disintegrate the railway company's undertaking as it exists to-day into the constituent parts out of which H it has been formed. To do so would go far to deprive the company of the benefits which amalgamation was meant to achieve. Nor, in my judgment, can the principle of the *Blackpool* case (1), to which I have referred, be usefully invoked by the plaintiffs. The Wirral Company, in respect of its undertaking, was enabled by sect. 6 of its Act of 1900 to obtain a supply of electricity from certain sources. It was an enabling section, and nothing else. By sect. 47 of the Act of 1926, a wider power was conferred upon a railway company. Why should I exclude from its scope the company into whose undertaking the Wirral Railway undertaking has been absorbed ? These are not circumstances in which the maxim *generalia specialibus non derogant,* of which the words of VISCOUNT HALDANE are an elaboration, can have any application. So much for the company. Of its competence to receive whatever supply it can obtain under sect. 47, and to use it within or without the area of supply for any purpose of its undertaking, I have no doubt.

What of the authorised undertaker, the Liverpool Corporation ? It is competent to give the supply to the company, if, and only if, it can be predicated of it that it may supply and is supplying within its district or area of supply electricity for haulage or traction to the company. First, it has been argued that it is not true to say of the corporation that it " may supply." These words, it is said on behalf of the plaintiff, refer back exclusively to the Electric Lighting Act, 1909, s. 5 (1), which provides :

> Any local authority, company, or person authorised to supply electricity in any area may, with the consent of the Board of Trade, supply at any point within that area electricity for the purposes of haulage or traction on any railway, tramway, or canal situate partly within and partly without that area, and for the purposes of lighting vehicles and vessels used on any such railway, tramway, or canal.

Undoubtedly the Liverpool Corporation has not obtained any consent of the Board of Trade to give a supply of electricity to the company. Accordingly, if the true view is that the words " may supply " in sect. 47 of the Act of 1926 refer back to this subsection alone, it follows that the Liverpool Corporation does not bring itself within the section. I see no reason for so construing the words " may supply." In the first place, it is to be noticed that, whereas sect. 5 of the Act of 1909 refers to haulage or traction on a railway, tramway or canal, sect. 47 of the Act of 1926 refers to a supply for haulage or traction to owners or lessees of a railway, dock, harbour or canal undertaking. The two sections do not deal with the same subject matter, and, if the plaintiffs are right, the result would be that sect. 47 never could be brought into operation in the case of a dock or harbour undertaking, for docks and harbour undertakings are not within sect. 5, and it is a condition of sect. 47 operating that sect. 5 should first have been applied. From such a strange interpretation I should in any case recoil. In the second place, I find a simple enough explanation of the words " may supply " in the fact that an undertaker may be properly described as an authorised undertaker and yet its power may be so limited that it may not supply electricity for haulage or traction to such undertakings as are mentioned in sect. 47. There are, then, authorised undertakers which may, and authorised undertakers which may not, supply electricity for such purposes to such undertakings. It is clear from the Liverpool Corporation Act, 1921, s. 175, that the Liverpool Corporation is in the former category.

Next, can it be said that the Liverpool Corporation " are supplying,"

within their area of supply, electricity for haulage or traction to the company? On behalf of the plaintiffs it is urged that the words "for haulage or traction" refer to a special supply for that purpose only, and that there is no such supply by the corporation to the company. They refer to other sections, where supply for haulage or traction is
A mentioned, and, in particular, to sect. 12 of the Act of 1926, which imposes on authorised undertakers the obligation, if they supply electricity to a railway company for the purpose of haulage or traction, to supply it on the same terms as those upon which they have themselves obtained it from the Central Electricity Board. In effect, they say that
B it cannot be said of authorised undertakers that they "are supplying," within sect. 47, unless sect. 12 has been brought into play and it can be ascertained what are the terms of supply. I do not think that so narrow an interpretation of sect. 47 is justifiable. It certainly cannot in all cases be a condition of sect. 47 applying that sect. 12 should already
C have been applied, for sect. 12 refers to a railway company only, and sect. 47 to owners or lessees of a railway, dock, harbour or canal undertaking. Moreover, even in the case of a railway company, sect. 12 is one which confers a benefit, and does not impose any obligation, on the railway company. Its terms might not be observed and yet there might
D be a supply for haulage or traction. I prefer the wider construction, for which the defendants contend. It is, in my view, sufficient to bring the company within the section if I find, as upon the agreed facts I must, that there is a supply for the general purposes of the company, including all the haulage and traction which is involved in operating capstans,
E hoists and traversers. The company and the corporation being thus brought within the section, I see no further difficulty, for it follows that the Minister of Transport was competent to give his consent to the latter supplying and to the former using electricity for any purposes of the railway undertaking, whether within or without the area of supply
F of the corporation. He has, after due inquiry, given his consent to the proposed supply and user, and that ends the matter.

The motion must, accordingly, be refused, and the action dismissed with costs. I think the proper form of order is: No order on the motion, except costs in the action, and the action dismissed with costs.

G *Motion refused. Action dismissed with costs.*

Solicitors: *Robins, Hay & Waters,* agents for *E. W. Tame,* Town Clerk, Birkenhead (for the plaintiff); *Alexander Eddy* (for the defendants).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

H

WEST *v.* AUTOMATIC SALESMAN, LTD.

[Court of Appeal (Slesser, L.J., du Parcq and Simonds, JJ.), **April 28, 29, 1937.**]

Interpleader—Claim—Subsequent action by claimant for wrongful execution—Whether action barred—County Courts Act, 1867 (*c.* 142), *s.* 31—*County Courts Act,* 1934 (*c.* 53), *s.* 133.

The respondent company having obtained a judgment against W., improperly levied execution upon goods of the appellant, W.'s mother. After interpleader proceedings in the county court, the appellant brought an action for trespass and wrongful seizure. The respondent company contended that, as this claim had not been raised in the interpleader proceedings, the judge had no jurisdiction :—

Held : as the appellant had failed to make a claim for damages during the interpleader proceedings, she could not do so thereafter.

[**EDITORIAL NOTE.** The rule of law is that parties shall litigate their whole case when they are before the court, and this is applied to interpleader proceedings in the county court by the words of the County Courts Act, 1934, s. 133 (3), reproducing similar enactments in previous Acts. A claim for damages for wrongful execution must therefore be made in the interpleader proceedings.

For the Law on the Point, see HALSBURY, Hailsham Edn., Vol. 18, p. 659, para. 1129 ; and for Cases, see DIGEST, Vol. 29, pp. 508, 509, Nos. 595-598 ; and see also THE NEW COUNTY COURT PRACTICE, 1937, p. 181.]

Cases referred to :

(1) *Death* v. *Harrison* (1870), L.R. 6 Exch. 15 ; 29 Digest 508, *595* ; 40 L.J. Ex. 26 ; 23 L.T. 495.

(2) *Salbstein* v. *Isaacs & Son,* [1916] 1 K.B. 1 ; 29 Digest 509, *600* ; 85 L.J. K.B. 109 ; 114 L.T. 235.

(3) *Henderson* v. *Henderson* (1843), 3 Hare, 100 ; 21 Digest 174, *276* ; 1 L.T. O.S. 410.

(4) *Mercer* v. *Stanbury* (1857), 2 H. & N. 155, *n* ; 29 Digest 509, *603* ; 25 L.J. Ex. 316.

(5) *Foster* v. *Pritchard & Whitroe* (1857), 2 H. & N. 151 ; 42 Digest 775, *2043* ; 26 L.J. Ex. 215 ; 29 L.T. O.S. 128.

(6) *Jones* v. *Williams* (1859), 4 H. & N. 706 ; 29 Digest 509, *602* ; 28 L.J. Ex. 324 ; 33 L.T. O.S. 185.

Appeal from a decision of His Honour Judge Crosthwaite, dated Dec. 4, 1936.

The facts of the case are fully set out in the judgment.

W. W. Stabb for the appellant.

J. L. S. Hale for the respondent company.

Stabb : Where a statute gives a special remedy, that is not necessarily an exclusive remedy. The interpleader proceedings were to decide the title to the goods ; that is no bar to an action for trespass. It is *res judicata* with regard only to the matters that were actually before the judge. [Counsel referred to *Mercer* v. *Stanbury* (4), *Foster* v. *Pritchard & Whitroe* (5), *Jones* v. *Williams* (6), *Death* v. *Harrison* (1) and *Salbstein* v. *Isaacs & Son* (2).] The court is being asked to overrule or else to distinguish the case of *Death* v. *Harrison* (1).

SLESSER, L.J.: A company called Automatic Salesman, Ltd., having obtained a judgment against a Mr. West, improperly levied execution upon the furniture of a Mrs. Jane Emma West, against whom it had no claim or title. The lady claiming her furniture, an interpleader issue was ordered, and the matter came before the court. The lady proceeded to bring an action for damages in respect of the wrongful entry on her premises in June, 1936, and wrongful seizure of certain goods. The defendant company raised the question whether she could, in the circumstances, maintain the action at all, whether the judge had any jurisdiction by reason of the fact that in the interpleader proceedings she had failed then to make any claim for damages. By the County Courts Act, 1888, it is provided that the proper time to make any claim for damages is at the hearing of the interpleader proceedings, and not afterwards. The County Courts Act, 1867, s. 31, which is repeated in substance in the later Act, is to this effect, so far as it is material:

> If any claim shall be made to or in respect of any goods or chattels taken in execution under the process of a county court, or in respect of the proceeds or value thereof, by any person, it shall be lawful for the registrar of the court, upon application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the said court as well the party issuing such process as the party making such claim, and the judge of the court shall adjudicate upon such claim, and make such order between the parties in respect thereof, and of the costs of the proceedings, as to him shall seem fit—

then follow these all important words:

> and shall also adjudicate between such parties, or either of them, and the high bailiff, with respect to any damage or claim of or to damages arising or capable of arising out of the execution of such process by the high bailiff, and make such order in respect thereof, and of the costs of the proceedings, as to him shall seem fit.

We were favoured by counsel with the cases which preceded that legislation, and I do not think it is necessary here to discuss them, beyond saying that there was doubt before that time how far an action for damages would lie when there had been a successful claim to the goods, more particularly in relation to the question of wrongful seizure as distinguished from wrongful entry. But, however that may be, this statute lays down, as I think, not only the rights of the parties, but also the means whereby those rights are to be enforced. It is to be noted—and the same words appear in the Act of 1888—that the language is not as contended for by Mr. Stabb, that the judge *may* adjudicate upon such claims for damages as one of the parties *may* think fit to bring before him. It is not merely permissive in that sense, in which case it might or might not be the case that that power did not necessarily exhaust the rights of the parties to proceed by other means. It seems to me to lay down as a condition of setting forth the right of the injured party to obtain damages, although capable of arising out of the execution of such process, a specific machinery, whereby, and whereby only, a claim can be enforced. The language is: "He *shall* adjudicate in respect of any damages or claim." I think those words are significant. He has the obligation to adjudicate, which is not only in regard to a claim, but also in regard to damages arising or capable of arising. That is the view which I would have taken, had the matter been free from authority, but, in point of fact, we find that there are two cases, one decided under the earlier Act of 1867 and one, which follows the Act of 1888, which seems the one conclusive of the point, the other inferentially supporting it.

The earlier case is *Death* v. *Harrison* (1), where the facts were in effect similar to those in the present case. In that case, the plaintiff had delivered particulars of his claim under the interpleader, but did not make any claim for damages arising or capable of arising out of the seizure or claim. MARTIN, B., expresses his opinion at p. 18, and says :

> I am expressing the opinion I entertained when this point was before the court on a former occasion and received a great deal of attention. The plea brings the case entirely within the words of the statute ; the entry is justified [there is no question about it there] and the only point not explicitly stated is, that the summons was issued at the request of the high bailiff ; but, by the Act, this must have been so. The case then being within the words of the statute, sect. 31 says expressly that the order made shall be final and conclusive. This is equivalent to saying that the whole matter between the parties shall be at an end ; and I have no doubt that the words were inserted with that very intention. The legislature directed this measure to meet the exigencies of common affairs, notwithstanding that in some exceptional and doubtful cases a hardship may be inflicted. My brother CHANNELL, J., has desired me to say that he is of the same opinion.

Speaking for myself, I prefer the reasons given by CLEASBY, B., who puts it in this way :

> This plea is in substance a plea of *res judicata* ; it shows that though the particular claim of special damage was not in controversy, the subject matter out of which it arose was, and that in that proceeding a claim of special damage was properly open to adjudication.

That seems to me exactly to follow the language of the statute to which I have referred. CLEASBY, B., continued at p. 19 :

> If the plaintiff had made his claim then, it could not be said that it could now be agitated again. But it is the same thing if the reason why the judge did not adjudicate upon it was that the plaintiff did not give particulars of his claim.

That was the position as stated in 1870, and, as I understand, the practice which has been continued ever since.

Now, as I have said, this provision was re-enacted in the County Courts Act, 1888. In *Salbstein* v. *Isaacs & Son* (2), a question arose where there had been an action in the county court claiming damages for trespass to his goods, and the defendants had obtained a judgment in the High Court and issued a writ of execution, there being an execution levied by direction of Salbstein in connection with the matter :

> The plaintiff claimed the goods seized, and on the application of the sheriff an order was made that an issue should be tried between the claimant and the execution creditors and that the interpleader proceeding should be remitted to the Croydon County Court. In the county court the plaintiff did not make any claim for damages against the present defendants, and the issue as to the ownership of the goods was decided in his favour. The plaintiff thereupon brought this action for damages, and the defendants set up the defence that there was no jurisdiction to award damages inasmuch as any claim for damages ought to have been made in the interpleader proceeding. The county court judge gave judgment in favour of the plaintiff for £5 5*s*. damages.

Various questions were canvassed about the extent and the authority of the rule, whether it was *ultra vires* or not, which does not directly concern us. But it is important to note, in reading the judgments in that case, that both the judges formed the same opinion as to the conclusiveness of what was done on the interpleader proceedings. It does not appear that the case of *Death* v. *Harrison* (1) was either cited in argument or considered in the judgments, but AVORY, J., says this, on p. 4 :

> The main point is that the judge had no jurisdiction because the claim for damages could only be put forward in the interpleader proceeding. . . . To this extent I agree with that contention, that the rule contemplates that any claim for damages in interpleader proceedings commenced in the county court, to which the high bailiff is a party, should be dealt with at the same time as the claim to the goods.

LUSH, J., at p. 5, says this :

> Ord. 27, r. 8 [that is the order which is made under the section of the County Courts Act] does seem to make it obligatory upon a claimant in interpleader, if he seeks to claim damages against the high bailiff or execution creditor, to make that claim at the hearing of the interpleader issue. The rule seems to say so imperatively.

To which I would add not only the rule but the section. Sect. 157 seems to make the matter imperative also. The only other observation I would make is that, as a matter of general principle, I think this case falls within the decision of WIGRAM, V.-C., in *Henderson* v. *Henderson* (3), at p. 114. WIGRAM, V.-C., says :

> I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

In the present case, so far from there being special circumstances, for the reasons I have stated, I think there was an obligation imposed by the statute, and the rule under the statute, that the parties should make their claim for damages at the time of the interpleader proceedings. For these reasons I think *Henderson* v. *Henderson* (3) was rightly decided. I think that that practice, which has been carried out since, is consistent and right, and that this claimant, in failing to bring her action for damages in the manner contemplated in sect. 157 of the County Courts Act and the rule thereunder, disentitled herself to make any further claim, and that the judge was right in refusing to hear the matter, and therefore that this appeal fails.

DU PARCQ, J. : I agree, and have nothing to add.

SIMONDS, J. : I agree.

Appeal dismissed with costs.

Solicitors : *C. J. Lewis*, agent for *R. Caradoc Roberts & Co.*, Manchester (for the appellant) ; *Reid, Sharman & Co.* (for the respondent company).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

Re CASSE, ROBINSON *v.* GRIGG.

[Chancery Division (Luxmoore, J.), **April 19, May 3, 4, 1937.]**

Bankruptcy—Deed of arrangement—Assignment of lease to debtor—Covenant of indemnity—Contingent liability to indemnify assignor—" Creditor."

The applicant and D. were the assignees of a lease which they assigned to the debtor. The debtor covenanted to pay the rent reserved by and perform and observe the covenants on the part of the lessees contained in the lease and to keep the applicant and D. indemnified against all claims on account of the non-payment of rent or the breach of the covenants. The debtor then executed a deed of assignment for the benefit of his creditors to which the applicant assented. There was no express provision in the deed of arrangement incorporating for the benefit of creditors the provisions of the Bankruptcy Act relating to the administration and distribution of a bankrupt's property. The applicant claimed to be a creditor entitled to the benefit of the deed of assignment in respect of the debtor's liability to indemnify the applicant against all claims of the original lessors and the mesne assignees. At the date of the execution of the deed no claim had been made against the applicant in respect of the rent of the property or of any breach of the covenants in the lease :—

Held : in the absence of anything in the deed of arrangement which would entitle the court to read the words " creditors," " debtor " or " debts " in any wider sense than is ordinarily attributed to those words, the applicant, who had only a contingent or future claim against the debtor, was not entitled to benefit under the deed.

[EDITORIAL NOTE. The point here is quite a short one. In the case of a deed of arrangement not incorporating bankruptcy rules of administration, can a creditor prove in respect of a contingent liability? The question is answered in the negative despite the wide terms of the release clause which is set out at the end of the judgment.

As to Interpretation of Deeds of Arrangement, see HALSBURY, Hailsham Edn., Vol. 2, p. 446, para. 610 ; and for Cases, see DIGEST, Vol. 5, pp. 1082-1087, Nos. 8868-8896.]

Cases referred to :

(1) *Hardy* v. *Fothergill* (1888), 13 App. Cas. 351 ; 4 Digest 250, *2385* ; 58 L.J.Q.B. 44 ; 59 L.T. 273.

(2) *Re Mitchell, Freelove* v. *Mitchell,* [1913] 1 Ch. 201 ; 26 Digest 128, *915* ; 82 L.J. Ch. 121 ; 108 L.T. 34.

(3) *Ascherson* v. *Tredegar Dry Dock & Wharf Co., Ltd.,* [1909] 2 Ch. 401 ; 26 Digest 127, *902* ; 78 L.J. Ch. 697 ; 101 L.T. 519.

(4) *Baker* v. *Lloyds Bank,* [1920] 2 K.B. 322 ; Digest Supp. ; 89 L.J.K.B. 912 ; 123 L.T. 330.

(5) *Woods* v. *De Mattos* (1865), L.R. 1 Exch. 91 ; 35 L.J. Ex. 64 ; 15 L.T. 142.

(6) *Re A Debtor* (*No.* 627 *of* 1936), [1937] 1 Ch. 156 ; [1937] 1 All E.R. 1 ; Digest Supp.

(7) *Re Beavan, Davies, Banks & Co.* v. *Beavan,* [1913] 2 Ch. 595 ; 26 Digest 126, *897* ; 83 L.J. Ch. 109 ; 109 L.T. 538.

(8) *Israelson* v. *Dawson,* [1933] 1 K.B. 301 ; Digest Supp. ; 102 L.J.K.B. 387 ; 148 L.T. 420.

Motion, *inter alia,* for a declaration that the applicant was entitled under and by virtue of an assignment of certain leasehold property to the debtor dated Oct. 19, 1933, to prove and receive dividends under a deed of arrangement executed by the debtor on Oct. 15, 1936.

J. B. Blagden, for the applicant: The first question is whether on the true construction of the deed the applicant is a creditor at all, and if he is a creditor, what are his rights under the deed. He is a contingent creditor, if he be a creditor at all. If he were to prove in bankruptcy, the trustee could put a value on his debt. But there is no machinery A under the deed unless it is imported. It may be that no contingent creditor has a right. But if that is so, it would mean that the deed would place a hardship upon a contingent creditor and also upon a debtor who has entered into a deed of arrangement to avoid the stigma of bankruptcy. The applicant is a contingent creditor under the assignment of a lease, B and it is difficult to value his claim. He has assented to the deed. If the debtor had become bankrupt, the applicant could have proved, but he cannot petition because his debt is not a sum certain and it is not payable at some certain future time. If "creditor" means one who can prove in a bankruptcy, it is hard upon the applicant. [Counsel C referred to *Woods* v. *De Mattos* (5).]

Maurice Berkeley, for the respondent: The person claiming has not yet been called upon to pay and so is not a creditor, as the debt does not arise in this case until payment has been made. The claim is not a claim within the meaning of the deed and the person claiming is not a D creditor entitled to share in the fund which the trustee has to distribute. [Counsel referred to: *Re A Debtor* (*No.* 627 *of* 1936) (6); *Re Beavan, Davies, Banks & Co.* v. *Beavan* (7), *Israelson* v. *Dawson* (8).]

Luxmoore, J.: On Oct. 15, 1936, the debtor, Mr. Edwin Joseph E Casse, executed a deed of assignment for the benefit of his creditors. The trustee of the deed is Mr. Leonard Stanley Grigg. By it the debtor assigned to the trustee substantially all his property, but certain specific items were excluded; these items included all property of leasehold tenure belonging to the debtor, but there is a provision in the deed F that the excepted leasehold property is to be held by the debtor in trust for the trustee. The debtor possessed four rooms on the ground floor of Salisbury House, Finsbury Circus, for the unexpired residue of a lease dated Mar. 12, 1925, made between the Salisbury House Estate, Ltd., of the one part, and three gentlemen who carry on business in partnership G together under the style of Mawby, Barrie & Letts, of the second part. The term created by this lease is for 21 years and a fraction of a year from Mar. 6, 1925, and is determinable by the lessees at their option at the end of the fourteenth year of the term. The yearly rent reserved by the lease is £700, and the lease contains repairing and other usual H covenants on the part of the lessees. This lease was assigned on Apr. 1, 1932, to Mr. Graham Henry Robinson, the applicant on the motion, and a Mr. Ernest Dunstan Dignasse. These two gentlemen carried on business together in partnership at the date of the assignment, but this partnership was dissolved in May, 1933, one of the terms of dissolution being that the leasehold property referred to should be assigned to

Mr. Robinson. No assignment was executed in his favour, but on Oct. 19, 1933, by deed of that date, the property was assigned to the debtor for the remainder of the term created by the original lease. What was described by Mr. Robinson, in the affidavit in support of this motion, as a true copy of this assignment is exhibited to that affidavit. This exhibit is quite inaccurate, but the original assignment to the debtor was A produced to me. From that document, it appears that the debtor covenanted jointly and severally with Mr. Robinson and Mr. Dignasse to pay :

> the rent reserved by and perform and observe the covenants on the part of the lessee and conditions contained in the said lease and will at all times keep the vendors B and their successors in title effectually indemnified against all actions and proceedings costs damages expenses claims and demands whatsoever by reason or on account of the non-payment of the said rent or any part thereof or the breach non-performance or non-observance of the said covenants or conditions or any of them.

After the execution of the assignment of Oct. 15, 1936, the trustee entered C into possession of the leasehold premises, and carried on there the debtor's business, which had been assigned to the trustee. In due course the trustee sold this business to a purchaser who did not require the leasehold property. The trustee consequently gave up possession of it, but he paid the rent which had accrued due in respect of the premises under the original lease down to Dec. 25, 1936. Notice has now been given to D the head lessor terminating the lease on Mar. 25, 1939, but the premises are, I understand, at present unoccupied. The position is that Mr. Robinson as one of the mesne assignees is liable to be called upon to pay the rent and perform the covenants contained in the original lease. I was told by Mr. Blagden, in the course of the argument on this case, that E Mr. Robinson has, since this motion was launched, been called upon so to do. Mr. Robinson claims to be a creditor of the debtor, and to be entitled to prove as such under the deed of assignment. No proof has been lodged by him, and the reason for that is stated by him in para. 10 of his affidavit. He says : F

> I have not yet actually lodged a proof because until I know the trustee's decision as regards the future rent payable under the aforesaid indenture of lease the amount of such proof is difficult if not incapable of being fairly estimated, but assuming that no further rent is paid under the aforesaid indenture by the trustee or by the debtor the capitalised value of the rent for the remainder of the term is approximately £1,627 and I am informed and verily believe that dilapidations in the G demised premises have occurred to the extent of about £200, making the amount for which on the above assumption I claim to prove about £1,827. Should it be possible to arrange with the landlords to accept a surrender and a less sum I am ready and willing for my proof to be reduced accordingly.

The trustee has declined to recognise Mr. Robinson as a creditor entitled to the benefit of the deed of assignment of Oct. 15, 1936, and Mr. H Robinson accordingly launched this motion on Feb. 1, 1937, for, among other things, a declaration that the applicant is entitled under and by virtue of the assignment of the leasehold property to the debtor dated Oct. 19, 1933, to prove and receive dividends under the deed of arrangement in respect of the debtor's liability to indemnify the applicant against all claims of the original lessors and the mesne assignees. The motion also asks for other ancillary relief. If the debtor's affairs were being wound up in bankruptcy, his liability to indemnify Mr. Robinson in respect of the covenants to pay the rent and perform the covenants contained in the head lease would be provable in bankruptcy under the Bankruptcy Act, 1914, s. 30 : *Hardy* v. *Fothergill* (1).

Mr. Blagden, on behalf of Mr. Robinson, has, however, quite properly admitted that the Bankruptcy Acts do not apply except in so far as their provisions may be incorporated in the deed of assignment, but he argues that, having assented to the deed of assignment, he is, on the true construction of that deed, a creditor of the debtor, and consequently entitled to the benefit of it. At the date of the execution of the deed, no claim had been made against Mr. Robinson in respect of the rent of the leasehold property, or of any breach of the covenants in the head lease, the position being that Mr. Robinson was under a contingent liability to indemnify the original lessees in respect of these matters. It is true that the debtor had covenanted to indemnify him against any such liability, but there was not at law any debt owing by the debtor to Mr. Robinson. I refer to the decision of Parker, J., in *Re Mitchell, Freelove* v. *Mitchell* (2), where Parker, J., said this :

> Now, I have heard a good deal of argument on the nature of the right which a surety has against the principal debtor, and I may say at once that it appears to me that, until the surety is called upon to pay and does pay something under his guarantee, there is no debt or right at law at all ; until then a surety's right is confined to a right to come into equity in order to get an indemnity against his liability to the creditor. That, I think, has long been well known law, and at any rate it is made reasonably clear by the case, recently before Swinfen Eady, J., of *Ascherson* v. *Tredegar Dry Dock & Wharf Co., Ltd.* (3).

I think that applies equally to the position of a person who has the benefit of a covenant for indemnity and to that of a person who has given that covenant. It is also true that Mr. Robinson would not have been entitled himself to present a bankruptcy petition founded on this liability. Mr. Blagden has argued that, as a matter of construction, Mr. Robinson is entitled to the benefit of the deed. It is, therefore, necessary to consider the form and terms of the deed. It is to be observed that there is no express provision such as is frequently to be found in deeds of assignment for the benefit of creditors incorporating the provisions of the Bankruptcy Act with regard to the administration and distribution of a bankrupt's property. A good example of a deed embodying such a provision is to be found in *Baker* v. *Lloyds Bank* (4). In the absence of such a provision, Mr. Robinson must rely solely on the terms of the deed of assignment. It is expressed to be made between the debtor of the first part, the trustee of the second part and :

> the several persons firms and companies being creditors of the debtor who shall execute or assent in writing to these presents (hereinafter called " the said creditors ") of the third part.

Pausing there, it is to be remembered that, at the time of the execution of this deed, Mr. Robinson was not, in the strict sense of the term, a creditor of the debtor, although he had or might be under a contingent liability in respect of which he was entitled to be indemnified by the debtor. The deed continues with a recital which says this :

> Whereas the debtor is indebted to the creditors who claim from the debtor the sums of money set opposite their respective names in the schedule hereto and has proposed and agreed to convey and assign all and singular his property and effects (except as hereinafter mentioned) unto the trustee upon the trusts and in manner hereinafter mentioned for the benefit of his creditors who have agreed to release him from his debts as hereinafter appears.

The *prima facie* meaning of the words " is indebted " does not cover the relationship between Mr. Robinson and the debtor, and the only matters which are referred to in that recital are referred to as debts. Then follows the assignment of all the debtor's property, with the exception, among other things, of the leasehold property. The first trust is a trust for sale and conversion, and the trusts of the proceeds begin at cl. 4 of the document. Shortly, the trustee is to pay the costs of any sale and conversion, and the costs incurred in the execution of the trusts. Then, subject to that, the trustee is to pay, and this is in cl. 6 of the deed, all claims which are by law entitled to be paid in full, or in priority to other debts in case of bankruptcy, and remain unpaid. Cl. 7 provides that the residue of the money is to be paid and to be divided into and among all the said creditors rateably and in proportion to the amount of their respective debts subject nevertheless to the provision hereinafter contained until each of the creditors shall have received the full amount of the debt owing to him with interest thereon at the rate of 4 per cent. from the date of these presents. It is to be observed that the beneficiaries are " the said creditors," and there is a direct reference to the definition clause at the beginning of the deed. The payment is to be in proportion to their respective debts, and there is no reference whatever in this clause to the bankruptcy law. The only other references to the bankruptcy law to be found in the deed, in addition to the reference to the preferential claims to which I have already referred, are in cl. 15, which relates to secured creditors, and does not extend the meaning of the words " creditors ", " debtor " or " debt " as used in the rest of the deed, and there is also a reference to the law of bankruptcy in cl. 21, with reference to the calling of the meetings and the appointment of new trustees. I think the only other clauses material to be considered are cls. 18, 19, 24, 25. Cl. 18 empowers the trustee to require any debt or debts due to or claimed by the creditors to be proved by statutory declaration or in such other way as the trustee may think fit to prescribe. Cl. 19 is an arbitration clause, and it refers there to the debt due to or claimed by a creditor. Cl. 24 is the release clause. That was, I think, the clause on which Mr. Blagden placed most reliance. It is in these terms :

> This deed further witnesseth that in consideration of the conveyance and assignment hereinbefore contained the trustee and the creditors do hereby (subject to the proviso hereinafter contained) respectively release and for ever discharge the debtor and his estate and effects from all and singular the debts bills bonds notes accounts costs damages expenses judgments executions actions claims and demands

whatsoever which they the said several persons parties hereto of the second and third parts respectively now have or shall or may or otherwise could or might hereafter have claim or demand of from or against the debtor or his estate or effects or either of them respectively an account of the debts and securities due or owing from the debtor and all interest for or in respect of the same or for or on account or any other thing relating thereto.

The general words which are to be found in this clause are all of them descriptive of, and are limited to what are described in the clause as, the debts and securities due or owing from the debtor. They are not, I think, apt to relieve the debtor of all claims and liabilities which had not crystalised as debts at the date of the deed. Cl. 25 again refers to debts and provides for the re-conveyance of the trust estate to the debtor when all the debts have been paid.

Having read the deed, I confess I am unable to find anything in it which would entitle me to read the words "creditors," "debtor" or "debts" in any wider sense than is ordinarily attributed to those words so as to bring in a person who has a contingent or future claim against the debtor within the scope of this deed. I think it would be improper for me to attempt to construe the deed with reference to the provisions of the Bankruptcy Acts with regard to contingent claims merely because it would be hard on the debtor, who has denuded himself of all his property, to remain liable in respect of any claim against him. Apart from cl. 25 of the deed, the word "claim" is not used in the document. The word used throughout is "debts." In my judgment, it is impossible, as a matter of construction, to hold that Mr. Robinson is a creditor entitled to the benefit of the deed of assignment of Oct. 15, 1936, or that the debtor's contingent liability to indemnify Mr. Robinson in respect of the property is a debt within the meaning of the deed.

It follows, from what I have said, that the motion fails and must be dismissed with costs.

Motion dismissed with costs.

Solicitors: *Mawby, Barrie & Letts* (for the applicant); *Constant & Constant* (for the respondent).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

KIRK *v.* EUSTACE.

[HOUSE OF LORDS (Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Wright and Lord Roche), **May 4, 1937.**]

Husband and Wife—Separation deed—Payment of weekly sum to wife "during her life"—Death of husband—Whether husband's estate liable for payments—Law of Property Act, 1925 (*c.* 20), *s.* 80 (1).

By a separation deed, whereby the parties agreed to live separately and apart, a husband covenanted to pay a weekly sum to his wife "during her life." They also agreed not to molest each other, and the wife covenanted to keep the husband indemnified against all debts and liabilities. The weekly payments were to cease if the parties resumed cohabitation as man and wife. On the husband's death, his executors refused to make the weekly payments, on the ground that the obligation to pay the money ceased on the husband's death. The wife brought an action against the executors for arrears of weekly payments, and contended that, under the express terms of the covenant, she was entitled to the weekly payments during her life for her maintenance, and that there was no express or implied limitation upon such right in the separation deed or a contrary intention within the Law of Property Act, 1925, s. 80 (1):— A

HELD: in the absence of any express intention in the covenant not to bind the real and personal estate of the husband, the executors were bound by the covenant to pay the weekly sum to the wife during her life, as the Law of Property Act, 1925, s. 80 (1), quite plainly imposed an obligation which bound the husband's estate, unless the contrary intention was expressed. B

Decision of Court of Appeal ([1936] 3 All E.R. 520) *reversed.*

[**EDITORIAL NOTE.** The Court of Appeal found in this deed a contrary intention within the meaning of Law of Property Act, 1925, s. 80 (1), and therefore held that the payments ceased upon the husband's death. They also thought that the provision for cesser upon the reconciliation of the parties tended to show that the deed was not intended to endure for the whole life of the wife. The House of Lords C have, however, taken the contrary view, and have decided that the estate of the husband is bound.

AS TO DURATION OF ANNUITIES UNDER SEPARATION DEEDS, see HALSBURY, Hailsham Edn., Vol. 16, pp. 723, 724, para. 1178; and FOR CASES, see DIGEST, Vol. 27, pp. 231-233, Nos. 2028-2043.]

D

APPEAL from an order of the Court of Appeal (SLESSER and SCOTT, L.JJ., EVE, J., dissenting), dated Nov. 5, 1936, ordering that the judgment given by DEPUTY JUDGE OWEN on July 14, 1936, in favour of the plaintiff (the present appellant) in the county court of Kingston-upon-Hull be set aside, and judgment entered for the defendants (the E present respondents) with costs. The proceedings in the Court of Appeal are reported in [1936] 3 All E.R. 520. The facts and the arguments are set out in the judgment.

Richard Elwes and *R. O. Wilberforce* for the appellant.

J. Willoughby Jardine, K.C., and *Clive W. Salter* for the respondents. F

LORD ATKIN: My Lords, this is an appeal from an order of the Court of Appeal which reversed the judgment of the deputy county court judge in an action which was brought by the appellant in the county court at Hull. The action was brought to recover a sum of money G alleged to be due to the plaintiff under a deed of separation which was made between her and her husband in 1922. The action was against the executors of the husband, and it was brought in respect of two sums of money, £8 which had fallen due before the death of the husband, and £12 which had fallen due after the death of the husband. The only H question which arises in this case is whether or not the widow is entitled to recover any sum of money which fell due after her husband had died, it being said that the provisions in the separation deed ceased to be of any effect as soon as the husband died. My Lords, it is necessary to refer to the separation deed, which is in a very common form. It was made on Sept. 23, 1922, between the husband, who was a butcher, and his wife. It recited that unhappy differences had arisen between Thomas Levitt Kirk and Annie Mary Kirk, and that they had mutually agreed to live apart from each other for the future, and that Thomas Kirk had agreed to pay to Annie Kirk, his wife:

> A a clear weekly sum of £2 during her life for the maintenance and support of herself subject nevertheless to the provisoes and conditions hereinafter contained.

Then it proceeded:

> In pursuance of the said agreement and in consideration of the premises the said Thomas Levitt Kirk hereby covenants with the said Annie Mary Kirk . . .

B The first covenant was that Annie Kirk might at all times live apart from Thomas Kirk; the second was that Thomas Kirk should not in any manner molest the wife, which is a common form covenant; and the third covenant was:

> C that the said Thomas Levitt Kirk will weekly during the life of the said Annie Mary Kirk on condition that and so long as the said Annie Mary Kirk shall continue to lead a chaste life pay or cause to be paid to the said Annie Mary Kirk or to such person or persons as she shall from time to time direct or appoint in writing the clear weekly sum of £2 without any deduction whatsoever for the separate use and benefit of the said Annie Mary Kirk and for the maintenance of herself the first payment thereof to be made on the execution of these presents.

D The deed then contained covenants by the wife:

> In consideration of the premises the said Annie Mary Kirk hereby covenants with the said Thomas Levitt Kirk as follows . . . that she will at all times hereafter keep the said Thomas Levitt Kirk indemnified against all debts and liabilities which the said Annie Mary Kirk may hereafter contract . . .

E Secondly, that she would not molest him; and, thirdly, that, if he were at any time called upon to pay any debts which she might thereafter contract, then the amounts which he had to pay should be deducted from the amount of the weekly sum of £2. There was then a further provision:

> F It is hereby agreed that in case the said Thomas Levitt Kirk and Annie Mary Kirk shall at any time hereafter with their mutual consent cohabit as man and wife then and in such case the said weekly sum of £2 shall be no longer payable and all the covenants hereinbefore contained shall become void.

My Lords, on the plain construction of that agreement, no question, it appears to me, could arise, but that the husband's estate remained G liable to pay this sum which he had covenanted to pay to the wife during her life. The wife is alive, and, therefore, she would, one would have thought, have become entitled under the covenant to receive that sum of money. It has to be remembered that, while it is true that the covenant was not expressly made by the covenantor for his executors H and administrators, by the provisions of the Law of Property Act, 1925, s. 80, which only restated in different words the terms of the well known section in the Conveyancing Act, 1881:

> A covenant and a bond and an obligation or contract under seal made after Dec. 31, 1881, binds the real estate as well as the personal estate of the person making the same if and so far as a contrary intention is not expressed in the covenant, bond, obligation, or contract.

Therefore, this contract, which is under seal, is to be read as if it were made by the husband for his executors and administrators, unless the contrary intention is found expressed in the covenant. So far, the matter seems to me to be beyond question, and the wife has the right expressed in the deed. From the judgment given by the late DEPUTY JUDGE OWEN—the judgment of a very careful, learned and experienced A lawyer—the county court judge had apparently no doubt upon the matter, and he gave reasons, which appear to me to be convincing, for holding that the plaintiff was entitled to recover. On appeal to the Court of Appeal, the majority of the Court of Appeal took a different view; SLESSER and SCOTT, L.JJ., differed from EVE, J., and the majority took B the view that, in this particular covenant, there was a contrary intention expressed as to the covenant binding the estate of the testator, or in other words continuing after his death. The view that was taken was that, in a deed of this kind (I am now paraphrasing the grounds of the judgment, but I think I am expressing them accurately), the main C object of the deed was to provide for the parties living apart; on the death of the husband, they could no longer live apart—I think that is true—and, inasmuch as they could no longer live apart, the whole basis of the contract had disappeared, and thereupon all the agreements came to an end. My Lords, I find myself quite unable to accept that view. It D has already been held that a covenant to pay for life, expressed in a separation deed, does not come to an end after the marriage tie has ceased to exist; in other words it does not come to an end on the divorce of the parties. For my part, I see no reason at all to assume that the parties would not have made this agreement, and did not intend to make E this agreement, in the events which have happened. It is a mistake, with respect, to assume that, because the parties enter into a contract, the primary object of which is to secure that each shall continue to render services or forbearances to the other for a term of years, one of the promisors may not validly make a promise to continue to make a F payment to the promisee after the period during which the mutual services or forbearances are to be rendered has come to an end. That seems to me to be this case: The parties have agreed to live separate, they have lived separate, the agreement has been performed, so far as it can be performed, up to the present, and there is no longer any obligation G which could be said to be in force, or could be enforced by either party, to live apart. But what has that got to do with the covenant by the husband that, provided his wife does agree to live apart from him, he will, after his death, continue to provide for her maintenance—the most ordinary obligation for him to assume on the one part, the most ordinary H obligation for the wife to stipulate for on her part; because, if it were otherwise, she would be left, on his death, without any provision at all for her maintenance, and, obviously, she is not in a position to expect to receive any relief from any of his testamentary dispositions?

My Lords, with great respect for the Lords Justices, I fail to see any ground whatever for invoking either the principle of frustration or any other principle of any implied term which should make this stipulation on the part of the husband come to an end upon his death. As I have said, the statute quite plainly imposes an obligation which binds his estate, unless the contrary intention is expressed. I find no contrary intention expressed in the deed. If I had to consider the intention of the parties at all, I should have come to the conclusion that the intention was that the obligation was to last after the death of the husband ; but it is unnecessary to decide that. On the plain words of the document, it appears to me that the wife proves her case, and, with great respect, I prefer the reasons given in the judgment of the deputy county court judge, and the very short and clear judgment of Eve, J. In consequence, I move your Lordships that this appeal should be allowed, and that the judgment of the deputy county court judge should be restored.

Lord Thankerton : My Lords, I agree. I adopt the words of Eve, J., with regard to this deed, when he says at p. 528 that :

> its language is clear, simple, unambiguous and intelligible. No one can read it without appreciating that the payment of £2 is to continue during the lifetime of the wife. It is so stated in the recital, in cl. (*c*) of the husband's covenant and in the wife's covenant (*c*).

I know that sometimes the word "frustration" is regarded in legal circles as blessed equally with the word "Mesopotamia," but I confess that I cannot see any justification for suggesting its applicability in the present circumstances. I really have nothing to add to what Lord Atkin has said ; I agree with him.

Lord Russell of Killowen : My Lords, this appears to me to be a very plain case, and one in which I would be quite satisfied to rest my decision on the grounds stated in the judgments of the deputy county court judge and of Eve, J. The convenant is a covenant by the husband to pay during the life of the wife, and I cannot find that any intention is expressed in the covenant not to bind the real and personal estate of the husband. Mere implication of such an intention, even if any grounds for such an implication existed in the present case (and in my opinion no such grounds exist), would be insufficient. To speak of frustration in regard to a contract which has been carried out to completion in every detail, except the one matter here in dispute, appears to me to be a misuse of that word. I agree that the appeal should be allowed.

Lord Wright : My Lords, I agree also, and I have nothing to add.

Lord Roche : My Lords, I agree, and have nothing to add to that which has fallen from your Lordships.

Appeal allowed with costs.

Solicitors : *A. E. Hamlin, Brown & Co.*, agents for *Pearlman & Rosen*, Hull (for the appellant) ; *F. Eustace & Co.* (for the respondents).

[*Reported by* Michael Marcus, Esq., *Barrister-at-Law.*]

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* SACKVILLE ESTATES, LTD.

[KING'S BENCH DIVISION (Lawrence, J.), **April 23, 26, 27, 1937.**]

Income Tax—Deduction by occupier from rent—Relief under Sched. A in respect of unlet tenements—Disagreement between landlord and tenant as to deduction—Reference to General Commissioners—Finality of decision of General Commissioners—Income Tax Act, 1918 (*c.* 40), *All Schedules Rules, r.* 22—*Finance Act,* 1930 (*c.* 28), *s.* 21.

The plaintiffs leased a certain building to the defendant company at a rent of £9,500. The assessment under Sched. A upon the defendant company for the years 1933/34 and 1934/35 was for £19,000. As some parts of the building were empty, relief was granted to the defendant company under the Finance Act, 1930, s. 21, so that tax was calculated upon £3,114 for 1933/34 and £5,654 for 1934/35. The defendant company sought to deduct tax from the rent payable to the plaintiffs upon the whole £9,500. The plaintiffs objected to such a deduction, and the defendant company purported to refer the difference which had arisen between them to the General Commissioners under All Schedules Rules, r. 22. The General Commissioners decided that the defendant company was entitled to deduct the amount of tax on £9,500. The plaintiffs protested against the jurisdiction of the General Commissioners and brought an action upon the lease for rent:—

HELD: the jurisdiction of the court was ousted by All Schedules Rules, r. 22, and the decision of the General Commissioners was final.

[**EDITORIAL NOTE.** While the adjustment of an apportionment account between a vendor and purchaser, which is purely a question of *quantum*, may most conveniently be referred to the general commissioners and their decision be made final, it may be thought that questions between landlord and tenant such as arise here involve a question of principle, and an appeal to the court should be provided for. The rule, however, as worded seems definitely to provide for such questions being finally decided by the general commissioners, for it refers to a difference arising between a landlord and a tenant with regard to the deduction on account of tax to be made. This provides not for a decision as to the amount of the deduction, but also as to the actual deduction.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 17, p. 62, para. 121; and FOR THE RULE, see HALSBURY'S COMPLETE STATUTES OF ENGLAND, Vol. 9, p. 594.]

ACTION for rent. The facts are set out in the judgment.

Cyril L. King, K.C., and *F. N. Bucher* for the plaintiffs.

A. M. Latter, K.C., and *F. H. Talbot* for the defendant company.

LAWRENCE, J.: In this case the Ecclesiastical Commissioners for England are suing Sackville Estates, Ltd., for rent upon a lease of a building, a lease by the plaintiffs to the defendant company, at a rent of £9,500. The assessment under Sched. A was made for the years in question, namely, 1933/34 and 1934/35, upon Sackville Estates, Ltd., and the net assessment was for a sum of £19,000. But in consequence of some of the rooms, or parts of this building, being empty, relief was granted to Sackville Estates, Ltd., under the Finance Act, 1930, s. 21. That section provides that the commissioners of inland revenue at any time not later than 12 months after the end of any year of assessment, if it is shown to their satisfaction that any apartment or tenement in any house or building let in different apartments or tenements and occupied by two or more persons was unoccupied during that year or any part of that year, shall cause such relief to be given from tax charged under Sched. A as appears to them just. Application having been made under sect. 21 of the Act of 1930, the Inland Revenue Commissioners granted relief to the defendant company, so that the tax was calculated upon a sum of £3,114, for, as I undertand, the year 1933/34, and upon a sum of £5,654 for the year 1934/35.

Sackville Estates, Ltd., sought to deduct the tax upon the whole £9,500, which was the ground rent which was payable under its lease. The Ecclesiastical Commissioners, having discovered that relief had been granted under sect. 21 of the Act of 1930, objected to such a deduction, whereupon Sackville Estates, Ltd., purported to refer the difference which had arisen between them to the General Commissioners, under All Schedules Rules, r. 22. The Ecclesiastical Commissioners refused to have anything to do with that purported reference to the General Commissioners, and protested against the jurisdiction of the General Commissioners under that rule, and they brought this action for the rent.

Two questions have been argued before me, the first being that the jurisdiction of the Commissioners, who have decided, under r. 22, that Sackville Estates, Ltd., was entitled to deduct the amount of tax on £9,500, is final, and that the court's jurisdiction is ousted. The second question which has been argued before me, assuming that the jurisdiction of the Commissioners is not final, and that the jurisdiction of the court is not ousted, is whether the decision of the Commissioners was right, and whether Sackville Estates, Ltd., has the right to deduct any more than the tax which it has actually paid and borne on £3,114 or £5,654.

The first question depends upon the construction of r. 22. The argument which has been presented for Sackville Estates, Ltd., by Mr. Latter and Mr. Talbot, is that r. 22 formed part of the Act of 1842, and that, at that time, there was no appeal from the decision of the General Commissioners, and that therefore there is nothing extraordinary in committing this question to the final decision of the General Commissioners, and that the words of the rule are apt to cover a difference such as this. On the other hand, Mr. King has argued that the words of r. 22 are inapt to cover the question as to what deduction a tenant is entitled to make from his rent on account of tax. The main argument adduced by Mr. King is that the words of the rule:

> the general commissioners of the division shall settle the proportion of the payments or deductions to be made according to the provisions of this Act, and, in default of payment, shall levy the same as if the proportions settled by them had been charged upon the respective persons, and shall pay over the same to the collector or to the proper person, as the case may require—

are totally inappropriate to apply to determining what the proper deduction is. He says that the Act lays down rules to determine what the proper deduction is, and that this rule merely gave to the commissioners power to apportion or to settle the proportions of the payments or deductions so arrived at by reference to the Act. He is constrained to admit, I think, that that construction of the words of r. 22 gives little or no meaning to the first sub-paragraph which says : A

> If a difference arises (*a*) between tenant and landlord or any other persons with regard to the deduction on account of tax to be made from any annual sum.

As I say, he is constrained to admit that that construction of r. 22 gives no meaning to those words. On the other hand, Mr. Latter says that the words may either be read as though the words " the proportion of the payments or deductions " are equivalent to the amount of the payments or deductions, or that the words may be read : " shall settle the proportion of the payments, or shall settle the deductions to be made according to the provisions of this Act." He also contends that the words : B C

> and, in default of payment, shall levy the same as if the proportions settled by them had been charged upon the respective persons, and shall pay over the same to the collector or to the proper person, as the case may require—

are perfectly apt to deal with a case where an improper deduction has been made by the tenant and a difference has arisen as to the improper deduction, and it is necessary for the commissioners to settle, as between the tenant and the landlord, what was the proper deduction, to put right that improper deduction and to levy the amount of the proportion upon the two of them, and to pay over either to the collector or to the landlord or tenant, as the case may be, the proper proportion. D

I have, with considerable reluctance, come to the conclusion that r. 22 ought to be given the construction for which Mr. Latter contends, and, on that view of the rule, the jurisdiction of the court, upon the question now raised, is ousted, and I have no jurisdiction to deal with the second question which has been argued. If the view which appears to have been taken by the Commissioners should be thought to work hardship, it is a matter which can be dealt with by legislation. I do not think it would be proper for me, holding that there is no jurisdiction, to express my own opinion upon it. I therefore must give judgment for the amount of the rent based upon the view of the General Commissioners as to the proper deduction to be made. E F G

Solicitors : *Milles, Jennings White & Foster* (for the plaintiffs) ; *Gregory, Rowcliffe & Co.*, agents for *Addleshaw, Sons & Latham*, Manchester (for the defendant company).

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*] H

CROWE *v.* CROWE.

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Bucknill, J.), **April 13, 1937.**]

Divorce—Foreign decree in favour of husband—Parties domiciled abroad at time of decree—Collusion—Fraud not touching the jurisdiction—Wife's petition to test validity of decree.

A husband and wife were married in 1916. In 1922 they went to America, where they settled, the husband getting employment. In 1925 the husband deserted his wife and in 1926 at the husband's request the wife visited certain lawyers in America, where she saw the husband. He said he had decided to take divorce proceedings against her and that he would pay her a certain weekly sum and give her the custody of the child of the marriage. The wife agreed to this, and a divorce petition was duly filed by the husband alleging cruelty by the wife, and alleging that he "resides in and is an inhabitant of the State of Michigan." No answer was put in by the wife, she did not take the point that the husband was not domiciled in that state, and she did not defend the case. A decree was duly made. The wife returned to England and, in order to test the validity of the American divorce, she brought a petition for divorce in England alleging adultery by the husband with the woman whom he had married since the American divorce :—

HELD : (i) it was clear from the evidence that the husband was domiciled in the State of Michigan when he filed his petition for divorce, and the decree granted in that state was a valid one. The wife, being a single woman, could not, therefore, bring a petition for divorce in England.

(ii) the American decree was not invalidated by the fact that the interview between the parties at the lawyers might in England be considered to amount to collusion.

[EDITORIAL NOTE. The competency of a court to pronounce a decree of divorce is only recognised in England where the parties at the time of the decree were domiciled within the jurisdiction of that court. It has been apprehended that subsequent proof of collusion between the parties would not invalidate a foreign decree, and that view is given effect to here.

AS TO FINALITY OF FOREIGN DECREE, see HALSBURY, Hailsham Edn., Vol. 6, pp. 309-311, para. 363 ; and FOR CASES, see DIGEST, Vol. 11, pp. 428-431, Nos. 927-943.]

Case referred to :

(1) *Bater* v. *Bater*, [1906] P. 209 ; 11 Digest 429, *935* ; 75 L.J. P. 60 ; 94 L.T. 835.

WIFE'S undefended petition for dissolution on the ground of adultery.

F. S. H. Bryant, for the petitioner : It has been considered that the most convenient way of testing the validity of the decree of divorce obtained by the present respondent against the petitioner in the State of Michigan is for the petitioner to bring a suit in this country charging him with adultery with the woman whom he subsequently married in Michigan. Although, on an examination of the facts, it might be thought that the proceedings in Michigan were collusive, it is submitted that the decision in *Bater* v. *Bater* (1) applies.

BUCKNILL, J. : This petition is brought by Grace Elisa Crowe for the dissolution of her marriage to Thomas Frederick Crowe, on the grounds of his adultery with a woman named Doris Mabel Edie. It is said that, on another date, adultery was committed with another woman at Newcastle. The petitioner in her petition says that she was living in London at the date of the presentation of the petition, in Aug., 1929, and she alleges that the respondent at that time was living in Surrey, and, further, that she and the respondent are domiciled in England. The respondent entered an appearance to the petition under protest in these words :

> . . . under protest to the jurisdiction of the court on the following grounds : That the marriage between the parties hereto was duly dissolved by decree of the circuit judge in the circuit court for the county of Wayne in the State of Michigan, United States of America, on June 19, 1926, when both the parties to the said marriage were domiciled within the jurisdiction of the said court.

There is really no dispute about the facts. The parties were married on June 8, 1916, and a son was born to the wife in 1917. In 1922, the husband and the wife went to America, to Detroit. They settled there, and he got work as a motor engineer. In 1925, the respondent deserted his wife, and, in the following year, the petitioner went to the offices of some lawyers in Detroit, at the request of the husband, who remained living in Detroit. She saw her husband, who said that he had decided to take divorce proceedings against her, and that he would pay her ten dollars a week and she could have the child. The petitioner in evidence said that she agreed to this, because she was very unhappy, and a divorce petition was in due course filed by the husband in the circuit court in the county of Wayne in the State of Michigan, alleging cruelty by the wife, and alleging in the petition that he " resides in and is an inhabitant of this state." I assume, in the absence of evidence to the contrary, that, in the State of Michigan, jurisdiction in divorce is based on the domicil of the husband. No answer was put in by the wife. She did not take the point that the husband was not domiciled in the state, and she did not defend the case. A decree was made by the judge of the court in these words :

> It is ordered, adjudged and decreed, and this court by virtue of the authority therein vested and in pursuance of the statute in such case made and provided doth order, adjudge and decree that the marriage between said plaintiff, Thomas F. Crowe, and the said defendant, Grace E. Crowe, is hereby dissolved and a divorce from the bonds of matrimony between the said parties is granted to plaintiff.

Mrs. Crowe, the petitioner, said quite frankly in the witness box that she and her husband both considered that divorce proceedings, if taken in the State of Michigan, would be valid, and that a decree would set both of them free so that either of them could marry again. She was advised out there that a decree would be valid, and she thought it would be valid and, at that time, at any rate, she acted upon that assumption. Now, I doubt very much whether, in the absence of fraud, this court is competent to consider the question of the validity of a foreign decree obtained by persons within the jurisdiction of the foreign court. It appears to be abundantly clear from the evidence that the husband was in fact domiciled in the State of Michigan when he asked for a decree. I think that that is clear from the evidence of the petitioner in this case, who says that they settled in America in 1922, that relations were there, that it was thought that they would be better there, that she formed the intention of remaining there, and so did he. They stayed in America from 1922 until 1927, with the exception of a short visit to England in 1925, when she brought the child over. In my view, the decree granted by the circuit judge in the State of Michigan was a valid decree, and the result of it was that the petitioner and the respondent ceased to be man and wife. That being so, this petition, in my view, fails, for the simple reason that, at the time when the petition in this court was filed, namely, Aug. 21, 1929, the petitioner was not the lawful wife of Thomas Frederick Crowe, but was in fact a single woman.

Mr. Bryant pointed out that the interview between the petitioner and the respondent at the lawyers' office, in Mar., 1926, might be considered in this court to amount to collusion, and he called my attention to the case of *Bater* v. *Bater* (1) as bearing on that question. What SIR GORELL BARNES, P., said, in that case at p. 218, I think applies to this case. He said:

> Mr. Duke argued that in many of the judgments it has been said that the courts will not recognise the decree of a foreign tribunal where it has been obtained by the collusion or fraud of the parties. But I think when those cases are examined that the collusion or fraud which was being referred to was in every case, so far as I have had time to examine the matter, collusion or fraud relating to that which went to the root of the matter, namely, the jurisdiction of the court. In other words, as an illustration, cases where the parties had gone to the foreign country and were not truly domiciled there, and represented that they were domiciled there, and so had induced the court to grant a decree. The collusion or fraud in those cases goes to the root of the jurisdiction. There is no jurisdiction if there is no domicil, and therefore collusion and fraud entered into many of those cases in a way that went to fortify the view that where there is no domicil there is no jurisdiction. But supposing that what was kept back was something that would have made the court come to a different conclusion than it would otherwise have done, I can see no valid reason in the judgments in cases affecting status for treating the decree as a nullity, unless it is set aside.

If, in the case which I am considering, the husband and wife had fraudulently tried to establish jurisdiction in America by submitting facts relating to domicil which were untrue, it might well be that this court would say, on proof of that, that the decree was invalid. There is nothing of that kind in this case. The mere fact that there may have been some arrangement as to the method of procedure in my opinion does not invalidate the decree that was made in the case.

I think that that really disposes of the matter, and the result is that the petition must be dismissed.

Petition dismissed.

Solicitors: *Godfrey Warr & Co.* (for the petitioner).

[*Reported by* J. F. COMPTON MILLER, ESQ., *Barrister-at-Law.*]

COOPER *v.* WILSON.

Applied. Barnard *v.* National Dock Labour Board. [1952] 2 All E.R. 424.

[Court of Appeal (Greer and Scott, L.JJ., and [illegible]

November 26, 27, 30, December 1, 2, 3, 1936

Applied. Barnard *v.* National Dock Labour Board. [1953] 1 All E.R. 1113

Police—Borough police force—Sergeant—Resignation—Acceptance—Cancellation—Dismissal after expiration of notice—Validity—Power to dismiss— A
Right to declaration—Municipal Corporations Act, 1882 (*c.* 50), *s.* 191 (4)—*Police Act,* 1919 (*c.* 46)—*Police Pensions Act,* 1921 (*c.* 31)—*Police* (*Appeals*) *Act,* 1927 (*c.* 19).

The plaintiff, who was a sergeant in the Liverpool city police force, tendered his resignation to the chief constable, who accepted it. Before the acceptance was communicated to the plaintiff, certain complaints B
were made against him. The chief constable retracted his acceptance of the resignation, and held an inquiry, as a result of which he purported to dismiss the plaintiff from the police force. The plaintiff appealed to the watch committee, who upheld the chief constable's decision. The plaintiff commenced an action against the chief constable, certain other members of the Liverpool city police force, and the members of the watch committee who had heard his appeal, and claimed, *inter* C
alia, declarations (*a*) that the chief constable was not entitled to cancel his acceptance of the plaintiff's resignation; (*b*) that the plaintiff had resigned; (*c*) that the hearing before the chief constable was invalid; (*d*) that the dismissal of the plaintiff was invalid; (*e*) that the hearing before the watch committee was invalid; (*f*) that the confirmation by the watch committee of the chief constable's decision was invalid; D
and (*g*) that the defendant members of the watch committee were not entitled to retain the rateable deductions from the plaintiff's pay. The plaintiff contended that the hearing before the watch committee was void, in that it had been conducted in a manner contrary to the principles of natural justice. The respondents contended that, if the plaintiff wished to appeal from the decision of the watch committee, by virtue of the Police (Appeals) Act, 1927, he should have appealed E
to the Home Secretary, and, in the alternative, that the proper procedure was by a writ of *certiorari* or *mandamus*:—

Held [Macnaghten, J., dissenting]: (i) the chief constable had no power to dismiss a police officer; such power is vested in the watch committee.

(ii) the plaintiff's resignation from the Liverpool city police force F
had become effective before the date of the watch committee meeting and that committee had no power to dismiss the plaintiff, as he was not at the time any longer a member of the police force.

(iii) the plaintiff was entitled to the rateable deductions from his pay.

(iv) the hearing before the watch committee was conducted in a manner contrary to the principles of natural justice.

(v) as the plaintiff was contending that he had never been dismissed, G
it would have been useless for him to have appealed to the Secretary of State under the Police (Appeals) Act, 1927.

(vi) although entitled to obtain a writ of *certiorari*, the plaintiff was not thereby prevented from asking the court for a declaration.

[EDITORIAL NOTE. The authority which controls a borough police force is the watch committee, and that committee has the power of the appointment and dis- H
missal of constables and other ranks. A dismissal by the chief constable is not effective until confirmed by the watch committee. If an officer resigns by giving a month's notice, his service terminates at the end of that month and he cannot be subsequently dismissed. A purported dismissal by the chief constable during the period of notice has to be confirmed by the watch committee and if this confirmation is not secured during the period of notice, the dismissal is ineffective and the officer's

resignation is the only cause of his being no longer a member of the force. The penalties attaching to a dismissal are therefore not incurred in such a case.

As TO CONTROL OF BOROUGH POLICE FORCE, see HALSBURY, 1st Edn., Vol. 22, Police, p. 487, para. 997; and FOR CASES, see DIGEST, Vol. 37, p. 180, Nos. 19-24.]

Cases referred to:

(1) *Wallwork* v. *Fielding*, [1922] 2 K.B. 66; 37 Digest 180, *24*; 91 L.J. K.B. 568; 127 L.T. 131.

(2) *Kutner* v. *Phillips*, [1891] 2 Q.B. 267; 42 Digest 768, *1950*; 60 L.J. Q.B. 505; 64 L.T. 628.

(3) *Flannagan* v. *Shaw*, [1920] 3 K.B. 96; 31 Digest 541, *6860*; 89 L.J. K.B. 168; 122 L.T. 177.

(4) *Guaranty Trust Co. of New York* v. *Hannay & Co.*, [1915] W.N. 38, *affd.* [1915] 2 K.B. 536; 30 Digest 147, *219*; 84 L.J. K.B. 1465; 113 L.T. 98.

(5) *Hanson* v. *Radcliffe Urban District Council*, [1922] 2 Ch. 490; 30 Digest 143, *190*; 91 L.J. Ch. 829; 127 L.T. 509.

(6) *R.* v. *Essex JJ., Ex p. Perkins*, [1927] 2 K.B. 475; Digest Supp.; 96 L.J. K.B. 530; 137 L.T. 455.

(7) *R.* v. *London County Council, Ex p. Akkersdyk, Ex p. Fermenia*, [1892] 1 Q.B. 190; 33 Digest 103, *698*; 61 L.J. M.C. 75; 66 L.T. 168.

(8) *R.* v. *Brixton Income Tax Comrs.* (1913), 29 T.L.R. 712; 28 Digest 100, *602*; 6 Tax Cas. 195.

(9) *Andrews* v. *Mitchell*, [1905] A.C. 78; 25 Digest 325, *266*; 74 L.J. K.B. 333; 91 L.T. 537.

(10) *Hill* v. *Tothill*, [1936] W.N. 126; Digest Supp.

(11) *Peebles* v. *Oswaldtwistle Urban District Council*, [1897] 1 Q.B. 625; 33 Digest 22, *91*; 66 L.J. Q.B. 392; 76 L.T. 315; *affd. sub nom. Pasmore* v. *Oswaldtwistle Urban District Council*, [1898] A.C. 387; 67 L.J. Q.B. 635; 78 L.T. 569.

(12) *R.* v. *Board of Education*, [1910] 2 K.B. 165; 42 Digest 614, *141*; 79 L.J. K.B. 595; 102 L.T. 578; *affd. sub nom. Board of Education* v. *Rice*, [1911] A.C. 179.

(13) *R.* v. *Local Government Board, Ex p. Arlidge*, [1914] 1 K.B. 160; 42 Digest 602, *15*; 83 L.J. K.B. 86; 109 L.T. 651; *on appeal, sub nom. Local Government Board* v. *Arlidge*, [1915] A.C. 120.

(14) *Leeson* v. *General Council of Medical Education & Registration* (1889), 43 Ch.D. 366; 34 Digest 544, *30*; 59 L.J. Ch. 233; 61 L.T. 849.

(15) *R.* v. *Sussex JJ., Ex p. McCarthy*, [1924] 1 K.B. 256; 33 Digest 294, *97*; 93 L.J. K.B. 129; 130 L.T. 510.

(16) *R.* v. *Lancashire JJ.* (1906), 75 L.J. K.B. 198; 33 Digest 299, *138*; 94 L.T. 481.

(17) *R.* v. *Glamorgan Appeal Tribunal, Ex p. Fricker* (1917), 115 L.T. 930; 16 Digest 427, *2867*.

(18) *Law* v. *Chartered Institute of Patent Agents*, [1919] 2 Ch. 267; 36 Digest 857, *3443*; 88 L.J. Ch. 319; 121 L.T. 50.

(19) *R.* v. *London County Council, Ex p. Entertainments Protection Assocn., Ltd.*, [1931] 2 K.B. 215; Digest Supp.; 100 L.J. K.B. 760; 144 L.T. 464.

APPEAL by the plaintiff from the judgment of SINGLETON, J., at Liverpool Assizes, after trial before a special jury. The appellant was a member of the Liverpool city police force, having joined it in 1919, and reached the rank of third-class sergeant in 1933. On July 22 of that year he was given a fortnight's leave of absence, to complete his annual leave, and, on July 27, having decided to resign, he handed in the statutory month's notice of resignation, as prescribed by the Town Police Clauses Act, 1874, s. 10, incorporated in the Liverpool Corporation Act, 1921, by sect. 6 of that Act. The notice was due to expire on Aug. 24. On Aug. 8, however, the police preferred against him certain charges of offences against discipline, which arose out of the state of mutual hostility prevailing in his domestic life between his wife and A himself. On Aug. 14, the chief constable, after an inquiry in which he heard evidence upon the charges, purported to sentence him to dismissal and, on Aug. 29, five days after his resignation was due to come into effect, the watch committee, the head disciplinary authority of the force and the domestic tribunal of appeal under the Police Regulations, 1920, B purported both to dismiss his appeal and to pass upon the chief constable's sentence of dismissal the statutory confirmation required to make it effective. Thereafter, the watch committee refused to hand over to him his accumulated rateable deductions from pay amounting to £116 13*s.* 6*d.*, and in fact handed the whole amount over to his wife. C The appellant thereupon brought an action against Mr. Wilson, the chief constable, Mr. Hughes, a police superintendent, and the members of the watch committee who had taken part in the hearing of Aug. 29 (the third and fourth defendants being included in error), alleging that neither hearing was in accordance with the said regulations, and that D both were conducted contrary to the principles of natural justice, and claiming declarations that neither of the hearings had been legally valid, that he had not been validly dismissed, and that his resignation had operated, and asking for consequential payment of the above sum of £116 13*s.* 6*d.* There were also claims for damages for libel and conspiracy. E The attack upon the validity of the hearing before the chief constable, as contrary to natural justice, and the allegations of libel and conspiracy, were disposed of adversely to the appellant in the court below. There was also a claim against the police superintendent Hughes for damages for assault. On this, the jury found in the appellant's F favour, with £5 damages, and judgment was entered for him without costs. Nothing arose in the appeal in regard to this matter. The judge entered judgment for the defendants (other than Hughes) and dismissed the action. The main contentions on the appeal were that the resignation of the appellant duly took place in accordance with his notice, G so that, on Aug. 24, he ceased to be a member of the force, and his right to payment of the £116 13*s.* 6*d.* then definitely and finally arose, and that the hearing before the watch committee was legally invalid.

Edward Wooll and *E. Heriot-Hill* for the appellant.

D. P. Maxwell Fyfe, K.C., and *F. E. Pritchard* for the respondents H other than Mrs. Whiteley.

Mrs. Whiteley in person.

GREER, L.J.: This is an appeal by Ernest Cooper, an ex-sergeant of the Liverpool police force, from the decision of SINGLETON, J., after a trial before that learned judge and a special jury, who answered certain questions submitted to them by the learned judge. The appellant claimed in his writ, *inter alia*, a declaration that the hearing of an appeal by him by the watch committee of the city of Liverpool was not legally valid, a declaration that the confirmation by the watch committee of A the findings of the defendant Wilson, who was the chief constable of Liverpool, and sentence, were not legally valid, a declaration that the defendant Wilson and/or the watch committee were not entitled to retain the rateable deductions from the plaintiff's pay, and an order for the payment thereof to the plaintiff.

B The appeal raises questions of considerable public importance, not only to the city of Liverpool but also to every borough whose police affairs are managed by a watch committee. Before stating the facts on which this appeal turns, and the contentions of the appellant, it seems to me to be convenient to refer to the statutes affecting the position of a C police sergeant in the police force. By the Towns Police Clauses Act, 1847, s. 10, a constable is authorised to resign his office on giving to his superintendent constable one month's notice. The common law meaning of one month is a lunar month, that is to say, 28 days. The County and Borough Police Act, 1859, s. 26, gives to the watch committee of any D city, borough, district or place, power to suspend a constable whom they shall think remiss or negligent in the discharge of his duties, or otherwise unfit for the same. The Municipal Corporations Act, 1882, s. 191, gives to the watch committee or to any two justices jurisdiction to suspend, and to the watch committee power to dismiss, any constable E whom they think negligent in the discharge of his duties, or otherwise unfit for the same. The Police Pensions Act, 1921, s. 20, provides that, where a member of a police force, who has not been dismissed, or required to retire, as an alternative to dismissal, leaves without a pension or gratuity, the police authority shall pay him the whole of his rateable F deductions, that is to say, the deductions which had been made from his pay in respect of his contribution to the pension fund. The Police (Appeals) Act, 1927, authorises a member of the police force who has been dismissed, or required to resign, as an alternative to dismissal, a right of appeal to the Secretary of State, and the Police Act, 1919, s. 4, gives G to the Secretary of State power to make regulations as to the government, etc., and conditions of service of the members of all police forces within England and Wales. None of these later statutes contains any repeal of the statutes which gave to the watch committee the power to dismiss a constable, or the power to suspend a constable, and it has been H decided, and I think rightly decided, in *Wallwork* v. *Fielding* (1), that the statute of 1919 cannot be construed as an implied repeal of the statutory provisions with regard to the dismissal or suspension of a member of the police force. I think it is beyond dispute that, if it had been intended to repeal the power, which is confined to the watch committee in the city, to dismiss a constable, or to empower a chief constable to dismiss, this would have been done by express provision in some later statute. It was admitted that there is no statute giving power to a chief constable to dismiss.

In *Wallwork* v. *Fielding* (1), Lord Sterndale, M.R., expressly said that, under the Municipal Corporations Act, 1882, s. 191 (4), no one has power to dismiss a constable except the watch committee. In the case cited, it was indicated that it was for this reason that the right of suspension was reserved to justices as well as to the watch committee. In the course of his judgment, Warrington, L.J., uses these words at pp. 73, 74:

> In order that a subsequent statute, not expressly repealing a previous Act, or the provisions of a previous statute, may operate by implication as a repeal, it must be found that the provisions of the subsequent statute are so inconsistent with those of the previous one that the two cannot stand together. The principle was expressed by A. L. Smith, J., in *Kutner* v. *Phillips* (2) in the passage quoted by Scrutton, L.J., in *Flannagan* v. *Shaw* (3). He said this: "Now a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together, in which case the maxim *legis posteriores contrarias abrogant* applies. Unless two Acts are so plainly repugnant to each other, that effect cannot be given to both at the same time, a repeal will not be implied, and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together." In my opinion there is no such inconsistency here. Suspension and disciplinary procedure, followed by punishment, seem to me to be two entirely different things.

These observations seem to me to show that the power to make regulations under the Police Act, 1919, s. 4 (1), does not impliedly repeal sect. 191 (4) of the Act of 1882. The regulations, in my jugdment, must be read as applying to the way in which the watch committee are to exercise their powers in a borough, and to the way in which the chief constable is to exercise his similar powers in a county. They cannot be used to repeal a provision which Parliament has expressly left applicable to boroughs.

The regulation affecting the present case is reg. 20, cl. 2, which reads as follows:

> (2) In the case of a borough police force, the decision of the chief officer of police shall, subject to any general directions of the watch committee, be either (i) to dismiss the case, or (ii) to remit the case to the watch committee for further hearing, or (iii) to award a punishment as provided in reg. 21, provided that any punishment other than a caution shall be subject to confirmation by the watch committee, and any member of the force who feels aggrieved by a decision of the chief officer of police awarding a punishment shall be entitled to appear before the watch committee to appeal against such decision upon giving notice in writing to the chief officer of police forthwith or at any later date not less than three clear days before his case is to be laid before the committee.

If the proper construction of this clause involves that a power of dismissal is given to the chief constable, it would be *ultra vires*. I do not think, however, that it is *ultra vires*. It is only a regulation as to the procedure to be adopted to bring the question of dismissal to a hearing before the watch committee. The power to make regulations as to the government of the police force seems to me to extend no farther than a power to make regulations with regard to the way in which the statutory authority in borough police forces shall exercise its powers, that is, in the case of petty offences, the chief constable, and, in the case of serious offences, involving suspension or dismissal, the watch committee. An application to the watch committee to discharge a constable by reason of the regulations takes the form of an application for confirmation of the chief constable's decision, but it is none the less an application to the watch committee to dismiss, and must be heard and determined by the watch committee acting judicially or *quasi*-judicially. Until the preliminary decision of the chief constable comes before the watch committee for confirmation, it cannot have the effect of operating as a dismissal. It is only on confirmation by the statutory body, to whom alone is given the power to dismiss, that any dismissal can operate. It seems to me clear that the watch committee have no power to dismiss a constable who has already terminated his service by due notice, nor can they *ex post facto* decide that they would treat him as dismissed as from a date prior to the hearing of an application to confirm the decision of the chief constable.

I have for convenience already stated the statutory provisions which have to be considered in this appeal, and, having regard to the arguments that have been addressed to us, it may be convenient now to state in chronological order how the questions between the plaintiff and the watch committee arose. The plaintiff was a policeman who for rather more than 13 years before July, 1933, had served in the Liverpool police force with credit, and, so far as evidence was given before the chief constable and before the watch committee, without reproach. He had been twice promoted, and for two years before July, 1933, he had been serving in E Division, having previously, I think, been in C Division. According to his own statement, he did not find himself so comfortable in E Division as he had been in the division in which he was previously serving. On July 27, he sent in his resignation in the following words:

> I beg to report that I am desirous of resigning from the Liverpool city police, and tender one month's notice commencing 27/7/33 and expiring 24/8/33. My reason for doing this is because I intend going to reside with a relative abroad. E. Cooper, Sgt.

Chief Inspector Nichols was at the time acting superintendent of the E Division, and on the same date he submitted to Superintendent Hughes what he describes as "this application," adding that he had interviewed the sergeant and had been assured that his wife had full knowledge of the steps he was taking. The chief inspector adds in his letter:

> I intimated I should like to see her, but he prefers that if this course is necessary it should be by the chief constable. He appears to be dissatisfied with E Division, but affirms that no inquiry or action will prevent him from taking the step intended. He stressed the point that no family difficulty or domestic relations was responsible for his action. He contemplates going to Switzerland.

The notice of resignation and the chief inspector's letter were sent on to the chief constable on July 31. On Aug. 1, the chief constable noted in the margin that the resignation was accepted, adding:

> His reasons for resigning are his own and apparently there would not appear to have been any conduct on the sergeant's part calling for disciplinary action.

On Aug. 3 he wrote across this marginal note "cancelled." I take this to mean that the chief constable was then cancelling his note that there did not appear to have been any conduct calling for disciplinary action. In the course of his evidence at the second trial, the chief inspector said that, before he saw Mrs. Cooper, he told Cooper he would like to see his wife, but it was with the idea of keeping him in the force. He also said that Cooper had told him that his family relations were all right. Thereafter Superintendent Rogers, of the police headquarters, and Inspector Nichols saw the plaintiff's wife, and took statements from her. These were communicated to the chief constable, who then, on Aug. 3, ordered an inquiry. This inquiry was at first fixed for Aug. 12, but was adjourned, at the request of the plaintiff, to Aug. 14. The following charges were then formulated by Superintendent Hughes as the charges into which they desired the enquiry to be held by the chief constable:

> (1) Discreditable conduct, that is to say, he acted in a manner likely to bring discredit on the reputation of the force, in that he failed to subscribe to the maintenance of his wife and 2 children at 41, Dorothy Street, between July 20, 1933, and Aug. 6, 1933, by leaving them in a destitute condition. (2) Falsehood, that is to say, he wilfully made a false verbal statement to Chief Inspector Nichols, to whom he stated that the domestic relations with his wife were all that could be desired, about 11 a.m. on Monday, July 31, 1933. (3) Neglect of duty, that is to say, he failed to report a matter it was his duty to report, that is, that after being granted 14 days' leave from 22/7/33, he neglected to report that he would not be sleeping at his home if required for duty.

After hearing evidence, the chief constable found Cooper guilty on all charges, and purported to dismiss him. In doing so, he, in my judgment, misconceived his powers under the regulations. Reg. 20 of the Police Regulations, Aug. 20, 1920, made under the Police Act, 1919, s. 4, has already been quoted. It is worthy of note that any punishment other than a caution is subject to confirmation by the watch committee. It seems clear that this was not intended to be inconsistent with the statutory provision to the effect that the power of dismissal is vested in the watch committee and not in the chief officer of the police. If it means that the dismissal applies until disaffirmed on appeal, it would be contrary to the statute to which I have referred, and would be *ultra vires*, but, in my judgment, reg. 20 is a procedural regulation, providing for the mode in which the question, which can be decided by the watch committee only, is to come before them. There can be no doubt that the power of dismissal in boroughs remains solely in the watch committee. The Act of 1919 does not expressly or impliedly repeal the statute which says that the right of dismissal is to be in the watch committee. If it had been intended to give the power of dismissal to the chief constable, I would have expected express provisions to that effect, and there are no such provisions in the Act of 1919.

At the hearing of the case at the Liverpool Assizes, some criticism was put forward by counsel for the plaintiff of the way in which the inquiry was held by the chief constable. Such criticism was mainly concerned with the chief constable's failure to allow the plaintiff to give an explanation at a meeting with the chief constable before the inquiry, but, at the hearing of the case before us, Mr. Wooll, on behalf of the plaintiff, admitted that he was not justified in making any complaint about the conduct of the inquiry by the chief constable. Under the statute already referred to, if the plaintiff resigned, he was entitled as of right to have the pension deductions from his salary, which were his property, repaid to him, but, if he ceased to be a constable by reason of dismissal, the watch committee, as the police authority, had power to pay these deductions to his wife for the keep of herself and her children. It is difficult to explain the attitude of Chief Inspector Nichols, after he had taken the statement from Mrs. Cooper, otherwise than as indicating that he wished to bring about a result which would deprive the plaintiff of his right to be paid the amount of the deductions. Unfortunately for what I think were the objects of the chief inspector, Sergeant Hughes and Sergeant Rogers failed to realise the fact that the notice of resignation would run on until Aug. 24, and that after that date the plaintiff would cease to be a member of the force. It seems to me that, when the watch committee met, on Aug. 29, the plaintiff was no longer a member of the force, and the watch committee therefore could not *ex post facto* discharge him as from Aug. 14. If they could discharge a police officer who had left the force for five days, they could equally discharge him if he had been out of the force for six months. I think they had no such power, and they were unable in law to decide that an ex-member of the force should be treated as discharged, because while he was still a member of the force he was guilty of conduct that would have entitled the watch committee to discharge him. On this ground, it seems to me that the order of the watch committee dismissing the plaintiff's appeal and dismissing him from the force was one that they were not entitled to make, and was a mere nullity.

It was contended for the respondents that, by appearing before the watch committee, the plaintiff must be taken to have withdrawn his notice of resignation. This argument has, in my judgment, no weight. If it was desired to obtain his discharge before the expiration of his notice, a special meeting of the watch committee could have been called on some date between Aug. 14 and 24, so as to enable the watch committee to deal with the matter before the expiration of the notice. This view of the case is sufficient to determine the appeal in the plaintiff's favour, unless we come to the conclusion either that, however unauthorised the dismissal might be, the plaintiff's sole right was to appeal to the Secretary of State, or, alternatively, to apply by *certiorari* to quash the order of dismissal. I do not think either of these contentions applies to a case like the present. It would be idle for a plaintiff who is alleging that he has never been dismissed to appeal to the Secretary of State, nor do I think that the fact that that is a remedy which he could take prohibits his access to the court for a declaration that his dismissal was invalid, nor do I think that the power which he undoubtedly possessed of obtaining a writ of *certiorari* to quash the order for his dismissal prevents his application to the court for a declaration as to the invalidity of the order of dismissal. The power of the court to grant declarations has been greatly extended in recent years, and, according to the judgment of Bailhache, J., in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (4), declarations may be granted in all cases where there is a dispute between a plaintiff and a defendant, and the claim for a declaration is a convenient method of dealing with such dispute. I think the view as to declaratory judgments that finally prevailed is that which is stated by Lord Sterndale, M.R., in *Hanson* v. *Radcliffe Urban District Council* (5), at p. 507. These are the words of Lord Sterndale, M.R.:

> Further, the defendants are a statutory body, which has purported to interfere with a contract made between two parties, and I adhere to my judgment in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (4), in which, although I had the misfortune to disagree with Lord Wrenbury, I said that a number of declarations had been made, and, in my opinion, rightly made, as to the rights of parties under contracts, without waiting for some event to happen, as, for instance, for a ship to arrive at its destination, in order to determine the result of the contracts, and what the exact causes of action might be. In my opinion, under R.S.C., Ord. 25, r. 5, the power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should, of course, be exercised judicially, but it seems to me that the discretion is very wide. I think that the order of Russell, J., was also right on this point, and that the appeal should be dismissed.

As I have said, if I am right, it is unnecessary for me to form any judgment on the more important question raised by the appellant's contention that the proceedings before the watch committee were contrary to natural justice, but, as this point was fully argued, it seems desirable that I should deal with it. When the plaintiff came into the presence of the watch committee to present his case in resisting confirmation of the chief constable's decision and asking for its reversal, he saw before him, seated at the table, opposite to where he would be giving his evidence, the deputy chairman, Mr. Alderman Eills, and, seated next to him, the chief constable, and, next to the chief constable, the deputy chief constable, and, to any outsider who happened to come in with him, it would seem as if the chief constable and the deputy chief constable were placed in a position where they would act with the committee as judges of the police application for dismissal and of the plaintiff's appeal against the findings of the chief constable. The proceedings were opened by a statement read by the chief constable. In the course of his opening statement, the chief constable again repeated the mistake made by the police of treating the plaintiff's notice of resignation as an application to resign. I cannot read the chief constable's statement as other than an opening statement by an applicant for an order of dismissal and by a respondent to the appeal, especially the passage referring to the third charge, and the concluding paragraph. Both learned counsel who addressed the court on behalf of the respondents described the chief constable as a second respondent. This seems to me a not inaccurate description of the chief constable's position in relation to the plaintiff's appeal, and nothing could be said with regard to him if he had said, "I am interested in the result of this appeal inasmuch as my decision is being attacked, but I do not propose to take any part in the arguments before this tribunal except by stating what my decision was." I think he went beyond that, and, in so doing, treated himself as one of the parties in the proceedings before the committee. In addition to the case made by Mr. Wooll with regard to the chief constable's presence in the tribunal, he made two other points which I think were not well founded. He complained that, when the plaintiff said that he had to contribute to the support of his father and mother, the deputy chairman said :

> He has just thought of that one ; we are too old in the head to believe it,

or words to that effect. The words proved to have been used by Alderman Eills, and so found by the jury, were :

> He has just thought of that one. We are too old in the head to believe that one.

I see no reason for holding that there was anything contrary to natural justice in this remark of the chairman, who was a man of experience, and entitled to express, as he appears to have done, his honest opinion. I also attach no importance to the suggestion that the refusal to permit the plaintiff to call Mrs. Gray and his mother-in-law was contrary to natural justice. Mrs. Cooper's allegation with regard to Mrs. Gray had been disproved in the inquiry, and there could be no object in calling her except to say again what she had said before the chief constable. With regard to the plaintiff's mother-in-law, what the plaintiff wished to happen was that she should be called in order that he might cross-examine her. This, of course, he was not entitled to do. But I think he is fairly entitled to complain that the presence on the bench, when they were deliberating as to whether they would or would not affirm his sentence, of one of the respondents to his appeal was contrary to natural justice, and that it thereby invalidated the decision of the watch committee, and entitled him to have a declaration to that effect.

I think the cases relied upon by Mr. Wooll, *R.* v. *Essex Justices, Ex p. Perkins* (6), *R.* v. *London County Council, Ex p. Akkersdyk, Ex p. Fermenia* (7), and *R.* v. *Brixton Income Tax Comrs.* (8), establish the proposition that, if the conduct of the justices is such as to give rise to a reasonable suspicion that justice does not seem to have been done, then their decision should be set aside. It is noticeable that in all those cases it was established to the satisfaction of the court that the persons whose presence was complained of when the tribunal was considering its decision in fact took no part in the decision, and, in the case of the surveyor of taxes, it was considered necessary to pass a special Act of Parliament to do away with all objections to his being present with the taxing authority when it was considering its decision. I ask myself what would anyone have thought who came into the room where the committee were sitting, after the plaintiff had gone out while they were considering their decision, and found, sitting on the bench with the committee, one of the respondents to the appeal, who had opened the case, though he had left the calling of the witnesses to Superintendent Hughes. Such a person, if reasonable, would have been likely to say to himself, "There has been an opportunity here for one of the parties to influence the judgment of the committee, and it looks as if justice may seem not to have been done." A

The case of *Andrews* v. *Mitchell* (9) seems to me to support the view that a claim for a declaration that a statutory body acted without jurisdiction can be dealt with by an action for a declaration that the decision in question was null and void. *Hill* v. *Tothill* (10) supports the contentions contained in the other justices' cases. *Pasmore* v. *Oswaldtwistle* B
Urban District Council (11), which was relied upon by the respondents, seems to me, with respect, to have no bearing on anything we have to decide in the present case. I think on this ground also the plaintiff ought to have succeeded in obtaining a declaration of the invalidity of the order made by the watch committee. C

Scott, L.J.: On the main issues in the case which survived for discussion before us, I have come to the conclusion that the judge ought to have accepted the contentions on behalf of the appellant, and given judgment for the appellant with suitable declarations of right and an order D
for payment of the £116 13*s.* 6*d.* for his rateable deductions from pay. I will deal first with the appellant's contention that his notice of resignation was not, as the respondents contended, defeated by the charges against him, but ran its course, and in fact brought about his statutory resignation on Aug. 24. For the following reasons, I think that the appellant's E
contention is well founded. There is nothing in any Act affecting borough police forces which in express terms provides that a statutory notice of resignation given under the Town Police Clauses Act, 1847, s. 10, shall cease to run if the constable who has given notice is charged before expiration of the notice with the commission of an offence for F
which he is liable to be expelled from the force. It was argued before us that, although not expressed, such a provision must be implied, because in its absence there might not be sufficient time to take all the proceedings required by the police regulations for prosecution of a discipline charge up to and including the final stage of confirmation by the G
watch committee, and that it was impossible that Parliament should have intended such an impasse. But this argument does not carry much weight, for there is a simple answer. In a borough police force, the watch committee has complete discretion at any moment to suspend a constable and, in that event, all his rights as a constable will be H
suspended, including his right to rely on his current notice of resignation: see *per* Lord Sterndale, M.R., in *Wallwork* v. *Fielding* (1), at p. 72, where he says this:

> All these learned judges treat it, it seems to me, as indisputable that if there is a power of suspension which is exercised, the whole contract is suspended, the

> obligations on both sides are suspended. It seems to me that is the inevitable meaning of suspension, and if there be any power necessary, there was express statutory power here to suspend the man from duty and that involves the suspension of payment for the discharge of the duty. The contract is suspended with regard to its performance by both sides, not only by one; therefore I think that point also fails.

And if, in an urgent case, there is not time to get action taken by the watch committee, any two justices have power under the Municipal Corporations Act, 1882, s. 191 (4), to make an order of suspension. The supposed need for the implication therefore does not exist. But, even if the argument of practical inconvenience were not thus disposed of, I could not see my way to imply the provision which the argument demands. In which section of which Act is it to be implied? In the Town Police Clauses Act, 1847, s. 10? In what words? Had Parliament intended it in that section, the intention could have been expressed: and, if it was not intended there, in what section of what Act should such a provision be implied? It is not consistent with the ordinary rules of statute interpretation to imply such a definite exception or condition in a vague and general way in some unspecified place in a series of statutes extending over a long period of time and covering a wide field of particular topics; it must at least be possible to select a particular provision in a particular Act and say that the exception or condition *must* be read into *that* provision in order to give to the Act the efficacy which its provisions as a whole plainly intend. I cannot see any such exigency here, and I therefore feel bound on this primary ground also to reject the respondents' suggestion. Accordingly, if a constable who has given notice is not suspended before his notice runs out, there is nothing to interrupt its currency. In the present case, the appellant was not suspended. His resignation therefore took place on Aug. 24, in accordance with his notice, and he resigned with all his statutory rights. One right was that which he possessed under the Police Pensions Act, 1921, s. 20, to be paid forthwith the whole of his fund of rateable deductions made under sect. 19 of the same Act—namely, the £116 13*s.* 6*d.* for which he claimed in this action. An ulterior consequence of the resignation was that, when the appellant came before the watch committee five days later, he was no longer a member of the Liverpool city police force, and the watch committee had no power, either executive or judicial, under the Acts and regulations, to dismiss him from the force, or to "confirm" the chief constable's sentence of dismissal, which was, by reg. 20, made expressly subject to subsequent confirmation by the watch committee. That this is the meaning of reg. 20 is clear on its wording but, if there were any doubt, it would be removed by the consideration that, in a borough force, as the references I will give in a moment will show, power of dismissal is not given to a chief constable, but only to the watch committee itself.

That the above reasoning is sound will appear, I think, from an examination of the Police Acts. They have always recognised and maintained certain distinctions between county police forces and borough police forces and, for that matter, also between the metropolitan police force and both the former, but we are not concerned in the present appeal with this last distinction. It is convenient in this review of the statutes to deal with the subject of dismissal first, although that topic is more closely germane to the second than to the first of the main questions. In county forces, the chief constable is the chief disciplinary authority for many purposes: see schedule to the Police (Pensions) Act, 1927. By the County Police Act, 1839, s. 6, he was given an express discretionary power to dismiss, subject to such lawful orders as he might receive from the justices in general, or quarter sessions assembled, and that power was extended, by the County Police Act, 1840, s. 15, to the case of county and borough forces consolidated under sect. 14 of the latter Act. In counties, the ultimate controlling power of the justices continued until the Local Government Act, 1888, came into force. Under sect. 9 of that Act, the powers and functions of the justices acting as an administrative body were transferred to the standing joint committee of the county council and the justices constituted under sect. 30 of the same Act, and that position still obtains to-day. But in the boroughs a different machinery was set up by the Municipal Corporations Act, 1835, the watch committee being by sect. 76 constituted the chief authority, and it was provided by sect. 77 that the watch committee, or two justices, might either:

> suspend or dismiss any constable whom they shall think negligent in the discharge of his duty, or otherwise unfit for the same.

Substantially the same provisions were repeated in the Municipal Corporations Act, 1882, ss. 190, 191, which are still in force to-day, with the exception that the power of dismissal was taken from the justices and reposed solely in the watch committee. In the schedule of the Police (Appeals) Act, 1927, the watch committee is stated to be the chief disciplinary authority in a borough. It is perhaps useful to quote the precise words of s. 191 (4) of the Act of 1882:

> The watch committee, or any two justices having jurisdiction in the borough, may at any time suspend, and the watch committee may at any time dismiss, any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same.

In a borough, it is thus clear that a chief constable has no power to dismiss, that power being vested solely in the watch committee.

I now deal with the power to suspend. By the County and Borough Police Act, 1859, s. 26, it was for the first time conferred on the chief constable of a county police force, and at the same time conferred on the watch committee in respect of a borough police force, but not alternatively on the justices, as had been done by the Municipal Corporations Act, 1835, s. 77, which I have already quoted. However, whether the power of the justices to suspend was taken away by sect. 26 of the Act of 1859 does not matter, for it was given back by sect. 191 of the present

Municipal Corporations Act above-quoted. In a borough, the power of suspension is thus to-day exerciseable by either the watch committee or two justices, but not by the chief constable. By the Police Act, 1919, s. 4 (1), the Secretary of State was authorised :

> to make regulations as to the government, mutual aid, pay, allowances, pensions, clothing, expenses and conditions of service of the members of all police forces within England and Wales, and every police authority shall comply with the regulations so made.

In the case of *Wallwork* v. *Fielding* (1), already cited, it was contended that the above enabling power about the "government" of the police and the regulations made thereunder together had the effect of repealing the power of suspension conferred by the Municipal Corporations Act, 1882, s. 191 (4), but it was decided by the Court of Appeal that they had no such effect, for neither in the Act nor in the regulations made under it was there anything said about suspension, or even indirectly affecting it.

The resultant statutory position, so far as material to this appeal, may be thus summarised : (1) No one but the watch committee could dismiss the appellant. (2) Either the watch committee or two justices could at any moment have suspended him, in which case his right to rely on his notice of resignation would equally have been suspended. (3) As he was not suspended, all his rights remained intact, and he ceased on Aug. 24 to be a member of the force. In the statement of claim a declaration was prayed "that the chief constable was not entitled in law to cancel his acceptance of the plaintiff's resignation," as he did. It is unnecessary to say more on this point, which was not much pressed before us, than that (i) the notice required no acceptance, and (ii) if it did, there could be no effective acceptance without communication to the author of the notice, which there never was in the present case.

I will now deal with the other main contention of the appellant before us, which was purely alternative—that, even if the appellant's resignation did not take place before the hearing of Aug. 29 before the watch committee, that hearing and the decision on the issues in the appeal, and the "confirmation" of the punishment, were all invalid and a nullity. Reg. 20 of the Police Regulations purports to do two things : (i) it repeats in effect the statutory provision that the watch committee alone can exercise the executive power of dismissal ; (ii) it constitutes the watch committee a *quasi*-judicial tribunal to try the charges against the accused constable. It is both an original hearing in which the chief constable is, as it were, prosecutor, and the accused constable the defendant—rather like an appeal at quarter sessions from magistrates on a question of fact—and also an appeal by way of re-hearing brought by the constable, who is aggrieved by the preliminary decision of the chief constable. The first part of reg. 20 is plainly *intra vires* sect. 4 of the Act of 1919, and it was not contended below, or before us, that this second legislative provision in reg. 20 is *ultra vires* the Act, and I assume that it is *intra vires*—without expressing any opinion. It is, however, necessary to look at the provision a little closely. Under it, the watch committee is made a domestic tribunal to try and decide very important issues of fact, of guilt or innocence, it may be, on grave criminal charges, and anyhow in all cases, where the chief constable has proposed dismissal, on charges of great seriousness to the accused A constable. On a criminal charge, presumably the watch committee would not act, but leave the matter to the ordinary criminal administration of justice; and in any case the decision of the watch committee would, in my view, be no bar to a trial of an issue "between the King and the prisoner" on the same charge in a criminal court. But as B between the constable and the police authority—the watch committee itself—which employs him, is the decision of the watch committee, on a trial under reg. 20, that the accused is guilty of the offences charged, an estoppel against an action for either damages for wrongful dismissal or declarations that he did not commit the offences charged? That C question does not arise here, as the form of the action brought seems to me tacitly to have assumed that the watch committee was, by the regulation, given exclusive jurisdiction over the question of guilt or innocence of the three charges of offences against the discipline code of the police regulations. But, if this view be right—and I repeat D that I express no opinion—it makes the function of the watch committee in point of degree approximate to the judicial rather than to the *quasi*-judicial.

In the Report of the Ministers' Powers Committee, at p. 73, an attempt was made to define the words "judicial" and "*quasi*-judicial": E

> A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute, and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which F disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including, where required, a ruling upon any disputed question of law. A *quasi*-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.

G

Broadly speaking, I think the above definitions there given are correct, but I would make an addition, and that is that, on such issues as were tried before the watch committee on Aug. 29, the *quasi*-judicial approaches in point of degree very near to the judicial. This does not, of course, mean that, because the watch committee was then exercising nearly H judicial functions, it was tied to ordinary judicial procedure. The principles both of its duties and of its freedom are explained in the oft-cited passage in the opinion of Lord Loreburn, L.C., in *Board of Education* v. *Rice* (12), at p. 182, which was quoted by Viscount Haldane, L.C., in *Local Government Board* v. *Arlidge* (13), at p. 132, and need not be re-quoted. But, whether the watch committee's function was judicial or only *quasi*-judicial makes no differences to the present case, because on behalf of the appellant there are made before us only three criticisms of its conduct of the hearing of Aug. 29, and those are as much applicable to the one function as to the other.

A It is plain, beyond doubt, that the chief constable was in effect the respondent to Sergeant Cooper's appeal. He was there in his capacity of chief executive officer of the force, in order to support his own provisional sentence of dismissal. He had prepared the statement of the case on behalf of the force as respondent, and against Cooper as appellant, B and he read it aloud at the hearing, as a sort of opening speech by counsel. From the finding by the jury that it was not read by him to the watch committee before Cooper was brought in, I infer that the reading took place at the outset of the trial, before anything else took place. The appeal seems to have been treated—rightly—as a re-hearing, and as if C the police authority were accepting the onus of proof as on the trial of an appeal on fact at quarter sessions, although I am not at all sure that that onus was really taken or discharged ; but that issue is not before us, and I express no opinion.

Two of the three complaints made before us against the conduct, D by the watch committee, of the proceedings before them, on the ground that it was contrary to natural justice, concern the conduct of the court in regard to the chief constable. The first is that he and his assistant were allowed to sit in a position which gave them the appearance at least of being members of the court which had to try the accused. They E sat next, and next but one, to the chairman. I think this was wrong. It is contrary to the principle of decisions like *R.* v. *London County Council*, *Ex p. Akkersdyk*, *Ex p. Fermenia* (7). In that case, the London County Council was determining applications for licences and acting judicially. Three members of a committee which had refused a licence, F their refusal being in effect under appeal before the main committee, sat with the others, although they did not vote. Their presence there was held to vitiate the proceedings : see *per* A. L. SMITH, J., delivering the judgment of the court (LORD COLERIDGE, C.J., and himself), at p. 195 :

> G In our judgment, the L.C.C. are adjudicating as to whether a man is or is not to be deprived of his licence ; to use the words of COTTON, L.J., in *Leeson* v. *General Council of Medical Education & Registration* (14), at p. 379, " Though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint made is well founded." In our judgment, when so acting, they are not emancipated from the ordinary principles upon which justice is administered in this kingdom, and which are, as it has been said, founded on its very essence.

H A. L. SMITH, J., later said, at p. 198 :

> In our judgment, if members of a body such as the L.C.C. consisting as it does of 139 persons, and sitting in a building like that at Spring Gardens, desire to retain counsel on their behalf to press accusations against applicants for licences, or others, before the council, they should either absent themselves altogether from the precincts of the building, or sit in such a position, with their counsel, that it may be known to all as to who the real accusers are, and that they do not " leave the bench " if they remain in the position the three councillors did upon this occasion.

See also *R.* v. *Sussex Justices, Ex p. McCarthy* (15); and, on the importance of the appearance, as well as the reality, of justice, see *R.* v. *Essex Justices, Ex p. Perkins* (6), *per* Avory, J., at pp. 488, 489, where he said this:

> If we had to consider whether or not he was in fact biassed, that statement would be most material. We have here to determine, however, whether or not there might appear to be a reasonable likelihood of his being biassed. If there might, then justice would not seem to the applicant to be done, and he would have a right to object to the clerk acting as such. I must conclude that, though the clerk to the justices and the justices did not know that his firm had acted for the applicant's wife, the necessary, or at least the reasonable, impression on the mind of the applicant would be that justice was not being done, seeing that the solicitor for his wife was acting with the justices and advising them on the hearing of the summons which she had taken out against him.

R. v. *Lancashire Justices* (16) is to the same effect. The case of *R.* v. *Glamorgan Appeal Tribunal* (17) is distinguishable. It was a time of war, and court space was scant and pressure great. I read the facts in that case as showing that the military representative was in fact segregated some little distance away, and treated as if he was in a different room. If the facts cannot be held to justify this view, the decision was wrong. But, even if the presence of the respondent sitting to all appearances amongst the members of the tribunal could be said not to vitiate the proceedings, the fact that he remained with them when the court was cleared for the committee to consider its decision is fatal to the validity of the proceedings. It makes no difference whether he then discussed the case with them or not: the risk that a respondent may influence the court is so abhorrent to English notions of justice that the possibility of it, or even the appearance of such a possibility, is sufficient to deprive the decision of all judicial force, and to render it a nullity.

In my view, this action is open to the same objections as is the committee's conduct in allowing the chief constable, really the prosecutor, on the re-hearing, and respondent on the appeal, to sit on the bench with them, but in a more acute degree, as there was, from the appellant's point of view, secrecy, and the risk of bias through the tribunal seeing one party without the other being present. Some relevant aspects of such procedure were discussed by Eve, J., in his judgment in *Law* v. *Chartered Institute of Patent Agents* (18), although others did not arise in that case; but I agree with the general views of the learned judge in that case, and in particular with this passage on p. 290:

> A person who has a judicial duty to perform is disqualified from performing it if he has a bias which renders him otherwise than an impartial judge, or if he has so conducted himself in relation to the matters to be investigated as to create in the mind of a reasonable man a suspicion that he may have such a bias.

Every one of the committee, by ordering the appellant to withdraw and allowing the chief constable to remain closeted with them, must inevitably have given rise in the appellant's mind to the suspicion that they already were, or might, under the influence of the chief constable, quickly become, biassed against him. The rule of justice that a court must not listen to one side behind the back of the other is fundamental—one of those "matters of substance, and not mere matters of form" to which the EARL OF HALSBURY, L.C., referred in *Andrews* v. *Mitchell* (9), at p. 81. It is not necessary to seek further authority for so self-evident a principle of justice as that when a tribunal considers its decision A behind closed doors it has no right to invite one party in and to shut the other out.

A third ground for impugning the hearing before the watch committee, on which the appellant relied in the argument before us, was that the conduct of the trial was inconsistent with "natural justice" in respect B of two incidents. The first was that the chairman, as found by the jury, interrupted the appellant in the course of his evidence, and said that he was lying. What provoked the interruption was an answer by the appellant to a question by Mrs. Whiteley. On p. 9 of the learned judge's notes is this passage, which I quote with an insertion agreed C upon between counsel before us, and italicised by me:

> Mrs. Whiteley—a member of the committee—said to me: "What do you do with the remainder of your money after you have paid your wife?" I told her that after buying food my wife did not even buy me a bootlace out of it. I bought all my own clothes and for some considerable time I had been assisting my aged parents across the water—they only have old-age pensions. Alderman Burton Eills remarked, after nodding his head and commencing to laugh, "He has just D thought of that one—we are too old in the head *to believe that, my lad.*" Each time I said anything, chief constable jumped up and interrupted. *I did not give evidence or make any statement because of the way I was treated. I could see it was useless* because of the attitude of the chief constable and the deputy chairman.

The incident and an explanatory answer of the jury are dealt with by the learned judge, at p. 9 of his judgment, in these terms:

E

> Then this answer is given to this question (8): "Did Alderman Eills impute to Cooper that he was lying?" "Yes." I thought it right to ask the jury what they meant quite by that. The foreman of the jury said what they meant was that Alderman Burton Eills made some such remark as "Oh, he has just thought of that one; we are too old in the head to believe that sort of thing." That was the only remark to which they pointed, and, so far as I know, it was made on one occasion only. That is on the jury's finding.

F

To meet the first police charge against him this statement, if true, was plainly material, and the tribunal ought to have given him every facility to develop his own evidence about it, and to adduce other evidence in support, if he had any. I do not doubt that a judge may express his G disbelief in a witness altogether, or in respect of a particular piece of evidence; but I do not think the occasion or manner of the chairman's intervention was justified. It tended to shut out a possible defence, and the impression left on my mind is that the disbelief in the honesty of the appellant's evidence was, to say the least, premature. With the H legal result of this view I will deal presently.

The other incident, also found as a fact by the jury, was that the chairman refused to allow the appellant to call Mrs. Gray as a witness. The appellant in his evidence at the trial before SINGLETON, J., swore that he told the chairman he wanted to call not only Mrs. Gray but also his wife's mother, that the chairman exclaimed, "We don't want to hear them. Do you, Mr. Wilson ?" and, on the latter saying "No," refused the appellant's request. The addition of his mother-in-law was corroborated by Mrs. Whiteley in her evidence. I deal first with Mrs. Gray. In view of the fact that Mrs. Cooper's statement, taken by the police, in which she accused her husband of immoral relations with Mrs. Gray, and Superintendent Rogers' report of Aug. 2, were both before the watch committee at the trial, and that Mrs. Cooper was then taken all through her statement by Superintendent Hughes, and, presumably, said that its contents were true, I think the appellant should have been allowed to call Mrs. Gray, even although the chief constable said he did not want her evidence. It is true that, as the chief constable had admitted that she was a wholly respectable woman, the particular allegation of illicit association with her was not being pressed against the appellant, and that allegation had become irrelevant and, if there had been a more regular and thorough hearing, so as to ensure (i) that the prosecution's complete withdrawal of that allegation was really understood by the members of the tribunal generally, and (ii) that the appellant should have a really sufficient opportunity of making good his contention that, at the lowest, he was not alone to blame for the unhappiness of his home, that there were two sides to that issue, and, putting it shortly, that he was not guilty on the first and third counts of the indictment against him, I should have agreed with the view that the refusal of leave to call Mrs. Gray did not involve a denial of justice. But I cannot feel sure on that head. I am not satisfied that that was the reality of the position. The fact that the chief constable's statement had been read to the tribunal, containing, as it did, a recapitulation of all the findings at which he had arrived, conveying, as it must have conveyed, the inevitable impression of his own strong belief in the truth of his findings ; and the further fact that Mrs. Cooper had been taken all through her "statement" with its references to Mrs. Gray, all this must have deeply impressed the minds of the tribunal, even although many of them were magistrates. For these reasons, I think the appellant should have been allowed to call Mrs. Gray. Had the lady been called, the chief constable would no doubt have made a formal disclaimer of any allegation connected with her name ; and I think that the appellant was entitled to the benefit of such a definite withdrawal.

In regard to the appellant's complaint in the witness-box that he was refused leave at the hearing before the watch committee to call his mother-in-law, the position is different ; his statement of claim did not include that part in the particulars of para. 18, and it was not included in the questions left to the jury. I do not think we can consider it now.

Taking both these incidents together, I arrive at the conclusion that they are sufficient to show a failure to give the appellant a fair trial. I do not think it necessary in this appeal to discuss the meaning and scope of the expression "natural justice" ; it is sufficiently understood to make my judgment clear when I say that the requirements of natural justice were not adequately met. There is a lengthy disquisition upon it in the Ministers' Powers Report, to which I have already referred, at pp. 75-80, and, without committing myself judicially to everything in that passage, I am in general agreement with it, so far as relevant to this appeal. I conclude, therefore, that for this reason also the hearing by the watch committee was not, in the legal sense, properly conducted.

The result is that, for the three reasons I have given, there was, in my opinion, no such hearing by the watch committee as is directed by reg. 20. That regulation must be construed as meaning that the appeal before the watch committee shall be conducted by them in consonance with the essential requirements of justice. However well intentioned the watch committee may have been personally in their desire to do their duty, which I do not doubt, the committee constituted as a *quasi*-judicial court to hear the appeal failed to conform to those requirements. It follows from this conclusion that there was in law no decision by the watch committee, and that the proceedings against the appellant under the police regulations were left, so to speak, in the air—charges made but not established; and thus the further conclusion follows that, even assuming, as I have assumed, for the purpose of deciding this, the second main issue, that the appellant's notice of resignation had not already produced his resignation on Aug. 24, there was, after Aug. 29, nothing to prevent his notice operating forthwith; and, in my view, it did so operate as soon as the watch committee treated their supposed but legally inoperative confirmation as the end of the matter.

There is no appeal before us from the learned judge's ruling on the issue of libel that the occasion was privileged, and we have not therefore to consider that matter. On the issues covered by the notice of appeal, the result, in my view, is that the appeal must be allowed, the judgment entered for the watch committee must be set aside, and an amended judgment entered, providing for payment to the appellant of the sum of £116 13*s*. 6*d*., his accumulated rateable deductions from pay. I think, in the circumstances, that that judgment ought to include interest on that sum at 4 per cent. from Aug. 24, 1933, the date upon which, in my view, the notice of resignation operated and made his rateable deductions immediately payable.

Macnaghten, J.: [His Lordship referred to the facts.] Before the trial judge and in this court it was argued that the minute of the chief constable, "The sergeant's resignation is accepted," precluded the chief constable from dismissing him subsequently. There is, in my opinion, no ground for that argument. No acceptance of the resignation was necessary and the minute made by the chief constable was in fact inoperative, since, whether he accepted or refused to accept the resignation, it would have become effective on Aug. 24. But, even if acceptance of the resignation had been required to make it effective, it seems obvious that, during the currency of the notice, the appellant remained a member of the Liverpool police force, and subject to the provisions of the police discipline code and to the punishments (including the punishment of dismissal) prescribed by the statutory regulations. Before SINGLETON, J., at the hearing in this court, another point was raised in support of the contention that the notice of resignation given on July 27 became effective on Aug. 24. It was said that, though the chief constable purported to dismiss the appellant forthwith on Aug. 14, he had in fact no authority to do so; that the power to dismiss a member of a borough police force belongs to the watch committee and to them alone, and the watch committee did not confirm the decision of the chief constable until Aug. 29, five days after the notice of resignation had taken effect. It is true that, by the Municipal Corporations Act, 1882, s. 191 (4), the power of dismissal is conferred, not on the chief constable, as is the case in the county police forces, but on the watch committee; but, in my opinion, the regulations made by the Secretary of State under the Police Act, 1919, s. 4, do confer that power upon the chief constable. That section empowers the Secretary of State:

> to make regulations as to the government . . . of all police forces within England and Wales.

It also provides that every:

> police authority shall comply with the regulations so made.

The regulations deal, *inter alia*, with discipline. They provide for the publication of a "code of offences against discipline," and for the procedure to be adopted where a report or complaint is made suggesting that a member of the force has committed such an offence, and they prescribe the punishments that may be awarded when the commission of an offence is proved. The offences set forth in the code vary from such minor matters as being late on parade or untidy in dress to offences of a serious character, including crimes triable on indictment; and the punishments prescribed by reg. 21 likewise vary from a mere caution to dismissal. The regulations provide that, when a member of a police force is charged with an offence against the code, the case must be heard by the chief officer of police. The chief constable of Liverpool is the chief officer of police within the meaning of these regulations in that city. Dismissal is one of the punishments prescribed by reg. 21, and therefore on the face of it, reg. 20 confers upon the chief constable power to dismiss. But it is urged, on behalf of the appellant that, since the regulation provides that such a punishment is "subject to confirmation by the watch committee," the chief constable himself has no power to dismiss. It is to be observed that the regulation does not provide that the chief constable may recommend to the watch committee that the offending police officer be dismissed by them; it provides that the chief constable himself may "award" the punishment of dismissal, though the punishment so "awarded" is subject to the confirmation of the watch committee. The use of the word "confirmation" seems to me to import that the punishment to be confirmed must have been previously imposed; and, in my opinion, the confirmation by the watch committee on Aug. 29 of the punishment awarded by the chief constable on Aug. 14, namely, that the appellant should be dismissed forthwith from the force, must necessarily relate back to the earlier date.

But then it is said that, if, on their true construction, the statutory regulations purport to confer on the chief constable this provisional power of dismissal, the Secretary of State had no power under the Police Act, 1919, to make such a regulation. The statute authorises the Secretary of State to make regulations as to the "government" of all police forces in England and Wales, and I should have thought that regulations as to the government of any disciplined body of men, such as a police force, must needs include provisions with regard to the dismissal of a member of such a body in case of a breach of discipline. If the statutory regulations had purported to deprive the watch committee of the power of dismissal conferred on them by the Municipal Corporations Act, 1882, I could appreciate the argument that this would be beyond the power of the Secretary of State. Even if the regulations had conferred on the chief constable a power of dismissal such as is entrusted to the chief constable of every county police force (and it certainly seems odd that the chief constable of a great city like Liverpool, which is a county borough, with 2,000 men under his command, should not have the power possessed by the chief constable of the smallest county), the argument that such a regulation was *ultra vires* might perhaps be maintained. But the regulations do neither of those things. They do not take away the power of dismissal conferred on the watch committee, nor do they confer on the chief constable any power to dismiss independently of the committee. They merely confer on the chief constable power to dismiss subject to the confirmation or ratification of the watch committee. I apprehend that the watch committee themselves, if they had been minded to do so, could have conferred that limited power on the chief constable, and I think that it was lawful for the Secretary of State to do so. With the greatest respect, therefore, I must express my opinion that this contention that the regulation in question is *ultra vires* is not well founded. I therefore think that the contention put forward for the appellant that he was not dismissed before Aug. 24, and that his resignation, therefore, took effect on that date, fails.

I turn now to the additional ground on which the appellant asks for judgment in his favour. By his statement of claim the appellant alleged, and by his evidence he sought to prove, that he did not obtain a fair hearing either before the chief constable on Aug. 14, or before the watch committee on Aug. 29, and that on both occasions the proceedings were conducted with such a disregard of what has been called "natural justice " that the decisions at which they arrived ought to be quashed. So far as the hearing before the chief constable is concerned, it is admitted that the verdict of the jury has disposed of the appellant's complaints once and for all, and that the chief constable conducted those proceedings properly and fairly, and in accordance with the procedure laid down by the regulations. It remains only to consider, therefore, whether there are any sufficient grounds for setting aside the decision of the watch committee. The proceedings before the watch committee are impugned on various grounds. Complaint is made of the conduct of the deputy chairman, Mr. Alderman Eills, who presided at the hearing of the appeal, in that he, as the jury have found, by their answer to the eighth question, imputed to the appellant that he was lying, when he stated that he had devoted part of his weekly pay to the support of his aged parents. It is certainly a matter for regret that the deputy chairman should have made such an imputation, more especially in view of the fact that the statement made by the appellant had little or no bearing on the charges preferred against him, but it cannot, I think, be maintained that this conduct on his part affords any sufficient ground for quashing the decision of the committee. A layman cannot be expected to exercise the wise restraint of an experienced judge, and it is not suggested that the deputy chairman or the members of the committee were affected by any prejudice or bias against the appellant ; on the contrary, it appears that none of them knew anything about the appellant except what they were told in his presence at the hearing of the appeal.

Complaint is also made that the appellant was not allowed to call a Mrs. Gray as a witness on his behalf. The jury have found, in answer to the ninth question, that he applied to call Mrs. Gray, and his application was refused. It seems to be plain, however, from the notes of the evidence, and from the judgment of SINGLETON, J., that Mrs. Gray could not have given any relevant testimony, and no court is bound to hear irrelevant witnesses. I therefore think that this complaint is baseless. Then it was said that the watch committee ought to have given separate hearings for the two questions which were submitted to them, namely, (i) was the appellant guilty of the offences charged against him, and, (ii) if he was guilty, whether dismissal was the proper punishment. In a trial for an indictable offence, where the jury decide the question of guilt, and the judge decides what the sentence of the court should be, it is, of course, necessary that the two questions should be separately considered, but where, as in the case of justices in petty sessions, or in the case of a watch committee hearing an appeal, the same persons have to decide both the question of guilt and the question of punishment, though they must of course decide the question of guilt before considering the question of punishment, there is no need for them, after deciding the question of guilt, to summon the guilty person before them again for consideration of the question of punishment.

Of all the various grounds put forward on behalf of the appellant for impugning the decision of the watch committee, there is but one which, in my view, has substance, and it is this, that, after the evidence had been heard, and the appellant and the other parties had withdrawn, the chief constable remained in the room with the committee while they were considering their decision. It is, of course, the duty of a chief constable to attend the meetings of the watch committee, and at the meetings of the Liverpool watch committee the chief constable occupied the chair on the left of the chairman. During the hearing of the appellant's case on Aug. 29, the chief constable was in his usual place, and it was said by Mr. Wooll for the appellant that the chief constable sitting beside the chairman assumed the role of prosecutor. But this was not the case. It was Superintendent Hughes who conducted the case against the appellant, and called the several witnesses in support of the charges made against him. All that the chief constable did was to read at the commencement of the proceedings a statement of the case which he had prepared for the watch committee, and he did this as the jury have found by their answer to the tenth question, in the presence of the appellant. The statement sets out the facts as found by him at the hearing on Aug. 14, and concludes with the expression of his opinion that the watch committee, after hearing the evidence, will arrive at the same conclusion as himself. A statement prepared by a layman is not to be judged by the same standard as is that of a trained lawyer; moreover, with but a slight alteration of the wording, the statement of the chief constable would be quite unobjectionable. After reading his statement, the chief constable took no further part in the proceedings. When the hearing of the case was ended and the parties retired to enable the committee to consider their decision, the chief constable remained in his seat beside the deputy chairman, and I agree with SINGLETON, J., in thinking that it is undesirable that the chief constable should remain with the watch committee while they are considering their decision on an appeal from him. It is, however, found as a fact that the chief constable, though present in the room, took no part in the discussion. He said nothing at all, and SINGLETON, J., who heard the evidence of all the surviving members of the committee, was completely satisfied that none of them was in the very smallest degree influenced by the chief constable. In these circumstances, though I think it would have been proper for the chief constable to withdraw from the room while the committee were considering whether the appeal from his decision should be allowed or dismissed, I do not think that their decision ought to be set aside merely because he remained in the room. I therefore think that SINGLETON, J., was right in holding that the dismissal of the appellant on Aug. 14 was duly confirmed by the watch committee, and was in all respects valid.

Two other points which were raised on behalf of the respondents must be noted. By the Police (Appeals) Act, 1927, it is provided that a member of a police force who is dismissed may appeal to the Secretary of State, and it was submitted that, since Parliament has provided this new means of redress, no other remedy is now available. It cannot be doubted that, if, before the passing of that Act, a member of a police force had been dismissed in violation of the statutory regulations, if, for instance, the watch committee had refused to hear the accused, and had condemned him unheard, the High Court of Justice, in the exercise of the jurisdiction formerly vested in the Court of King's Bench, would have set aside the dismissal. The Police (Appeals) Act, 1927, while providing a new remedy, did not purport to deprive the court of that jurisdiction, and it has not, in my opinion, done so. The jurisdiction of the High Court over the proceedings of a watch committee when they are exercising—as in this case—judicial functions, remains, I think, unimpaired. The second point put forward on behalf of the respondents is that, if the watch committee so misconducted their proceedings that their resolution confirming the decision of the chief constable ought to be quashed, the proper and only remedy is by an application to a divisional court of the King's Bench Division for the prerogative writ of *certiorari*. It is well settled that the writ of *certiorari* runs not only to courts of inferior jurisdiction, but also to all tribunals exercising judicial functions: *R.* v. *London County Council, Ex p. Entertainments Protection Association, Ltd.* (19), at p. 233. The declaration prayed for in this action is a declaration that the resolution of the watch committee confirming the decision of the chief constable was invalid, and ought, therefore, to be quashed, and, though I fully accept the view that the power of the court under R.S.C., Ord. 25, to make declarations as to the rights of parties is almost unlimited, the limit is, in my opinion, reached when it is sought to obtain a declaration that a decision of a tribunal exercising judicial or *quasi*-judicial functions ought to be quashed. It is to be observed that the statement of LORD STERNDALE, M.R., as to the wide power of the court to make declarations as to the rights of parties in *Hanson* v. *Radcliffe Urban District Council* (5), at p. 507, is restricted to the "rights of parties under contracts." The question at issue in this case was not as to the rights of the appellant under his contract of service but as to the validity of the resolution of the watch committee confirming his dismissal from the police force. With very great respect, I venture to think that, in such a case, an application for a writ of *certiorari* was the proper and only remedy available to the plaintiff.

Appeal allowed. Leave to appeal to the House of Lords subject to payment of plaintiff's solicitor and client costs in any event.

Solicitors: *Teff & Teff*, agents for *Alfred Bieber & Bieber*, Liverpool (for the appellant); *F. Venn & Co.*, agents for *Walter Moon*, Town Clerk, Liverpool (for the respondents other than Mrs. Whiteley).

[*Reported by* E. FULLER BRISCOE, ESQ., *Barrister-at-Law.*]

ROGERS *v.* BOOTH.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and Scott, L.JJ.), **May 3, 1937.**]

Workmen's Compensation—Workman—Salvation Army officer—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 3.

The appellant, who was an officer in the Salvation Army, when working at the Army's Hall fell over a bucket, and sustained injuries. She claimed compensation under the Workmen's Compensation Act :—

HELD : upon the construction of the "orders and regulations for officers of the Salvation Army" and of the form which set out the appellant's rights and duties, and which was signed by the appellant when she became an officer of the Salvation Army, the relationship between the appellant and the General of the Salvation Army was a purely spiritual, and not a contractual, one, and the fact that the applicant received money for her maintenance according to a scale and that deductions had been made therefrom for a pension fund did not affect that relationship. The appellant was therefore not a "workman" within the Workmen's Compensation Act, 1925, s. 3, and was not entitled to compensation under that Act.

[**EDITORIAL NOTE.** The agreement between the General of the Salvation Army and its officers expressly disclaims that it is in the nature of a contract of service. It does, however, provide for the regular payments of money and for deductions from such payments of contributions to a pension fund. There is no binding agreement to make these regular payments, and they depend upon there being sufficient funds to meet them. Despite the fact that such an agreement had been carried out over a number of years as a binding contract of service, the expressed intention of the parties that the service shall be purely voluntary prevails, and the officer is not a workman within the Workmen's Compensation Act.

AS TO "WORKMAN," see HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 154, paras. 327, 328 ; and FOR CASES, see DIGEST, Vol. 34, pp. 239-241, Nos. 2043-2058. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 137-142.]

Case referred to :

(1) *Re National Insurance Act,* 1911, *Re Employment of Church of England Curates,* [1912] 2 Ch. 563 ; 19 Digest 428, *2645* ; 82 L.J. Ch. 8 ; 107 L.T. 643.

APPEAL by the applicant from a judgment of His Honour JUDGE THOMAS, sitting as an arbitrator under the Workmen's Compensation Acts in the Mayor's and City of London Court, on Apr. 5, 1937.

The applicant became a lieutenant in the Salvation Army in May, 1933. On Dec. 12, 1935, when working at the Army's Hall in Minster, Kent, she fell over a bucket and received an injury to her elbow, and afterwards suffered from nervous debility. She claimed compensation for total incapacity under the Workmen's Compensation Acts, alleging that she was a "workman" employed by the General of the Army. The terms of her agreement with the Army appear from the judgment of SIR WILFRID GREENE, M.R.

L. A. Moules for the applicant, appellant.

Harold L. Murphy, K.C., and *H. J. C. Whitmee* for the respondent.

Moules : The Workmen's Compensation Act, 1925, s. 3 (1), defines "workman" as anyone who works under a contract of service, but this definition is subject to the exception "unless the context otherwise requires." Sect. 1 (3) nullifies an agreement to contract out of the provisions of the Act. The word "workman" cannot therefore be applied strictly to every person who has a contract of service, for the Act has to apply, in spite of any contract that the person shall not be a workman within the meaning of the Act. The court must decide whether the person is in fact a workman. In the "curates' case," *Re National Insurance Act*, 1911 (1), Parker, J., held that a curate is not the employee of his incumbent or bishop so as to make him compulsorily insurable. A curate's status is conferred on him by ecclesiastical law, but the position of an officer of the Salvation Army is defined solely by his agreement with the General of the Army.

The court did not call on counsel for the respondent.

Sir Wilfrid Greene, M.R.: In this case, Mr. Moules has advanced every argument that could have been advanced on behalf of his client, but, in my opinion, the appeal must fail. By the Workmen's Compensation Act, 1925, s. 3 (1), "workman", subject to certain exceptions, means:

> any person who has entered into or works under a contract of service or apprenticeship with an employer. . . .

The rest I need not read. Then sect. 1 (3), which prohibits contracting out of the Act, says this:

> This Act shall apply notwithstanding any contract to the contrary, whether made before or after the commencement of this Act [subject to an exception in the case of a scheme].

The sole question that arises on this appeal is whether the appellant falls within the definition of "workman" as contained in the Act. The appellant at the time of the accident was in the position of an officer in the Salvation Army. The accident was a fall over a coal-bucket, which produced a certain disability, and she claims that she is entitled to compensation under the Workmen's Compensation Act. In order to establish such a claim, the first step is to show that she was a workman, that is to say, that she was at the time of the accident a workman as defined by the Act, and was under a contract of service with an employer. For the purpose of this case, the employer, if he be an employer for the purposes of the Act, is agreed to be the General of the Salvation Army.

In order to examine the case, it is necessary to see what the character of the relationship is between those who become officers in the Salvation Army and the Army and its General. The Army has laid down in a book entitled Orders and Regulations for Officers of the Salvation Army a code of regulations for the conduct and discipline of officers in the Army. I need not do more than refer to one or two of the provisions in order to show what the nature of the relationship is. The objects of the Army are set out in Chap. I, cl. 1. It is described as:

> an organisation composed of persons who know their sins forgiven, and who are

> united together in love to God and man for the common purpose of bringing others to submit themselves to Jesus Christ.

Then in Chap. III, para. 3, it states:

> The vigour and force with which any organisation can carry on its work is in proportion to the power and energy of its government. Hence the Army needs strong government.

In sect. 2, para. 1, of that chapter, it says that leadership is required, and it describes the character of the leadership which is necessary for the efficient conducting of the Army's work. Then, in paras. 3, 4, 5, it says this:

> 3. The wisest method of leadership, it is almost universally admitted, is for men to surrender themselves to the guidance of the most devoted, most capable, and best trained persons among them.
>
> 4. Leadership necessitates the corresponding surrender, on the part of those led, of some liberty of choice as to plans and methods of action, which would otherwise be enjoyed.
>
> 5. It follows, therefore, that the Salvationist, having accepted the principle of leadership, and having placed himself under the guidance of those whom he believes to be his leaders by divine appointment, should render to those leaders a constant and cheerful obedience He should take their instructions as from God, and obey them without controversy or complaint. His duty is not to be arguing as to whether such instructions are the wisest or the best, but simply to obey them; providing, of course, that they are not opposed to truth and righteousness.

Then there are one or two more paragraphs that are material. There is a paragraph in an amendment, printed on a red slip, on p. 12 of the book. It describes the extent of the General's control. Para. 4 says:

> The control of the General extends to every part of the Salvation Army, and to every phase of its operations throughout the world.

Then it particularises under that. Then again para. 5:

> The chief means by which the General controls the world-wide operations of the Army are as follows: (*a*) By orders and regulations, which all officers and soldiers are under obligation to obey. (*b*) By appointing officers to represent him, and changing them according to the requirements of the war.

On p. 439 of the book is a passage relating to the obligations of officers, and Chap. I, cl. 2, says:

> Officership in the Army, with participation in its privileges, carries with it continued obligation to abide by the undertakings entered into (see Appendix I) and to seek, to the best of the officer's ability, the accomplishment of the Army's great purposes.

Then Appendix I sets out a number of undertakings which are embodied in the application form which the intending officer has to sign, and to which I shall refer in a moment. On p. 444 of the book is a chapter entitled "Salary," and para. 1 says this:

> Every officer becomes such upon the distinct understanding that no salary or allowance is guaranteed to him.

Then there is this:

> The officer is pledged to do his duty, with or without pay; he works from love to God and souls, whether he receives little or much.

In para. 2, it says:

> The army does not recognise the payment of salary in the ordinary sense; that is, the Army neither aims at paying nor professes to pay its officers an amount

> equal to the value of their work; but rather to supply them with sufficient for their actual needs, in view of the fact that, having devoted themselves to full-time Salvation service, they are thereby prevented from otherwise earning a livelihood.

I need not read any more out of that book. What I have read is quite sufficient to show the general nature of the institution, and the character of the relationship of those who become officers in it, towards their General, and the institution as a whole. It is a relationship pre-eminently of a spiritual character. They are united together for the performance of spiritual work, and, in order to carry out efficiently the ends they have in view, they submit to a very strict discipline, and a very strict command. On the face of that, it appears to me that the necessary contractual element which is required before a contract of service can be found is entirely absent. The parties, when they enter into a relationship of that kind, are not intending to confer upon one another rights and obligations which are capable of enforcement in a court of law. It would be a very curious thing if the General of the Salvation Army, in regard to those under him, who are under him by virtue of these requirements, should be in a position in which he could bring actions for damages against them if they failed to obey some directions that he gave as to the way in which they should perform their spiritual task. I venture to think that nothing of the sort was the intention of either party when that arrangement was entered into.

When the applicant, the appellant, became an officer of the Salvation Army, she signed a form, which is a very elaborate document, setting out under various heads the questions relating to the duties and rights of the applicant, and certain understandings under which he or she becomes an officer. I need refer to only one or two clauses in it. Para. 44, for instance:

> Do you pledge yourself to work, when on active service of the Army, not less than nine hours every day, and, if appointed to a corps, to visit the people faithfully during the required number of hours, which will average not less than eighteen per week?

Then para. 47:

> Do you possess ORDERS AND REGULATIONS FOR FIELD OFFICERS OF THE SALVATION ARMY? Have you read the same?

The answer in each case is Yes. Then para. 49:

> Do you pledge yourself to study the Army's Regulations and to carry out such as apply to yourself and your work?

The answer is Yes. Then para. 51:

> Do you understand and agree that, as an intending officer, you are giving yourself to the work of the Salvation Army, that you are not "employed," that you have no right to any "wages," that there is no contract of service and that whatever your future rank or service may be, your position, so long as you remain in the Army, will be that of a voluntary co-operator in the Army's work for God, without claim to any other reward than the approval of God and the doing of the work itself will bring to you?—Yes.

Now, if there was any element of doubt as to the non-contractual nature of the relationship which was being entered into, all that would, in my opinion, be completely disposed of by that paragraph, in which the parties are setting out in explicit terms what would appear, from a general perusal of the regulations and the general constitution of the organisation, to be an affirmation that the relationship is a purely spiritual one, without any kind of contractual element in it. That paragraph contains the following note :

> Notwithstanding the position set out in Question 51, and without taking from it, and because it is obvious that an officer cannot do his work unless he is maintained, the following regulation will as far as possible be carried into effect, but expressly subject to the arrangements mentioned in Questions 57 and 58 as to contributions to "the pension fund," and the deduction of the 2½ per cent. therein mentioned. From the day of arrival at his appointment, each officer may draw an allowance according to the scale operating at the time, provided that the necessary amount remains in hand after current expenses are met. Is this perfectly clear to you ?

The answer is Yes. Then para. 52 :

> Do you understand and agree that, although permitted to receive an allowance according to the official scale, no allowance is guaranteed to you, and you will have no claim against the Salvation Army, or against any one connected therewith, on account of any allowance not being received by you ?

The answer again is Yes. Then para. 57 refers to the pension fund :

> Do you agree to contribute (or that there shall be contributed) 2½ per cent. of your allowance (that is, 6*d.* in the £), to a pension fund for the benefit of Salvation Army officers who may be sick or disabled ?

Then para. 57a :

> And do you understand that under no circumstances whatever can any of such contributions be returned to you ?

The circumstance that a monetary sum is paid to officers who enter into this relationship is, in my opinion, quite insufficient to change the relationship from what it otherwise would be. It is quite obvious that, if officers are devoting the whole of their lives to this service, the Army would make provision to maintain them, and that it in effect does. But that does not mean that the sum which is paid has any similarity to wages or salary, or any payment given contractually for services given or for services rendered. It is a maintenance payment, to enable them to carry on the work that they have undertaken. It appears to me, therefore, that the appellant cannot establish, not merely a contract of service, but also any contractual relationship at all which could possibly become a contract of service or be a contract of service, and, in my opinion, the appeal fails on that ground.

It was suggested by Mr. Moules that in some way the section of the Workmen's Compensation Act which prohibits contracting out helps him, but, in my opinion, that argument is not well founded, because, before that section is to be looked at, it must first of all be established that the applicant *is* a workman within the meaning of the Act, and it is only when that circumstance has been established that the statutory prohibition against contracting out becomes relevant to the case at all.

In my opinion, the judge was perfectly correct, and this appeal must be dismissed.

Romer, L.J.: I quite agree, and I have nothing to add.

Scott, L.J.: I also agree, and I have nothing to add.

Appeal dismissed without costs.

Solicitors: *Frederick A. Cox* (for the appellant); *Ranger, Burton & Frost* (for the respondent).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

Approved. Amal. Anthracite Collieries, Ltd. *v.* Wilds. [1948] 2 All E.R. 252.

WHEATLEY *v.* LAMBTON, HETTON & JOICEY COLLIERIES, LTD.

[Court of Appeal (Sir Wilfrid Greene, M.R., Romer and Scott, L.JJ.), **May 4, 1937.**]

Workmen's Compensation—Compensation—Two accidents—Total incapacity from first accident—Second accident supervening—Right to compensation for second accident.

In Jan., 1935, a miner suffered an injury to his spine which totally incapacitated him for a period. He resumed work until Sept. 21, 1936, when he again became totally incapacitated by reason of the effects of the same injury. During the first period of incapacity he was paid 30*s.* a week compensation. That payment ceased when he returned to work, but it was resumed when the second period of incapacity occurred. It was not disputed that from Sept. 21, 1936, the miner was totally incapacitated for work by reason of the spinal injury which he had received in Jan., 1935. On Oct. 3, 1936, the certifying surgeon certified that the miner was suffering from miners' nystagmus and was thereby disabled from earning full wages at the work at which he was employed. As the certificate did not specify the date for the commencement of the disablement, the date of the certificate, Oct. 3, 1936, was the relevant date. The medical referee dismissed an appeal against the certificate of disablement and in his certificate of the miner's present condition he stated, "He is at present unfit to do any kind of work." The miner claimed, in addition to the 30*s.* he was receiving in respect of total disability due to spinal injury, compensation for total disability due to miners' nystagmus, which, if payable, would amount to 24*s.* a week:—

Held: as at the date of the second accident the miner was already totally incapacitated for work, he had no element of capacity left in him which the new supervening accident could take away. He could not, therefore, recover compensation for incapacity due to miners' nystagmus while he was receiving compensation for total incapacity due to spinal injury, but he was entitled to a declaration of liability in respect of the disablement from miners' nystagmus.

Per Sir Wilfrid Greene, M.R.: When the certifying surgeon certifies and the medical referee decides that a man is suffering from disease, and is thereby disabled, they are dealing, and dealing only, with the particular nature and the particular severity of the disease, considered in connection with the earning capacity of the man. They are not concerned with the question whether, owing to the presence of something else, the man is already suffering from a total incapacity for work.

Thompson v. *London & North Eastern Ry. Co.* (2) *distinguished.*

Decision of His Honour Judge Richardson (1937, 4 L.J.N. C.C.R. 111) *affirmed.*

[EDITORIAL NOTE. This case discusses the question whether a workman can claim compensation in respect of two concurrent total disablements. Such a claim is held not to be possible since the compensation is not a solatium for injury but merely compensation for loss of wages. There can, therefore; be only one award of compensation on the footing of total disablement, but there should be a declaration of liability in respect of any disablement caused by any other injury by accident within the Act.

As to Maximum Limit of Compensation, see WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 248, 249, and for Cases, see DIGEST, Vol. 34, pp. 413, 414, Nos. 3360-3363.]

Cases referred to:

(1) *French* v. *Archibald Russell, Ltd.* (1934), 104 L.J.P.C. 17; Digest Supp.; 152 L.T. 1; 27 B.W.C.C. 338.

(2) *Thompson* v. *London & North Eastern Ry. Co.*, [1935] 2 K.B. 90; 28 B.W.C.C. 95; Digest Supp.; 104 L.J.K.B. 515; 152 L.T. 571.

(3) *Richards* v. *Goskar* (*Receiver of Dulais Anthracite Collieries, Ltd.*) (1935), 29 B.W.C.C. 357; Digest Supp.; 153 L.T. 304.

Appeal from a decision of His Honour Judge Richardson given on Mar. 18, 1937, and reported in 1937, 4 L.J.N. C.C.R. 111. The facts are set out in the judgment of Sir Wilfrid Greene, M.R.

Sir Stafford Cripps, K.C., *J. Alun Pugh*, and *Anthony Ward* for the appellant.

Sir Walter Monckton, K.C., and *J. Charlesworth* for the respondent company.

Sir Wilfrid Greene, M.R.: The appellant in this case was a hewer in the respondent company's collieries, and in Jan., 1935, he suffered an injury to his spine, which had the result of totally incapacitating him for a period. On July 8, 1935, he was able to resume his work, and remained at work until Sept. 21, 1936, when he again became totally incapacitated by reason of the effects of the same injury. During that first period of incapacity, he was paid 30*s.* a week compensation. That payment ceased when he returned to work, but it was resumed on Sept. 21, 1936, when the second period of incapacity occurred. It is not disputed that, from Sept. 21, 1936, he was totally incapacitated for work by reason of the spinal injury which he had received in Jan., 1935.

On Oct. 3, 1936, the certifying surgeon certified, under sect. 43 of the Act, that the appellant was suffering from miners' nystagmus, and, following the words of the section:

> is thereby disabled from earning full wages at the work at which he was employed.

His employer company appealed to the medical referee, and the medical referee dismissed that appeal. His finding, which is dated Oct. 26, 1936, is as follows:

> I dismiss the appeal of the Lambton, Hetton and Joicey Collieries, Ltd., against the certificate of disablement given to Joseph Wheatley on Oct. 3, 1936.

Then follows the certificate as to the workman's present condition:

> And I hereby certify that the present condition of the workman, as ascertained by my examination, is as follows: He is suffering from miners' nystagmus with oscillations of eyes when erect or stooping, and is thereby disabled from earning full wages at the work at which he was employed. He is at present unfit to do any kind of work.

That decision, under sect. 43 (*f*) of the Act, is conclusive as to the matters certified. I should add that the certifying surgeon's certificate did not specify the date for the commencement of the disablement, but the result of not so specifying is that the date of the certificate is to be taken as the relevant date. That is Oct. 3.

It so happens that the compensation to which the appellant is entitled A
in respect of the disablement due to his spinal injury is the sum of 30*s*. a week, whereas, owing to the application of the relevant provisions in the case of nystagmus, if he were to be paid compensation on the footing of total disablement due to miners' nystagmus, he would receive only 24*s*. The employer company has continued to pay the 30s. The work- B
man claims, in addition to that, the 24*s*. which he would be entitled to receive if he were entitled to compensation for total disability due to miners' nystagmus. The claim, it is to be observed, is a claim for compensation in respect of two total disablements, which were referred to in the course of the argument as "concurrent." The claim possesses C
upon its face the quality of courage, and, if it be right, leads, I think, necessarily, to this position: that a workman totally disabled through one injury may nevertheless be entitled to receive in respect of a different injury, or one or more different injuries, compensation on the footing of total disablement, with the result that he would be receiving, or might D
be receiving, two or three or four sets of compensation, each based on the footing that the particular injury to which the particular compensation related had the effect of preventing him from earning his wages. It would result also in this: that the Workmen's Compensation Act with regard to such matters would give a solatium for misfortune rather E
than compensation for loss of earning capacity. If the Act on its true construction so provided, of course it would be necessary to give effect to it.

I will first look at the relevant provisions of the Act in order to see whether, when properly read, they afford a basis for this claim. Sect. 1 F
of the Act, which lays down its guiding object, provides as follows:

> (1) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained.

The provisions in the case of total or partial incapacity are to be found G
in sect. 9 (1), which provides as follows:

> The compensation under this Act where total or partial incapacity for work results from the injury shall be a weekly payment during the incapacity of an amount calculated in accordance with the rules hereinafter contained.

Pausing there for a moment, I observe that, in order to qualify the injured H
workman for compensation, "total or partial incapacity for work" must result from the injury. I myself should have understood this without any difficulty as meaning that it must be shown that the effect or the result of the injury is to deprive the workman of a capacity for work which he previously enjoyed. That previous capacity might, of

course, be a total capacity or a partial capacity. If he was a man in good health, without injury, his capacity would be what I may conveniently call 100 per cent. On the other hand, if he was in ill-health, or was injured, his capacity might be less—it might be a 60 per cent. capacity. Nevertheless, if the result of the injury is to destroy or A diminish the capacity which he has, whether it be 100 per cent. or 60 per cent., or any other percentage, then he becomes entitled to compensation. The basic requirement of the section, as I read it, is that, before compensation is claimed, there must be a diminution of or a destruction of an existing capacity for work, with, of course, consequential incapacity B to earn the wages which a man in that condition, whatever it may be, is capable of earning. In applying that to the case of injury by accident, in the ordinary sense no particular difficulties are presented by that construction. The task of fitting into the scheme of this Act a different class of disablement, namely, that due to industrial disease, is rather C more complicated, and for this quite obvious reason. In the case of an industrial disease which is progressive in its effect, the date of its commencement may very well be uncertain, and in its earlier stages it may not prevent a man from working, even if its existence is known. That was a state of things which had to be fitted into the scheme of the D Act by appropriate language and appropriate machinery. The way in which that is done is laid down in sect. 43. Taking the relevant words of the section, sect. 43 says this :

> (1) Where (i) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the work- E man is suffering from a disease mentioned in the third schedule to this Act [and that includes miners' nystagmus] and is thereby disabled from earning full wages at the work at which he was employed ; or (ii) a workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment . . . and the disease is due to the nature of any employment in which the workman was employed at any time within the 12 months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation F under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications : (*a*) The disablement or suspension shall be treated as the happening of the accident.

I need not read what follows. It is to be observed, with regard to that, G that, in order that the case of industrial disease may be brought into line with the case of personal injury by accident in the ordinary sense, it is necessary that there should be two elements present—there should be the presence of the disease and there should be the consequential disablement.

H I may here refer to one sentence in the speech of LORD TOMLIN in *French* v. *Archibald Russell, Ltd.* (1), where he says at p. 18 :

> I think it follows that in cases of industrial disease the injury by accident is not the contraction of the disease *simpliciter* but the contraction of the disease plus the consequent disablement or suspension as the case may be.

Therefore, in what I may call the first onset of an industrial disease, the injury by accident is not present, unless those factors are combined—the presence of the disease and the consequential disablement.

There is a third matter of importance to remember under sect. 43, and that is this. The proof of the two matters dealt with, the presence of the disease and the disablement, consists, in the first instance, of the certificate of the certifying surgeon, and, in cases where the matter has been taken to a medical referee, it consists of the decision of the referee which is conclusive with regard to all matters falling within his competence under the section. The language, as I have said, has this effect. Given the presence of the necessary elements, the disease is to be treated as if it were "a personal injury by accident arising out of and in the course of that employment." I do not read that as meaning that the mere presence of those matters, unaccompanied by any disability in fact due to the disease, is sufficient to entitle the workman to compensation, because the governing conditions of that compensation, namely, that there should be total or partial incapacity for work resulting from the injury, must be satisfied. Unless it is possible in any particular case to say that the total or partial incapacity for work results from an injury which, in the case of an industrial disease, may be called a notional injury, owing its existence to the language of sect. 43, the right to compensation does not, in my opinion, arise. The section provides, as I have said, that the disablement or suspension shall be treated as the happening of the accident. It is also provided that, in the absence of any particular date mentioned in the certificate or report of the medical referee, the date of the certificate is to be the date when the disablement commenced. That provision is contained in sect. 43 (2):

> For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given: Provided that (*a*) where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine.

That proviso, of course, has no relevance to the present case, but, taking the language of the section as it appears to fall for construction, it would appear in the present case that, as the date of the certifying surgeon's certificate is Oct. 3, and he did not certify any date for the commencement of the disablement, Oct. 3 is to be taken as the date of disablement, and, accordingly, the disablement which is to be treated as the happening of the accident must be dated as at Oct. 3, 1936. As I say, that is what I should have thought, myself, was the effect of the section.

If that view be right, the position is this. On Sept. 21, 1936, this workman was in fact totally incapacitated. He was suffering as a result of his spinal injury from a total incapacity for work, and he was in receipt of appropriate compensation on that basis. On Oct. 3, the accident happened to him, and that accident consisted of the onset of the disease called miners' nystagmus, coupled with the disablement certified in the certificate. But, at the date of the certificate, as he was already totally incapacitated for work, he had left in him no element of capacity which this new supervening accident could take away.

It is said, nevertheless, that, although there was no element of capacity of which the man was deprived, the language of the Act is imperative, and that the existing incapacity due to spinal injury must, for the purposes of this case, be totally disregarded, and treated as though it had
A never occurred. The argument in respect to that matter really falls under two heads, if I have followed it rightly. First of all, it is said that the language of sect. 43 imperatively directs that wherever the certificate is given, according to the language of the section, that conclusively shows
B that the man is entitled to compensation, on the footing that he is totally incapacitated from his work by the injury, namely, the disease plus the disablement. It is said that the effect of this may very well be to create two concurrent disablements, in respect to each of which the man is entitled to his compensation. Reliance is placed in that connection upon
C the case in this court of *Thompson* v. *London & North Eastern Ry. Co.* (2), to which I shall refer in a moment. It appears to me, however, that the answer to that argument is really to be found in the true construction of sect. 43. When the certifying surgeon is called upon to exercise his powers under the Act, he can effectively do only what the section entitles
D him to do. Under the section, he is concerned with one thing, and one thing only. He has no jurisdiction under the section to certify with regard to matters which fall outside that one thing. That one thing is the presence or absence of an industrial disease of such a character as to disable the man from earning full wages. The certifying surgeon has
E nothing to do with the state of the man's health, or his situation in other respects. His function is to certify the presence of the disease, and the quality of the disease as a disease. Is it a disabling disease ? That is the question that is put to him, and that is the only question that he has to answer. If he or the medical referee were to deal with matters out-
F side that, that would be dealing with matters which certainly would not fall within the language of sect. 43 (1). Although it is true that the medical referee, by subpara. (*f*), is to "certify as to the condition of the workman," and it may be that, under that language, he would be entitled to go into outside matters ; but there is much to be said for
G the view that the words "the condition of the workman" in subpara. (*f*) mean his condition in relation to the particular disease which is in question. But, however that may be, when the certifying surgeon certifies and the medical referee decides that the man is suffering from disease, and is thereby disabled, in my opinion they are dealing, and
H dealing only, with the particular nature and the particular severity of the disease, considered in connection with the earning capacity of the man. They are not concerned with the question whether, owing to the presence of something else, the man is already suffering from a total incapacity for work. It seems to me that that is the proper way to read sect. 43, and to give it its appropriate effect, when read in conjunction

with sect. 9. I am quite unable, in this case, to accept the view that the certification by the certifying surgeon and the decision of the medical referee to the effect that the man was suffering from disease, and thereby disabled, have or are intended by the section to have, the meaning that the total or partial incapacity for work results from the injury. The language used, it is to be observed, is different, and it appears to me that the certificate, taken by itself, does not dispose of the matter, and that it is legitimate to inquire whether, on the facts of the case, the man has been deprived, by reason of this statutory accident, of some already existing capacity.

That appears to me to be the only view consistent with the language and scope of the Act. But it is said that *Thompson* v. *London & North Eastern Ry. Co.* (2) in some way assists the argument. It is necessary to examine that decision only quite shortly in order to see that it really does not touch the matter now in question. That was a case where a workman, having suffered a particular accident, as a result of which he became partially incapacitated, was put to do work suitable to his injured condition, at which he continued for some time, but in which he suffered another accident, the result of which was total incapacity. It is to be observed, in that case, that the man who received his compensation for his partial incapacity, and then went back to work, returned to work as a partially incapacitated man, and as a man, nevertheless, who retained that percentage of capacity permitted by his physical condition. If that remaining percentage of capacity were taken away from him as a result of an accident, under the clear language of the Act he became entitled to compensation for being so deprived of that percentage of capacity. It was held by this court that, in the first place, he was entitled, not merely to his compensation for the partial incapacity, which was a partial incapacity which affected a previously sound man, but also to compensation for the supervening incapacity which affected him as a partially sound man. The real question which fell to be decided in that case was whether or not, in such a case, the limit of 30*s*. imposed by the Act operated so that the compensation payable to the man in respect of those two incapacities ought to be limited to 30*s*. It was held by this court, on the true construction of the Act, that that was not the result, and the man was entitled to his full compensation in respect of each injury. I cannot see how that case affects the present one. To begin with, this is not a case where the man suffering from partial incapacity has his remaining capacity removed by nystagmus. If this were a case where the man's spinal injury was such as to reduce him into a lower category of capacity, and he continued to work as a partially incapacitated man, but miners' nystagmus supervened, the case would be very like *Thompson* v. *London & North Eastern Ry. Co.* (2). It would be a case of a man, partially incapacitated, deprived of his remaining capacity by a fresh accident. But that is not the case here. The county court judge has used in his judgment a very useful expression in saying :

"You cannot add to totality." I would add to that another way of looking at it, namely, that you cannot subtract from nothing. If you have an existing total incapacity, there is no element of capacity which can be taken away. That appears to me really to be the short answer to the main argument in this case.

A There is put forward another argument which I have some little difficulty in following. It is, I think, of this nature. It is said that the court ought not to take Oct. 3 as the relevant date for the happening of the accident, but that the happening of the accident must be put forward to some earlier date, which is to be fixed during the period when the man B was back at work, after he had temporarily recovered from the original spinal injury. It is said that it is quite obvious that the miners' nystagmus must have been contracted some time during that period. If that were so, I suppose the result would be something of this kind. First of all there would be the original spinal incapacity due to the spinal C injury which had been temporarily cured, but the injury remaining, so to speak, dormant, with the result that subsequent incapacity from the same cause would entitle the man to resumption of compensation. During that dormant period there might be a fresh accident, the effect of which is to cause total incapacity. The third stage would be the D re-awakening of the dormant injury to the spine. It is to that position that the present argument wishes to steer the case, the idea, no doubt, being that, if the sequence of events could be put in that order, it would be possible to make a claim both for the incapacity due to the original injury and for the incapacity due to miners' nystagmus. I need not E consider what the effect would be, if that were the order of events. It is sufficient for me to say that, on the facts of this case, the case appears to be quite different from that which I have been envisaging, because I am quite unable to see that the court is entitled for this purpose to throw back the date of the injury to some date earlier than Oct. 3.

F As LORD TOMLIN said, it is to be remembered that the injury consists of the two elements of disease and disability. It is only when those two elements are both present that injury by accident is to be deemed to have occurred. It is important in this connection to bear in mind the principle underlying a class of case where a man suffering from industrial G disease, which totally incapacitates him temporarily, recovers from that disease so that he can go back to work, and then, owing to the recurrence of the disease, is again disabled. In that class of case, as soon as the first disability occurs, the injury is complete. When the man is able to resume his work, the effect, as I understand the authorities, is merely this, that H the original disease is still present: the man is not completely cured, although the element of incapacity has for the moment disappeared. But, if a new incapacity or a new disablement supervenes, and attaches itself, so to speak, to the dormant disease, that is to be treated as a recrudescence of that disease due to the original accident. That is a perfectly comprehensible and perfectly logical conception. But cases of that kind, in my judgment, afford no authority for giving to a disease, the beginning of which is referable to some unknown date, the potential quality of accident, until it is coupled with the supervening disablement. What I mean by that is this. Where a man has suffered the injury of disease plus disablement, the removal of the disablement does not mean that he is cured from the disease. On the other hand, where a man has not suffered from disablement due to disease until a particular date, it is not legitimate, for any relevant purpose, to treat him as though he had, at some date prior to that, been suffering from the disease. It is said that *Richards* v. *Goskar* (3) affords some foundation for this argument. In my opinion, that was a case of a totally different character, where the matters falling to be considered were quite different from those which fall to be considered here. The House of Lords was confronted with the task of reconciling certain observations in previous decisions which at first sight had caused difficulty, and appeared to be irreconcilable, but which, after careful examination, were found by the House in that case to be reconcilable. The question in that case (and it is important to remember what the question was) was merely this, as stated by Lord Atkin, at p. 376:

> The simple question is whether a workman who has been certified to have been disabled by an industrial disease, and is found to be still suffering from that disease, and to be disabled by that disease, is debarred from recovering compensation because for some time after the original disablement he was able to earn full wages at the employment in respect of which he was originally certified.

That case, therefore, was of the class which I have just mentioned, where a man originally suffering from disease plus disablement, which constituted the injury, subsequently was able to work, and then was again incapacitated by the same disease. It is a class of case totally different from the present case, because the foundation of that case is the original happening of the accident constituted by the disease plus disablement, and the mere supervening capacity for work does not destroy the effect of that combination which took place in the first instance.

It is true that, in the reasoning of Lord Atkin, who delivered the leading opinion in the House, the provisions of the section are exhaustively considered, and there are observations with regard to the meaning of the provision in sect. 43, that the disablement or suspension shall be treated as the happening of the accident. It is said that, because Lord Atkin in that case indicated an opinion that that expression must be read subject to some limits, we must so limit its meaning in this case as to entitle us to speculate as to the date on which the disease first effected its lodgment in the man, and to treat that date, which we are to ascertain by some method, I will not say of guesswork, but by some method of inference, as though it were the effective date. I cannot find, either in the reasoning or the decision, or in the observations of Lord Atkin, in that case, any justification for taking any such view in such a case as the present, and I am not prepared to take it. In my opinion, both the arguments that were put forward are void of foundation. On the particular facts of this case, the employee, so long as he suffers from the total incapacity due to the spinal injury, cannot, for the purpose of claiming compensation, be treated as incapacitated over again by miners' nystagmus. The county court judge, in a careful judgment, has quite clearly arrived at that conclusion, and I find nothing to quarrel with in his judgment. The actual order that the county court judge made was as follows:

> I find that the applicant is and has been since Oct. 3, 1936, suffering from the disease of miners' nystagmus, so as to constitute a personal injury by accident within the meaning of the Workmen's Compensation Act, 1925, s. 43, and is thereby disabled from earning full wages at the work at which he was employed, and is at present unfit to do any kind of work; but inasmuch as the evidence has established that at the time of the arbitration the applicant was totally incapacitated for work as a result of injuries caused by accident arising out of and in the course of his employment on Jan. 28, 1935, and from Sept. 21, 1936, has been in receipt of compensation at the rate of £1 10*s.* per week in respect of such injuries, I order that should the applicant recover from the injury sustained on the said Jan. 28, 1935, or cease to be totally or partially incapacitated for work as the result of the said industrial disease, either party shall be at liberty to apply for review in accordance with sect. 11 of the said Act and I therefore grant a declaration of liability.

It appears to me that the county court judge had ample jurisdiction to make that order. Indeed, the order logically follows from the construction which I have put upon the Act. The position of the workman, as it seems to me, is amply safeguarded by the declaration of liability, which will enable him, if and when the circumstances warrant it, to claim the compensation which will be due to him on the footing that he is actually incapacitated for work by reason of miners' nystagmus, and I think that decision is in accordance with the language of the Act. This appeal must be dismissed with costs.

ROMER, L.J.: It is provided by the Workmen's Compensation Act, 1925, s. 1, that:

> If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the provisions hereinafter contained.

But it by no means follows that, because a workman has sustained personal injury by accident arising out of and in the course of his employment, he thereby becomes entitled to be paid compensation from his employer. It is provided in the proviso subclause (*a*) as follows:

> The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least 3 days from earning full wages at the work at which he was employed.

That proviso not only protects the employer from paying compensation in cases of injuries that are comparatively trivial, but it also enacts quite clearly, to my mind, that compensation is not payable unless, by reason of the injury, the workman is wholly or partly disabled in fact from earning the wages which he was earning at the time of the accident. It is loss or diminution of those wages which gives him the right to compensation. It is the amount of that pecuniary loss or diminution which forms the basis on which the amount of the compensation is calculated, under sect. 9 of the Act. In the present case, I cannot find that the miner, the workman in this case, was disabled, by reason of the nystagmus, from earning wages. At the time of the accident, which we must take to be Oct. 3, the workman was not earning any wages at all, because he had been disabled from earning those wages by the earlier accident to which Sir Wilfrid Greene, M.R., has referred. If and when the workman can say that he is disabled in fact by the nystagmus from earning pre-accident wages, then he will be entitled, under the declaration of liability, which, in my opinion, the county court judge quite rightly made, to obtain compensation.

It is true that the medical referee in his certificate has stated that the workman was disabled by nystagmus from earning full wages at the work on which he was employed at the date of the accident, but I agree with Sir Wilfrid Greene, M.R., that that certificate is no more than, and is intended to be no more than, a certificate as to the present condition of the workman, and was not intended to be, and could not have been intended to be, a certificate by the medical referee that the workman in fact had been disabled from earning wages, because the medical referee would have no knowledge at all, or would not necessarily, at any rate, have any knowledge of that fact. In my opinion, the county court judge arrived at the right conclusion in this case.

Upon the second point with which Sir Wilfrid Greene, M.R., has dealt, namely, the true date on which the accident from nystagmus must be taken to have occurred, I have nothing to add to what he has said in his judgment, except to say that I entirely agree with every word of it. In my opinion, this appeal fails, and must be dismissed.

Scott, L.J.: The judgment of Sir Wilfrid Greene, M.R., supplemented by the observations of Romer, L.J., covers the whole field of this appeal so completely, and, in my view, so perfectly, that I need say nothing further.

Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors: *T. D. Jones & Co.*, agents for *R. W. Williams*, Durham (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Cooper & Jackson*, Newcastle-upon-Tyne (for the respondent company).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

MERCHANTS' AND MANUFACTURERS' INSURANCE CO., LTD. *v.* DAVIES.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., and Slesser, L.J.), **April 6, 7, May 3, 1937.**]

Discovery—Action by insurance company to avoid a policy—Non-disclosure of convictions of motoring offences—Application for discovery of documents in similar cases—Road Traffic Act, 1934 (c. 50), *s.* 10 (3).

The plaintiff company brought an action and asked for a declaration that it was entitled to avoid an insurance policy, on the ground that it had been obtained by non-disclosure of material facts. The assured had failed to disclose that he had been convicted of two motoring offences. The defendants denied that this non-disclosure was material, and applied for discovery of documents relating to policies where disclosure of similar convictions had been made :—

HELD : the discovery sought was not material to the issue raised. A prudent insurer, who might accept a policy where a conviction had been disclosed, might nevertheless refuse to accept one where he subsequently discovered that the conviction had been concealed.

[**EDITORIAL NOTE.** This case considers how far discovery may be had against an insurance company of the proposal forms and other documents tending to show that insurances had been accepted where disclosure had been made which in the case under consideration had been withheld. Such discovery cannot be had because it is material to the risk that the assured failed to disclose such information, and a company might consider itself justified in accepting a case where full disclosure has been made and in refusing a risk where the facts have been concealed.

AS TO NATURE AND EXTENT OF DISCOVERY, see HALSBURY, Hailsham Edn., Vol. 10, pp. 374, 375, para. 454 ; and FOR CASES, see DIGEST, Vol. 18, pp. 101-105. Nos. 525-551.]

Cases referred to :

(1) *Thames & Mersey Marine Insurance Co.* v. *Gunford Ship Co., Southern Marine Mutual Insurance Assocn.* v. *Gunford Ship Co.*, [1911] A.C. 529 ; 29 Digest 123, *765* ; 80 L.J. P.C. 146 ; 105 L.T. 312.

(2) *Ionides* v. *Pender* (1874), L.R. 9 Q.B. 531 ; 29 Digest 123, *763* ; 43 L.J. Q.B. 227 ; 30 L.T. 547.

(3) *Locker & Woolf, Ltd.* v. *Western Australian Insurance Co., Ltd.*, [1936] 1 K.B. 408 ; Digest Supp. ; 105 L.J. K.B. 444 ; 154 L.T. 667.

APPEAL from a decision of GODDARD, J., dated Mar. 17, 1937. The facts of the case are fully set out in the judgments.

N. R. Fox-Andrews and *S. Chapman* for the appellant Owen.

Theodore Turner for the appellant Davies.

F. Soskice for the respondent company.

Fox-Andrews : No reliance is placed upon the fact of non-disclosure *per se* ; the question is as to whether the fact not disclosed was material. That depends upon the circumstances of the conviction. It is relevant to know whether the plaintiff company has treated each case on its merits. [Counsel referred to *Thames and Mersey Marine Insurance Co.* v. *Gunsford Ship Co.* (1).] The question is not what is material to a prudent underwriter, but what was material to this underwriter. The defendants are entitled to call evidence to show what a prudent underwriter would do, and what this particular underwriter did : *Ionides* v.

Pender (2), *Locker & Woolf, Ltd.* v. *Western Australian Insurance Co., Ltd.* (3).

Turner : I adopt the argument of the first appellant. It is necessary to consider the moment when the non-disclosure was made, i.e., when the proposal for insurance was made ; it is irrelevant to consider whether the matter would subsequently become material. [Counsel referred to A *Locker & Woolf, Ltd.* v. *Western Australian Insurance Co., Ltd.* (3).]

Soskice : It is of no assistance to the court to know what this underwriter did in different circumstances. The judge must disregard this underwriter, and determine what an ordinary prudent underwriter would do. Unless the court is satisfied that proper discovery has not been made, B it must rely upon the oath of the party. If there is no more than a conjectural possibility that this discovery might assist the judge, then it is oppressive. It is for the party seeking relief to show a reason for going behind the affidavit of discovery.

C

SIR WILFRID GREENE, M.R. : These appeals arise in the following circumstances. The action is brought by the plaintiff company, which asks for a declaration that it was, or is, entitled to avoid a certain policy of assurance, apart from any provision contained therein, on the ground that it was obtained by non-disclosure of material facts, or by a representation D of facts false in some material particulars. The policy in question had been issued to the defendant Davies, and it extended to cover, among other things, liability for injury to third parties by an accident caused by, through, or in connection with a motor-cycle described in the policy. During the currency of the policy the defendant Davies, E while riding the motor-bicycle, was involved in an accident, which resulted in injuries to the defendant Owen, who is in a position to make a claim for damages against the defendant Davies.

In these circumstances, the plaintiff company, in order to obtain the benefit of the Road Traffic Act, 1934, s. 10 (3), began this action, and F in its statement of claim it alleges that it was induced to grant the policy, and that the policy was obtained by non-disclosure of material facts, or representation of facts false in material particulars. The non-disclosure alleged is the non-disclosure of two convictions which had been suffered by the defendant Davies, namely, (*a*) a conviction on or about Apr. 1, G 1931, for driving a motor car without a licence, for which offence he was fined 10*s.*, (*b*) a conviction on or about Feb. 18, 1932, for driving a motor-cycle in a dangerous manner, for which offence he was fined a sum amounting with costs to £3 2*s.* 6*d.*, and his driving licence was endorsed. The misrepresentation alleged is that, in answering a question as to convictions H for motoring offences contained in the proposal form, the defendant Davies stated that his only conviction was for driving without tail-lights. These appeals are concerned only with the question of non-disclosure of material facts.

In their defences, the defendants deny the materiality of the facts alleged not to have been disclosed. Para. 5 of the defence of the defendant Owen contains the following allegation:

> In cases similar to that of the defendant Davies where disclosure of the facts has been made to them the plaintiffs have neither refused the risk nor attached any special conditions to the policy. (Particulars hereunder cannot be given until after discovery.)

A In these circumstances, after the plaintiff company had delivered a list of documents, interlocutory applications were made in the action by each defendant, asking for an order on the plaintiff company to file a further and better list of documents disclosing:

> B correspondence, documents or files which are or have been in their possession, custody or power, relating to policies which have been granted or refused by the plaintiffs where disclosure has been made of similar convictions as mentioned in para. 3 of the statement of claim herein.

The plaintiff company on its side made an application for an order striking out the words in para. 5 of the defence of the defendant Owen which is C set out above. All three applications were dismissed by GODDARD, J., who gave leave to appeal.

The relevant provisions of the Road Traffic Act, 1934, are contained in sect. 10 (3), (5), and are as follows:

> D (3) No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within 3 months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it.
>
> E (5) In this section the expression "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions.

I am prepared to assume, for the purposes of this appeal, that, in ascertaining the "materiality" of any fact, evidence as to the practice of F prudent insurers will be admissible at the trial. On this basis, the defendant Owen seeks to justify the insertion of the sentence in para. 5 of his defence set out above. But that sentence, at the highest, amounts to pleading evidence of want of materiality, and nothing more, and, in my opinion, ought to be struck out. Indeed, counsel for the defendant G Owen made no serious attempt to justify its insertion, except as bringing out the point which he wishes to make in the matter of discovery, a point, however, which remains open to him, in view of his denial of the materiality of the facts alleged not to have been disclosed. The argument upon which the applications for further discovery are based is to the following H effect. It is said that the materiality of the facts in question will be an issue at the trial, that upon that issue the practice of prudent insurers in dealing with cases where applicants for insurance have suffered similar convictions will fall to be considered, that in this connection the practice of the plaintiff company itself may be examined, and that relevant evidence of its practice will be found in the documents discovery of which is sought by the defendants. With regard to those documents, counsel for the defendants asked leave to amend their applications by describing the documents discovery of which is sought as those :

> relating to proposals or applications for insurance of motor car and motor-cycle risks made to them by persons disclosing the fact that they have been once convicted of driving a motor car or motor-cycle without a licence and once convicted of driving a motor car or motor-cycle in a dangerous manner or of one or other of such offences. A

It is said, on behalf of the defendants, that we ought to reverse the decision of the judge, upon the ground that his discretion was not properly exercised, and that, in view of the argument summarised above, he ought to have made the order. I am unable to adopt this view. It appears B to me that the judge was perfectly entitled to take the view which he did take upon this matter. The mere fact—and it is only this fact that the defendants hope to establish by this discovery—that the plaintiff company, in cases where convictions of the same character (but not necessarily accompanied by the same punishments) as those now in question C had been disclosed to it by applicants for insurance, did not decline the risk, or raise the premium, would not, in my judgment, advance the defendants' case to any such material extent as to compel the court to make what would be a novel and oppressive order. There appears to me to be all the difference in the world between a case where an underwriter D accepts a risk after receiving full information as to previous convictions, and may well be willing to issue a policy to an applicant who makes a frank disclosure, and the case where no disclosure is made. Underwriters may well regard as material a fact which is concealed from them, and at the same time be prepared to disregard it if a frank disclosure is made ; E proof that the plaintiff company had adopted the latter course in certain cases would, by itself, in my judgment, lead nowhere. If discovery had been asked, or could have been asked, of documents relating to cases where the plaintiff company, after discovering the existence of similar convictions which an applicant had failed to disclose, nevertheless decided F to issue a policy on ordinary terms, the position might have been different, but obviously an application for discovery of this kind could be made only if supported by an affidavit under R.S.C., Ord. 31, r. 19A (3), a thing which it is not suggested could be done in the present case.

In the result, the appeal, so far as it relates to the application to strike G out the paragraph in the defence of the defendant Owen, succeeds with costs, and the appeals of the defendants are dismissed with costs.

Slesser, L.J. : In this action, the plaintiff company, the Merchants' and Manufacturers' Insurance Co., Ltd., seeks a declaration that it is H entitled to avoid a policy of insurance, dated June 28, 1935, issued by it to the defendant Davies, on the ground that it was obtained by non-disclosure of a material fact, or representation of facts which were false in some material particular. The second defendant, Owen, who alleges that injury was done to him by the defendant Davies, when driving a motor-cycle, and that claims have been, or will be, made against the defendant Davies, also opposes the declaration.

The present appeal is from an order of GODDARD, J., refusing an application by the defendant Davies to order the plaintiff company to file a further and better list of documents. This application now takes a form which has been modified during the appeal as a consequence of criticism from the court of the original. The application on which the appeal is now solely based is as follows :

> That the plaintiffs do within   days file a further and better list of documents disclosing all documents which are or have been since Jan. 1, 1935, in their possession, custody or control or in the possession, custody or control of their agents, relating to proposals or applications for insurance of motor car and motor-cycle risks made to them by persons disclosing the fact that they have been once convicted of driving a motor car or motor-cycle without a licence and once convicted of driving a motor car or motor-cycle in a dangerous manner.

It is contended by the appellants that, under the general principles which govern discovery of documents, the above discovery is justified, upon the general ground that the documents sought are relevant, in that they directly or indirectly enable the appellant to advance his own case or destroy that of his adversary, or may fairly lead him to a train of inquiry which may have either of these consequences, and, generally, that the documents sought are such as would throw light on the case. In my view, this contention is not well founded. The allegations in this case, as they appear in the statement of claim under particulars of misrepresentation, say that the defendant Davies, having submitted a proposal to the plaintiff company, in reliance whereon it granted such policy, in reply to the question : " Have you ever been convicted of an offence in connection with the driving of a motor vehicle or motor-cycle ? " wrote : " Once ; without tail lights," whereas in truth he had been convicted and fined on Apr. 1, 1931, for driving a motor car without a licence, and, on Feb. 18, 1932, convicted and fined £3 2*s.* 6*d.* (including costs), and his driving licence endorsed, for driving a motor-cycle in a dangerous manner.

One of the issues to be determined in the action is whether, in order to satisfy sect. 10 (3) of the 1934 Act, the policy may be avoided on the ground that it was obtained by the non-disclosure of a material fact, and that means, as I have pointed out, according to sect. 5, of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions. It is said that documents relating to proposals or applications for insurance of motor car and motor-cycle risks made to it by persons disclosing the fact that they have been once convicted of driving a motor car without a licence and once convicted of driving a motor-cycle in a dangerous manner will be material to show that such disclosures have not been deemed to be material by one insurer, at any rate, namely, the plaintiff company. But, in my opinion, the facts contemplated to be disclosed by such discovery are essentially different from those of the present case,

for, in the present case, it is not suggested that there has been acceptance of policies after such disclosure, but an acceptance brought about by non-disclosure, and, though it might well be that, in appropriate cases, the knowledge of particular circumstances affecting acceptance might be material, for it has been decided that on such a question of fact expert evidence may be given (see *Thames & Mersey Marine Insurance Co.* v. A
Gunford Ship Co. (1), *per* Lord Alverstone, L.C.J., p. 533, and *per* Lord Robson, p. 550 : *Ionides* v. *Pender* (2)), having regard to all the circumstances of this case, in which it is said that there has been concealment, or non-disclosure of facts, I do not think that the discovery of instances where there has been complete disclosure and no concealment is in any B
way either conclusive or relevant.

The factor of the moral hazard involved in the fixing of a premium, or determining whether an insurer would take a risk, where the proposer has concealed or mis-stated the facts as to previous conviction, more particularly when full details are asked, is a circumstance which must be C
considered in relation to the materiality of the non-disclosure, and it may well be that an insurer who would accept a policy when a previous conviction has been disclosed, which is the contingency contemplated in the discovery here sought, would refuse to complete such a policy where there had been a failure to disclose a conviction or other material matter. D
On the ground, therefore, that the discovery sought is not relevant to the issue raised, in the circumstances of the case, I agree that the order desired was rightly refused, and that this appeal fails.

Solicitors : *Vizard, Oldham, Crowder & Cash* (for the appellant Owen) ; *Official Solicitor* (for the appellant Davies) ; *William Charles Crocker* (for E
the respondent company).

[*Reported by* E. Fuller Briscoe, Esq., *Barrister-at-Law.*]

R. v. RULE. F

[Court of Criminal Appeal (Lord Hewart, L.C.J., Humphreys and Singleton, JJ.), **April 26, 27, May 7, 1937.**]

Libel—Privileged occasion—Allegation of improper conduct by public official—Communication to member of parliament seeking interview with Minister. G

The appellant, who was an inhabitant of S. and an elector, wrote to one of the members of parliament for S. with the object of inducing him to help the appellant to bring certain matters, at first unspecified, to the attention of the Home Secretary or the Minister of Health. The member of parliament replied that it was impossible for him to ask the Home Secretary for an appointment unless he had first intimated to H
him what the purpose of the appointment was. The appellant thereupon wrote two letters to the member of parliament containing allegations of grave and criminal conduct against a detective sergeant of police of the S. police force and a justice of the peace for S. The appellant was charged with publishing defamatory libels, and was convicted :—

Held : the letters were written on a privileged occasion, and, in the absence of proof of malice, the conviction ought to be quashed.

[EDITORIAL NOTE. This case extends the number of cases to which the doctrine of privilege applies to that of a constituent writing to his member of parliament upon an allegation of improper conduct by a public official, and, it would seem, generally to cases where the matter is a proper one for the member to bring to the attention of one of His Majesty's ministers or upon which a question ought to be asked in the House.

As to Privileged Occasions, see HALSBURY, Hailsham Edn., Vol. 20, pp. 470-478, paras. 573-575; and for Cases, see DIGEST, Vol. 32, pp. 118-135, Nos. 1500-1653.]

(1) *Harrison* v. *Bush* (1856), 5 E. & B. 344; 32 Digest 123, *1550;* 25 L.J. Q.B. 25, 99; 25 L.T. O.S. 194.

(2) *Hebditch* v. *MacIlwaine*, [1894] 2 Q.B. 54; 32 Digest 114, *1460;* 63 L.J. Q.B. 587; 70 L.T. 826.

(3) *Lake* v. *King* (1670), 1 Mod. Rep. 58; 32 Digest 109, *1420*.

(4) *Fairman* v. *Ives* (1822), 5 B. & Ald. 642; 32 Digest 133, *1639*.

(5) *Ashby* v. *White* (1703), 1 Bro. Parl. Cas. 62; 14 State Tr. 695; 1 Digest 23, *187*.

(6) *Dickson* v. *Wilton* (*Earl*) (1859), 1 F. & F. 419; 32 Digest 156, *1881*.

(7) *Davison* v. *Duncan* (1857), 7 E. & B. 229.

(8) *Wason* v. *Walter* (1868), L.R. 4 Q.B. 73; 32 Digest 144, *1754;* 38 L.J.Q.B. 34; 19 L.T. 409.

(9) *Davies* v. *Snead* (1870), L.R.5 Q.B. 608; 32 Digest 114, *1455;* 39 L.J. Q.B. 202; 23 L.T. 126, 609.

(10) *Jenoure* v. *Delmege*, [1891] A.C. 73; 32 Digest 156, *1887;* 60 L.J. P.C. 11; 63 L.T. 814.

(11) *London Assocn. for Protection of Trade* v. *Greenlands, Ltd.*, [1916] 2 A.C. 15; 32 Digest 120, *1521;* 85 L.J. K.B. 698; 114 L.T. 434.

(12) *Chaffers* v. *Goldsmid*, [1894] 1 Q.B. 186; 36 Digest 276, *240;* 63 L.J. Q.B. 59; 70 L.T. 24.

(13) *Harwood* v. *Green* (1827), 3 C. & P. 141; 32 Digest 111, *1436*.

(14) *Graham* v. *Crozier* (1879), 44 U.C.R. 378; 32 Digest 124, case *r*.

(15) *Blagg* v. *Sturt* (1846), 10 Q.B. 899; 32 Digest 158, *1908;* 16 L.J. Q.B. 39; 8 L.T. O.S. 135.

Appeal against a conviction on two counts of an indictment charging the appellant with the publication of a defamatory libel.

J. Scott Henderson for the appellant: When a constituent writes to his member of parliament, the communication is one of qualified privilege. The member of parliament has a common interest with his own constituents in their grievances, and, so long as he is communicated with in his capacity of member of parliament, it does not matter what is the subject of the communication. If a man wishes to petition Parliament, he must first approach an individual member who must sign the petition: *Lake* v. *King* (3); *Fairman* v. *Ives* (4); *Ashby* v. *White* (5). A member of parliament has a duty to hear the grievances of his constituents, and, if a constituent makes any statement to his member of parliament as such for the purpose of enabling the latter to do his duty, that statement is protected: *Dickson* v. *Wilton* (*Earl*) (6); *Davison* v. *Duncan* (7); *Wason* v. *Walter* (8); *Harrison* v. *Bush* (1); *Davies* v. *Snead* (9); *Jenoure* v. *Delmege* (10). A man may make a communication *bona fide* to anyone who has an interest to receive it, and to do so may be a duty that he owes to society. It is enough that the other party has an interest to receive it; he need not be under such a duty to act that a *mandamus* would lie. In this particular case it can be said that the misconduct of a police officer or of a justice of the peace is a matter of public interest as well as a grievance to the particular elector in whose voting area it occurs. If this matter had gone direct to the Home Secretary it is indisputable that it would have been covered by privilege. The member of parliament was the intermediary between the constituent and the proper officer to deal with such a grievance; and if the constituent made a mistake in going to the member of parliament instead of to the Home Secretary, that would not deprive him of privilege: *London Assocn. for the Protection of Trade* v. *Greenlands, Ltd.* (11).

F. J. Tucker, K.C., and *W. Blake Odgers* for the Crown: In no circumstances does the mere fact that a man is a member of parliament create a privilege between him and a constituent; and the fact that the former has made a request for the information makes no difference. The test must be whether the privilege was there at the start. A member of parliament as such is nothing but a supposedly influential person able to capture the ear of the necessary official more speedily or more persuasively than the constituent. If a man writes to a member of parliament or anyone else and says, "I want to see you about something," either this is privileged from the start or it is not. If it is not, he cannot create the privilege by saying, "I want you to tell me confidentially what it is you want to see me about." Blackstone's Commentaries, Bk. 1, Ch. 2, p. 159, and *Chaffers* v. *Goldsmid* (12) show that once a member of parliament is elected he represents all the constituents of the realm. A communication made to any minister is in effect a communication made to the Crown. That is why it does not matter to which minister complaint is made: *Hebditch* v. *MacIlwaine* (2). The mere fact that it may be a very general practice to refer complaints to a particular quarter is no defence if it appears that that is the wrong quarter: *Harwood* v. *Green* (13). The present practice whereby constituents communicate with their member of parliament is no defence, for the communication, in order to be privileged, must be made by a person having an interest in its subject matter to another having a similar interest. [Counsel also referred to *Graham* v. *Crozier* (14); *Blagg* v. *Sturt* (15); *Harrison* v. *Bush* (1).]

Scott Henderson in reply: May in his Parliamentary Practice, at p. 243, says: "Nor can any question be asked regarding character or conduct except of persons in their official or public capacity." Both these complaints related to the persons in their public capacity.

Lord Hewart, L.C.J. [reading the judgment of the court]: The appellant was convicted before Branson, J., at the assizes for the county of Southampton upon an indictment which charged him with publishing defamatory libels, knowing them to be false. There were two counts in the indictment. The first related to a libel concerning a detective sergeant in the Southampon police force, published in letters addressed to Mr. William Craven Ellis, the second to a libel, published in one of these letters, concerning a justice of the peace for Southampton. There was no plea of justification. At the close of the case for the prosecution, the counsel for the Crown said that he would not ask the jury to find that the appellant knew the alleged libels to be false, and submitted that, on the evidence, the appellant should be convicted of publishing defamatory libels. Counsel for the appellant then submitted to the judge that the letters were written on a privileged occasion, so that the appellant was entitled to be acquitted, unless the jury found that in writing them he was actuated by malice. After hearing argument, the judge ruled that the occasion was not privileged. Thereupon the counsel for the appellant announced that he would call no evidence, and would not address the jury, inasmuch as all the evidence he had proposed to call was directed to show that the defendant had acted *bona fide* and without malice. The judge directed the jury that they should convict the appellant if they were satisfied that he published the libels and that the words complained of were defamatory. The jury found the appellant guilty on both counts. The judge ordered that he should be bound over in his own recognizances in the sum of £50 for 12 months to be of good behaviour, and to come up for judgment if called upon, and that he should pay the costs of the prosecution. The question for our determination is whether the judge was right in holding, upon the evidence before him, that the occasion was not privileged. If that decision was correct, the verdict cannot be challenged; if it was erroneous, it follows that the conviction must be quashed.

The relevant facts are as follows: Mr. Craven Ellis is one of the members of parliament for Southampton. The appellant is an inhabitant and an elector of that county borough. Early in July, 1936, the appellant had been in communication with Mr. Craven Ellis, with the object of inducing him to help the appellant to bring certain matters, at first unspecified, to the attention of one of His Majesty's Ministers. On July 7, the appellant wrote to Mr. Craven Ellis a letter in which he said:

> My business with either the Home Secretary or the Minister of Health is of the utmost urgency and importance which vitally affects two of your constituents' happiness.

In the same letter the appellant offered to produce to Mr. Craven Ellis documents in his possession. On the same date, Mr. Craven Ellis acknowledged and replied to the appellant's letter. The terms of his reply are of importance. He wrote:

> Whilst I am most anxious to do whatever I can to help my constituents who are in difficulties, it is quite impossible for me to ask the Secretary of State for Home Affairs to give an appointment unless I have first intimated to him what the purpose of the appointment is. You say that you are in possession of certain documents. These can be forwarded to me with utmost confidence, and if a full statement of the case accompanies the documents I can take steps to meet your wishes. . . . If you can let me have the statement and the documents by Thursday morning, it would then be possible to fix an appointment with the Minister early next week.

It was in response to this letter that the appellant, on July 8, wrote the two letters which are the subject of these proceedings. With one of them he enclosed a long statement, signed by two persons, which contained allegations of grave and indeed criminal misconduct against a detective sergeant of police of the Southampton police force. The appellant took it upon himself to affirm his belief in these allegations, and, further, in a postscript to a second letter of July 8, alleged that a gentleman, whom he named and described as "chairman of the harbour board," and who is also a justice of the peace, had been guilty of theft and other dishonest practices. He added:

> I can produce several living persons as well as myself who can prove these awful statements to be absolute facts.

In the absence of any finding that the appellant was actuated by malice, we are bound to assume, for the purposes of our judgment, that, although these libels were wholly untrue, the appellant honestly believed them to be true, and, in publishing them, was not influenced by any wrong or indirect motive. On this assumption, he was entitled to be acquitted, if the communication which he made to Mr. Craven Ellis fell within the legal canon adopted by the Court of Queen's Bench in *Harrison* v. *Bush* (1), at p. 348:

> A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable.

It was conceded in argument that the appellant had an interest in the subject matter of the libels. Indeed, the contrary could not well have been contended. In the circumstances of this case, as in those considered in *Harrison* v. *Bush* (1), every elector and inhabitant of the locality would have an interest in the conduct of its public functionaries: see *per* LORD CAMPBELL, C.J., at pp. 348, 349. The question remains whether Mr. Craven Ellis had a corresponding interest, and it was to this point that the argument before us was mainly directed. It was not disputed that the Secretary of State for Home Affairs was the Minister, or one of the Ministers, to whose attention it was proper to bring these complaints in the public interest.

The discussion has covered a wide field, but it will not be necessary for this court to express any opinion as to the rights and duties generally of members of parliament. It is sufficient for the purpose of this case to say that, in our judgment, a member of parliament to whom a written communication is addressed by one of his constituents, asking for his assistance in bringing to the notice of the appropriate Minister a complaint of improper conduct in relation to his office on the part of some public official acting in that constituency, has sufficient interest in the subject matter of the complaint to render the occasion of such publication a privileged occasion. When once it is seen that a decision favourable to the appellant requires no more than this limited assertion of the interest of a member of parliament in the welfare of his constituents, it appears to us impossible to resist the conclusion that the conviction cannot be supported. In so holding, we are doing no more than giving effect to well-settled principles. In the case of *Hebditch* v. *McIlwaine* (2), upon which reliance was placed by counsel for the Crown, it was not in dispute that the persons (a board of guardians) to whom the libel was published had no interest in the matter: see *per* A. L. SMITH, J., at p. 62. The meaning of the word "interest" in this context is stated in a passage in the book on the law of libel and slander of the late FRASER, J., where the learned author summarises the effect of many decisions:

> This common interest may be in respect of very varied and different matters; indeed, the only limitation appears to be that it should be something legitimate and proper, something which the courts will take cognizance of, and not merely an interest which is due to idle curiosity or a desire for gossip.

See FRASER'S LAW OF LIBEL AND SLANDER, 7th Edn., p. 152; 5th Edn., p. 229. It is, in our view, impossible to contend that the member of parliament had not at least such an interest in the subject matter of the libels as would come within this limitation.

It follows, in our judgment, that the appeal must be allowed, and the conviction quashed. The orders of the judge consequent upon the conviction will be set aside.

Appeal allowed.

Solicitors: *Lamport, Bassitt & Hiscock*, Southampton (for the appellant); *Sharpe, Pritchard & Co.*, agents for *R. R. H. Meggeson*, Town Clerk, Southampton (for the respondent).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

AVERY *v.* LONDON & NORTH EASTERN RAILWAY CO., HARRIS *v.* LONDON & NORTH EASTERN RAILWAY CO., BONNER *v.* LONDON & NORTH EASTERN RAILWAY CO., WATSON *v.* LONDON & NORTH EASTERN RAILWAY CO.

[COURT OF APPEAL (Slesser and Romer, L.JJ., and Luxmoore, J.), **April 20, 21, 22, May 11, 1937.**]

Negligence—Negligence of fellow servant causing death—Statutory liability—Proceedings by widow of deceased but not by children—Amount recoverable by widow—Fatal Accidents Act, 1846 (*c.* 93), *ss.* 1, 2, 5—*Fatal Accidents Act*, 1864 (*c.* 95), *s.* 1—*Employers' Liability Act*, 1880 (*c.* 42), *ss.* 1, 3.

Workmen's Compensation—Fatal accident—Compensation—Proceedings by children but not by widow of deceased—Amount recoverable by children—Workmen's Compensation Act, 1925 (*c.* 84), *s.* 8.

A number of workmen were fatally injured in a collision which was due to the negligence of a fellow servant. The widow in each case brought proceedings against the employers under the Employers' Liability Act, 1880, and the children proceeded under the Workmen's Compensation Act, 1925:—

HELD: (i) the widow in each case could recover only her proportionate share of the whole amount recoverable under the 1880 Act, irrespective of whether the children did or did not take their share.

(ii) the children in each case could recover only their proportionate share of the whole amount recoverable under the 1925 Act, irrespective of whether the widow did or did not take her share.

(iii) the widow in each case, by electing to proceed under the Employers' Liability Act, 1880, had not precluded the children from proceeding under the Workmen's Compensation Act, 1925.

[**EDITORIAL NOTE.** This case was in some measure the subject of decision in *Gill's* case (1), which is also a decision of the Court of Appeal. That case had, however, been adversely criticised by the House of Lords in *Kinneil's* case (3), and the court has therefore felt free to deal with the matter without reference to that decision. Now it is decided that neither under the Employers' Liability Act, 1880, nor under the Workmen's Compensation Act can the full amount be awarded where one or more of those entitled decide not to be a party to that particular proceeding. The right of parties to elect under which Act they will proceed without prejudicing the rights of other dependants is also again considered. A B

AS TO AMOUNT RECOVERABLE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 207, 208, paras. 362-365 ; and FOR CASES, see DIGEST, Vol. 34, pp. 236, 237, Nos. 2018-2021 ; and HALSBURY, 1st Edn., Vol. 20, Master and Servant, p. 199, paras. 439-441 ; and FOR CASES, see DIGEST, Vol. 34, pp. 408-413, Nos. 3322-3359.] C

Cases referred to :

(1) *Gill* v. *Fortescue (N.) & Sons, Ltd.* (1913), 6 B.W.C.C. 577 ; 34 Digest 428, *3477*.

(2) *Codling* v. *Mowlem (J.) & Co., Ltd.*, [1914] 3 K.B. 1055 ; 34 Digest 491, *4067* ; 83 L.J. K.B. 1727 ; 111 L.T. 1086 ; 7 B.W.C.C. 786.

(3) *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon (or Waddell)*, [1931] A.C. 575 ; Digest Supp. ; 100 L.J. P.C. 113 ; 145 L.T. 289 ; 24 B.W.C.C. 181. D

(4) *London County Council* v. *Schewzik*, [1905] 2 K.B. 695 ; 26 Digest 503, *2104* ; 74 L.J. K.B. 959 ; 93 L.T. 550.

APPEALS from decisions of His Honour JUDGE LANGMAN, given on Oct. 9, 1936. The facts and the issues raised are set out in the judgments. E

Hon. S. O. Henn Collins, K.C., and *F. W. Beney* for the appellant company.

G. J. Lynskey, K.C., and *W. Shakespeare* for the respondents. F

SLESSER, L.J. : In these cases, which raise essentially the same problems, claims have been made by the widows and children of men who have died as a result of a railway collision on Jan. 19, 1936, the men being employees of the London & North Eastern Railway Co. G In each case, the widows have brought proceedings under the Employers' Liability Act, 1880, and the children have proceeded under the Workmen's Compensation Act, 1925. Dealing first with the Employers' Liability Act, 1880, it is necessary in the first place to have regard to the Fatal Accidents Acts, 1846 and 1864. By sect. 1 of the 1846 Act, H it is provided that :

> Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding

the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

By sect. 2 it is provided that:

> Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in A every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting costs not recovered from the defendant shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

B By sect. 3 it is provided that:

> not more than one action shall lie for and in respect of the same subject matter of complaint.

The Fatal Accidents Act of 1864 by sect. 1 provides that:

> If . . . there shall be no executor or administrator . . . [the] action may be C brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been, if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator.

D In the present cases, all the widows brought their actions under sect. 1 of the Amendment Act, and, in my view, on the language of that section, must be taken to have brought them for the benefit of themselves and their children in just the same manner as if the action had been brought by an executor, and, although the children have made no claims under E the Act, I think it was incumbent upon the county court judge, in the first place, to ascertain the damages attributable to the whole group proportioned to the injury resulting from such death to the widows and their children. By reason of the Workmen's Compensation Act, 1925, s. 29 (1), in so far as the children have claimed compensation under that F Act, the employer is not liable to pay them compensation independently of the Act, nor liable to any proceedings independently of the Act, and therefore the children are precluded from taking such share as they otherwise might have taken of the damages which would have been divided among them under the Fatal Accidents Act. In other words, G the judge should have treated the action, albeit brought in the name of the widow, as a claim by her alone as one for her and the other persons for whose benefit the action must be taken to have been brought, in just the same way as would perhaps more clearly have been the case had the action been brought for the group of beneficiaries mentioned H in the Act by an executor. In the latter case, it is apparent that the executor could not, of his own choice, favour one dependant by excluding the others, though of course the others, being declared entitled to their shares, if competent to do so, could disclaim their rights. This method of ascertaining the whole damage suffered and then dividing it up among the dependants in their proper proportions, and allowing to the widows such shares as they would have obtained if the other dependants had claimed, is not a method which has been followed by the county court judge in these cases. He has, wrongly, I think, awarded to the widow the full sum of damages ascertained, without considering what the other dependants would have been entitled to had they not brought proceedings under the Workmen's Compensation Act ; whereas, for the reasons I have stated, in my judgment, he should have first ascertained the total damage suffered by all the dependants, including the widow, and so divided that amount that the widow should receive her proportionate share and no more.

In arriving at this conclusion, I do not ignore the difficulties which have arisen through a decision of this court in the case of *Gill* v. *Fortescue (N.) & Sons, Ltd.* (1), in which there appear, in the judgment of Lord Cozens-Hardy, what I can only think, although the facts are not entirely similar, to be observations to the contrary effect. The material facts of *Gill's* case (1) are these : The children of a workman, who was killed by accident, applied for compensation as dependants. The widow did not claim, it being understood that she intended to claim under the Fatal Accidents Act. Speaking for myself, I cannot find any suggestion that the widow assigned her waived rights to the children. Under the rules, she was made a respondent in the arbitration. A part of the case dealt with a matter, here not relevant, as to the total sum which the employers could be called upon to pay ; but, whatever the sum, the county court judge ordered the whole of it to be paid to the children, and, on appeal, on this point, it was argued that, the money having been paid into court on the basis of compensation for all the dependants, if one dependant renounced his share there was a resulting trust of that share to the employers. Sir H. H. Cozens-Hardy, M.R., at p. 581, describes the point as so far-fetched that it hardly deserves mention. He added :

> The widow was not a claimant and she was not awarded compensation. She might, I assume, if she had been so minded, have made a claim as a dependant but she did not. And to say that the children, who do claim as dependants, are not entitled to all the sum awarded because one member of the class of dependants decided to stand out and rely on Lord Campbell's Act, seems to be an impossible contention. The dependants who obtained an award as plaintiffs, cannot be prejudiced by the fact that another person who might have become a co-plaintiff, has refused to do so.

These observations, in which apparently the remainder of the court concurred, were made in relation to the claim of the children to the total sum awardable under the Compensation Act, and proceeded, I think, on the footing that the widow had not assigned any share to the children, as in *Codling* v. *Mowlem (J.) & Co., Ltd.* (2), but had merely stood aside as a claimant, and the same principle, if correct, would enable the widow to claim her whole share under the Fatal Accidents Acts, and therefore it is convenient to deal with the whole matter at this stage of my judgment. I find this case difficult, in principle, to distinguish from the present ones, and, if it is one which the court ought now to follow, it appears to me to be very much in favour of the respondents in the present appeal; but, in my view, it has been received with such hesitancy in the House of Lords, in *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon* (*or Waddell*) (1), that I feel justified, in the circumstances, in refusing, respectfully, to follow it. In view of the A words which I am about to cite, I think this is one of those cases where, as LORD ALVERSTONE, C.J., said in *London County Council* v. *Schewzik* (4) at p. 700:

> There are strong grounds which enable the court to say that the previous decisions ought not to be followed.

B In *Kinneil's* case (3), which I shall hereafter consider upon another matter, namely, that of election, it is true that LORD BUCKMASTER, at p. 186, where he recites that this court decided that the children were entitled to the whole sum when the mother was taking proceedings under Lord Campbell's Act in *Gill* v. *Fortescue* (*N.*) *& Sons, Ltd.* (1), said C "This case does not come before us for criticism." So also VISCOUNT DUNEDIN adds, at p. 190: "I express no opinion as to whether *Gill* v. *Fortescue* (*N.*) *& Sons, Ltd.* (1) was rightly decided or not." But he also speaks of the claim to participate in the lump sum, and says that no individual is to get two payments, one at common law and one under D the Act, observations which I find it difficult to reconcile with the reasoning in *Gill's* case (1), at p. 189. LORD WARRINGTON comments on *Gill's* case (1), at p. 192, thus: "Whether the actual result was right may be a matter of doubt. As to this I reserve my opinion." LORD THANKERTON, at p. 199, also reserved his opinion as to the soundness E of the decision. But LORD RUSSELL points out that the point was only a subsidiary one, and there was little argument upon it. Nowhere, it is to be noted, in the House of Lords, although the case was cited in favour of the appellants, was there any expression of approval of *Gill* v. *Fortescue* (*N.*) *& Sons, Ltd.* (1), and some doubt as to its correctness was F expressed. In the circumstances, as I have said, I feel myself at liberty to treat the matter as one upon which I am free to act upon my own judgment.

The next question which falls to be considered is the Employers' Liability Act, 1880. Admittedly, the accident occurred to the deceased G men through the negligence of fellow workmen, and, by sect. 1 of the Act of 1880, where personal injury is caused to a workman by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engines or train upon a railway, the workman, or, in case the injury results in death, the H legal personal representative of the workman entitled in the case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work. The reliance upon this section has the effect, as is admitted by the employers, of destroying, in the present case, the defence of common employment, which otherwise might have been fatal to the claimants, but the use of the section brings in sect. 3 of the same Act, which is to the effect that :

> The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

Applying this section to the present case, I think that the sum recoverable means the total sum payable to the group, and, if the widow, as I think, is only entitled to her proportionate share, irrespective of whether the children do or do not take their shares, so also, I think, she is only entitled to a proportionate share of the amount of compensation recoverable under the 1880 Act, the proportion of her share to the total amount awardable under the Fatal Accidents Act being ascertained, and there should be an abatement of her claim to such an amount as would give her that share, under sect. 3 of the Employers' Liability Act, which she would have taken had the other dependants made their claims and been compelled to suffer their appropriate abatements.

Next is to be considered the argument that, as the widow has elected to proceed under the Fatal Accidents Acts and the Employers' Liability Act, she has thereby precluded, not only herself, but also her children, from taking proceedings by arbitration under the Workmen's Compensation Act. In this matter, I think that the county court judge was right in coming to the conclusion that the election of the mother and of the children are independent elections under sect. 29, and that the widow may exercise her option in one way and the children in another. In my opinion, this point is decided by authority. In the decision in the House of Lords in *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon (or Waddell)* (3), it was held that, where one dependant has exercised an option conferred upon him by sect. 29 (1) of the Workmen's Compensation Act, by proceeding against the employer independently of the Act he cannot be deprived of the benefit of that option by the fact that separate proceedings under the Act could have been taken against the same employer by a second dependant who cannot claim the option. The widow of a miner, whose husband had been killed in a pit, brought proceedings at common law. A stepson then proceeded under the Workmen's Compensation Act, he being a dependant for the purposes of that Act. Viscount Dunedin, in a passage to which I have referred in part in another connection, says, at p. 189 :

> The argument, accordingly, depends on the view that the term "workman" is exactly represented by, not the dependants taken individually, but as a body. . . . The compensation to be paid by the employer may be viewed as a lump sum, and an aggregate of what is actually called a lump sum plus a children's allowance, if there are such. But the claim to participate in this lump sum is an individual claim, and what I think the section means to say, and what involves no absurdity, is that no individual is to get two payments, one at common law and the other under the Act.

Lord Warrington says, at p. 192 :

> The rights of the several dependants are not identical, and it seems to me quite

> impossible to hold that the independent action of one should deprive the others of the benefit of an option, conferred upon them by the Act, which option they have effectually exercised.

Speaking of the definition of a "workman" in sect. 48 (3), to the effect that any reference to a workman who has been injured shall, where the
A workman is dead, include a reference to his dependants, LORD WARRINGTON says, they also say that, under sect. 48 (3), the dependants must be treated as one and indivisible, and that a claim by one of them, followed by payment of compensation, even if only made into court, for ever debars the prosecution of all other dependants of their right
B of action independently of the Act. LORD THANKERTON adds, at p. 195:

> I am therefore of opinion that each person, who is entitled to compensation under the Act on the death of the workman and who has also a right of action independently of the Act, has an individual option under sect. 29 (1).

LORD RUSSELL at p. 200 reads into sect. 29 (1) the words:

C
> [Dependants] may, at [their] option, either claim compensation under the Act or take proceedings independently of [it].

It is clear from this authority that the claims of the widows under the Employers' Liability Act are not such elections as to debar the children from exercising their option to proceed to arbitrate.

D Having said this, I pass, therefore, finally to the consideration of the children's claims under the Workmen's Compensation Act. The county court judge proceeds to assess this compensation in accordance with the provisions of sect. 8 of the Workmen's Compensation Act, ignoring the widow altogether. In this, I think he has fallen into an error similar
E to that which he made in excluding the children from all consideration under the Fatal Accidents Act. Under sect. 8, it is necessary for the judge to find a lump sum, calculated in accordance with the rules of the statute, where there are a widow and other members of the family wholly or partially dependent, and he has no right to exclude that widow
F from the ascertainment of the lump sum, if in fact she is dependent upon his earnings, merely because she is factually not a claimant. In the language of VISCOUNT DUNEDIN, in the *Kinneil* case (3), at p. 189

> The compensation to be paid by the employer may be viewed as a lump sum, and an aggregate of what is actually called a lump sum plus a children's allowance, if there are such.

G
He goes on to point out, in the passage I have already quoted, that the claim to participate in this lump sum is an individual claim. Now, though the lump sum is to be ascertained on the basis that the deceased has left a widow and children, if any, dependent, it may be that, as in
H the present case, the widow is precluded from claiming her share, by reason of the fact that she has elected to proceed otherwise than by arbitration, though it is to be observed that she has retained her right, under sect. 29 (2), to make a claim for compensation under the provisions of the Workmen's Compensation Act if the action independently of that Act should be dismissed. As in fact she succeeded in this case, she

cannot, of course, rely upon sect. 2, and her share of what she would otherwise have received under the lump sum must be excluded, but, in arriving at the sums payable to the dependants, a proper proportion of the whole of the lump sum must be made in accordance with sect. 8, and the rules thereunder, although the widow's share, for the reasons I have stated, is not claimed, and should not be recovered by her.

All the cases, therefore, for the reasons I have stated, must be remitted to the county court judge for fresh calculation and assessment upon the principles which I have endeavoured to indicate, and these appeals must be allowed with costs. The costs in the county court on both hearings to be in the discretion of the county court judge.

ROMER, L.J.: When the death of a workman is caused by the negligence of his employer, or a person in the service of his employer, the dependants of such workman specified in Lord Campbell's Act are, in certain circumstances, entitled, by virtue of the Employers' Liability Act, 1880, to recover from the employer damages proportioned to the injury resulting to them from the death of the workman. It is, however, provided by sect. 3 of the last-mentioned Act that the amount recoverable under that Act shall not exceed the maximum sum therein specified. In the like circumstances the like dependants would also be entitled to recover compensation under the provisions of the Workmen's Compensation Act, 1925, though that Act also limits the total amount of the compensation to which the dependants between them are entitled. It is accordingly provided by sect. 29 (1) of that Act as follows:

> When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.

By sect. 48 (3), it is provided that any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative, or to his dependants, or other person to whom or for whose benefit compensation is payable.

In *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon* (*or Waddell*) (1), it was decided by the House of Lords that the option given to the workman's dependants by sect. 29 (1) is not one that has to be exercised by them as a whole, but that each dependant who may have a claim both under the Workmen's Compensation Act and apart from that Act, is entitled to exercise his option independently of the other dependants. VISCOUNT DUNEDIN said at p. 189:

> What I think the section means to say, and what involves no absurdity, is that no individual is to get two payments, one at common law and the other under the Act.

A dependant cannot therefore recover compensation both under the

Employers' Liability Act and under the Workmen's Compensation Act. The question to be decided on these appeals is whether, where some of the workman's dependants, having rights under both the Employers' Liability Act and the Workmen's Compensation Act, elect to pursue their remedies under one Act while the rest of those dependants elect to pursue their remedies under the other, any dependant is entitled to recover from the employer under the Act invoked by him a larger sum in compensation than that he could have recovered had all the dependants elected to proceed under that Act. Supposing, for example, that a workman is killed by an accident arising in the course of and out of his employment, such accident being due to the negligence of a fellow workman. Suppose, further, that his only dependants are his father and his mother. If they both elect to pursue the remedy given them by the Employers' Liability Act, they can recover between them only the maximum sum specified in sect. 3 of that Act. If they both elect, on the other hand, to proceed under the Workmen's Compensation Act, 1925, they can recover between them only the lump sum calculated in accordance with sect. 8 of that Act. But the damages sustained by each of them in fact may be in excess of what he or she will recover by either of these means. In such circumstances, is it permissible for the father, say, to proceed under the Employers' Liability Act, and to recover the damages he himself has sustained, up to the maximum fixed by that Act, and for the mother to proceed under the Workmen's Compensation Act, and to recover the whole of the lump sum calculated in accordance with sect. 8 of such Act ? In such a case, is unity a source of weakness rather than one of strength ? This is the question involved on these appeals. In order to answer it, the relevant statutory provisions must be carefully examined.

In the present case, the death of the workman was caused by the negligence of his fellow servants in charge of an engine. The defence of common employment would therefore have defeated any proceedings taken by or for the benefit of his dependants under Lord Campbell's Act, or the Fatal Accidents Act, 1864. It is, however, provided by the Employers' Liability Act, 1880, s. 1, (among other things) that, in such a case, any person entitled in case of his death shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work. The workman's dependants are therefore given the same right of compensation and the same remedies against the employer as they would have had against him under Lord Campbell's Act, as amended in 1864, if he had been a stranger. In order, therefore, to see what that right of compensation is, and what those remedies are, it is necessary to look at Lord Campbell's Act as so amended. But the right and the remedies are given by the Employers' Liability Act alone, and any compensation recoverable from the employer will be compensation "recoverable under this Act" within sect. 3 of that Act.

[His Lordship referred to the Fatal Accidents Act, 1846, ss. 2, 3, 5, and
the Fatal Accidents Act, 1864, s. 1.] The result would seem to be as
follows. An action under the Employers' Liability Act can be brought
by one only of the persons mentioned in sect. 2 of Lord Campbell's Act.
But such action will necessarily be for the benefit of the others of such
persons, whether they wish the action to be brought or not. The statute
seems to be imperative upon this point. Particulars of those other A
persons must be furnished by the plaintiff, and, though no doubt in
practice he could safely omit the names of those who had suffered no
damage by reason of the death of the workman, the names of those who
had suffered any damage would necessarily have to be given. For only
the one action can be brought, and the defendant might desire to pay B
into court a lump sum to satisfy the claims of all such persons, as he is
entitled to do under the provisions of sect. 2 of the Act of 1864. Any
damages awarded or any lump sum paid into court by the defendant
must be apportioned by the jury or the judge, as the case may be, between
all the persons damaged proportionately to the injury sustained by such C
persons. Lord Campbell's Act in no way limits the amount of damages
that may be awarded, but, as I have already pointed out, the Employers'
Liability Act does. In cases, therefore, where the maximum sum permissible
under the Act is awarded, the sum must be apportioned between
the various persons damaged by the death proportionately to the extent D
to which they have been respectively damaged. But, though the action
is necessarily brought for the benefit of all the persons mentioned in
sect. 2 of Lord Campbell's Act who have been damaged by the death,
and although the jury or judge, as the case may be, must determine
the total amount of the damages sustained by those persons not exceeding E
the maximum sum recoverable, and apportion such sum among the
individuals, there is, of course, nothing in the statute to compel any
individual to receive the sum apportioned to him. He may, if he thinks
fit, allow such sum to be retained by, or go back to, the employer. If,
however, he does so, the sums payable to the other individuals will in F
no way be increased. They will get the sums apportioned to them,
and no more. The employer's liability to each of the dependants under
the Act arises upon the workman's death, even though the amount
cannot be accurately ascertained until later, and, though a dependant
may, subsequently to the death, release his right to compensation, he G
cannot, in my opinion, by any such act, increase the employer's liability
to any other dependant. If I am right so far, the position will be the
same whatever the motive of a dependant may be for giving up his
claim to compensation under the Act. Whether he gives it up out of
mere generosity or whether he gives it up because he elects to proceed H
against the employer under the Workmen's Compensation Act, can, in
my judgment, make no difference. The sums that would have been
payable to the other dependants cannot be increased by reason of his
election.

I must now turn to the last-mentioned Act. By sect. 2 of that Act, compensation payable under it is, where the death of the workman results from the injury, payable to or for his dependants. Sect. 4 provides that the dependants entitled to claim compensation under the Act are such of the members of the workman's family as were wholly or in
A part dependent upon the earnings of the workman at the time of his death. Sect. 8 enacts that the compensation under the Act, where death results from the injury and there are dependants, shall be a lump sum calculated in manner therein specified. The precise method of calculating it need not be here stated. It is sufficient to say that its
B amount in no way depends on the number of the dependants, and that it is not to exceed the sum of £300. In certain cases there is payable, in addition to the lump sum, certain allowances for dependent children who are under the age of 15 years, but the fact does not appear to be material for the moment. It is provided by the Workmen's Compensa-
C tion Rules, 1926, r. 4, that an application on behalf of the dependants of a deceased workman for the settlement of the amount payable as compensation to such dependants may be made either by the legal personal representatives of the workman or by the dependants themselves. The rule further provides that, if any dependants neglect or
D refuse to join in an application, the application may be made by or on behalf of some only of such dependants, but that, in that case, the other dependants are to be named as respondents. By sect. 21 (2) of the Act, it is enacted that any question as to who is a dependant shall, in default of agreement, be settled by arbitration or by the county court in accord-
E ance with the provisions of the Act, and that the amount payable to each dependant shall be settled in like manner.

It would seem, therefore, that, just as under the Employers' Liability Act, the total compensation payable to the dependants and the proportion payable to each dependant individually will be settled in one and
F the same proceeding. A dependant may, of course, waive his right to take the sum allotted to him, but, should he do so, his waiver will not operate so as to increase the sum payable to the other dependants, except in so far as his waiver can be regarded as equivalent to an assignment of his right in favour of those other dependants. An example of a waiver
G of this kind is to be found in *Codling* v. *Mowlem (J.) & Co., Ltd.* (2). The widow in that case waived her right in favour of her children, and on that ground was held by the Court of Appeal to have elected to proceed under the Workmen's Compensation Act and to have lost her right to proceed under Lord Campbell's Act. Where a dependant dies before a
H claim under the Act is made, or, if a claim has been made, before an agreement or award has been arrived at or made, the legal personal representatives of the dependant have no right to payment of compensation, and the amount of the compensation is to be calculated and apportioned as if that dependant had died before the workman: see the Workmen's Compensation Act, 1925, s. 2 (3). But, subject to this,

the rights of the dependants and the liability of the employer come into existence at the date of the workman's death, though the pecuniary measurement of them has to be made afterwards.

Upon the death of a workman, therefore, a dependant of his may acquire two rights—one under the Employers' Liability Act and the other under the Workmen's Compensation Act. Which of these two rights he will enforce is left to his choice. But, having chosen one, he is debarred from enforcing the other, and the compensation that he is debarred from recovering will cease to be payable by the employer. It does not, in my judgment, accrue to the other dependants. In the cases with which this appeal is concerned, the employer's liability to the widow and to the children under each Act should be ascertained. The widows, having elected to proceed under the Employers' Liability Act, should recover the amounts allotted to them under that Act, and no more. The children, having elected to proceed under the Workmen's Compensation Act, should recover, or have provided for them, as the case may be, the amount allotted to them respectively under that Act, and no more. The eight appeals should therefore, in my opinion, be allowed, and the cases remitted to the county court judge to make awards upon the footing that I have indicated.

I have not so far referred to *Gill* v. *Fortescue* (*N.*) *& Sons, Ltd.* (1), upon which the respondents to this appeal very naturally relied. In that case, however, no proceedings under Lord Campbell's Act had been taken by the widow. It was merely " understood " that she intended to do so in the future. But she had been made a respondent to the application by the children under the Workmen's Compensation Act, and, according to the report, had " renounced her interest under the arbitration." Whether or not she had renounced it in favour of her children, as in *Codling's* case (2), does not appear. But, in any case, the court was not called upon to consider what would be the effect on the widow's rights under Lord Campbell's Act of the receipt by the children of the whole compensation payable under the Workmen's Compensation Act. The case, moreover, received some adverse criticism in the House of Lords in *Waddell's* case (3), to which I have already referred. LORD DUNEDIN in terms refrained from expressing any opinion as to whether it had been rightly decided ; LORD WARRINGTON said it might be doubtful whether the actual result of the case was right, as to which he reserved his opinion. LORD THANKERTON said that he desired to reserve his opinion as to the soundness of the decision. But the case has not been overruled, and, in a case where the facts were the same, I should, for myself, feel bound to follow it. As, however, the present case differs in the material respect that the widows have in fact proceeded under the Employers' Liability Act, and are entitled to have damages awarded to them under that Act, we are not precluded from expressing our own view as to the true effect of the Workmen's Compensation Act, 1925, s. 29.

LUXMOORE, J.: The question to be considered in these appeals may be shortly stated in these terms. In cases where some or one of the dependants of a workman killed in an accident caused by the negligence of a fellow workman elect to proceed under the Employers' Liability Act and the other or others of them elect to proceed under the Workmen's Compensation Act, can any of those proceeding under either Act recover a larger sum under the Act chosen than they, he, or she would have been able to recover if all the dependants had proceeded under the same Act? The county court judge has in substance answered this question in the affirmative. The railway company contends that the answer should be in the negative. In order to determine which is the correct contention, it is necessary to consider the relevant provisions of the two Acts, and, in doing so, to bear in mind that, before the Employers' Liability Act was passed, in 1880, it was impossible for the dependants of a workman killed or fatally injured in an accident caused by the negligence of a fellow workman to recover compensation for the injury suffered by them, because the defence of common employment afforded a complete answer to any claim under the Fatal Accidents Act, 1846 (commonly called Lord Campbell's Act), and the Fatal Accidents Act, 1864, which amended Lord Campbell's Act. One of the objects of the Employers' Liability Act, 1880, was to remove this disability. By sect. 1 of that Act it is provided that any person entitled, in case of the death of a workman caused by the negligence of a fellow workman, shall have the:

> same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

The right and remedies so conferred are those which the dependants would have had under Lord Campbell's Act and the amending Act if the deceased workman, on whom they were dependent, had been a stranger to the employer. By the Employers' Liability Act, 1880, s. 3, a limit is placed upon "the amount of compensation recoverable under this Act," that is, the Employers' Liability Act, 1880.

It is to be observed that, although it is necessary to refer to Lord Campbell's Act as amended in order to ascertain what are the rights and remedies given by the Employers' Liability Act, those rights and remedies are conferred by the Employers' Liability Act, and that any compensation recovered from the employer by the exercise of those rights and remedies is properly recovered under the Employers' Liability Act, and not under Lord Campbell's Act or the amending Act. The full title of Lord Campbell's Act is "An Act for compensating the families of persons killed by accidents." Its object was to render liable in damages a person who, by his wrongful act, neglect, or default, had caused the death of another. The position under Lord Campbell's Act as amended is that the action must be brought either by the legal personal representative of the deceased or by one of the class of persons named in sect. 1 of Lord Campbell's Act. It is not a representative action in the strict sense of the term. Only one action can be brought, and whatever amount is recovered is to be for the benefit of all the members of the class of persons named in the Act. The amount recovered is to be divided by the jury between the members of the class, having regard to the injury suffered by each. In view of the provisions that only one action can be brought, and that the action is to be for the benefit of the whole class, I do not think the words in sect. 2 of Lord Campbell's Act, "for whom and for whose benefit such action shall be brought," can properly be construed as referring only to those members of the class who may be mentioned in the particulars required to be delivered by the plaintiffs in such an action. It is obviously the duty of the plaintiff to give particulars of all the members of the class, but failure to give particulars of all such persons does not enable a second action to be brought by those whose names are omitted, nor can non-compliance with the requirement limit the effect of the mandatory words: "every such action shall be for the benefit" of the whole class or such of its members as may be named in the particulars. In my judgment, the words "for whom and for whose benefit the action shall be brought" must be construed as referring to the whole class of persons named in sect. 1 of the Act. I am unable to find anything in the amending Act to alter or displace the construction of the earlier Act; indeed, the provisions in sect. 2 of the latter Act appear to me to afford strong confirmation that the construction which I have placed on it is correct. "All persons entitled under the Act" must, I think, refer to the whole class of persons mentioned in the opening sentence in sect. 2 of the earlier Act.

It is to be observed that there is no limit fixed with regard to the amount of compensation recoverable under Lord Campbell's Act as amended, and that, by sect. 3 of the Employers' Liability Act, a limit is placed on the amount of compensation recoverable. It seems clear that, whatever the total amount recovered under the Employers' Liability Act may be, whether it is equal to or is less than the maximum, it is the duty of the court or the jury, as the case may be, to apportion that total amount between the class of persons damaged by the death in proportion to the injury each of the individual members of the class has suffered. But, when this has been done, there is nothing in the statute which makes it obligatory on any individual to receive the share apportioned to him or her, nor is there any provision which gives a share which an individual is, for any reason, unwilling to receive to the other members of the class, or any of them. In my judgment, the liability of the employer to the dependants is fixed by the Act, and arises immediately on the death of the workman, although it must necessarily be ascertained at a later date. It seems to me plain that the liability of the employer to any particular dependant cannot be increased or diminished by reason of the exercise by a dependant of his or her volition, and that it makes no difference what the motive of a dependant may be in refusing to accept his or her share, or in electing to pursue his or her rights under the Workmen's Compensation Act. If, however, an individual dependant assigns his or her share for the benefit of the other dependants, the position is different, for he or she must, by reason of the assignment, be held to have accepted the share, for it is only on this basis that an assignment can be made.

The provisions of the Workmen's Compensation Act, 1925, appear to me to lead to a conclusion similar to that at which I have arrived with regard to the Employers' Liability Act, namely, that the total compensation payable to the dependants, and the proportion payable to each individual dependant, must be ascertained under the Workmen's Compensation Act in one proceeding. A dependant may refuse to accept the proportion of the compensation awarded to him or her under the Workmen's Compensation Act in precisely the same way as he or she may do under the Employers' Liability Act, but such refusal cannot increase the proportions to be awarded to other dependants under the Workmen's Compensation Act. Again, the position seems to me to be the same if, instead of refusing to receive his or her share under the Workmen's Compensation Act, a dependant assigns that share to the remaining dependants. In such a case, the dependant making the assignment must, of necessity, accept the share, and, by so doing, elect to accept his or her compensation under the last-named Act. I think this conclusion is the basis of the decision in *Codling's* case (2). That the option given by the Workmen's Compensation Act is exercisable by the individual members of the class of dependants entitled to be compensated under either Act has been finally decided by the House of Lord in *Kinneil Cannel & Coking Coal Co., Ltd.* v. *Sneddon* (*or Waddell*) (3). As Lord Dunedin pointed out in his speech, no real difficulty is caused by such a conclusion. The compensation to be paid by the employer under the Employers' Liability Act is a lump sum. Under the Workmen's Compensation Act, it is an aggregate of what is called in that Act a lump sum plus a children's allowance, if there are children. The claim to participate in this lump or aggregate sum is an individual claim. Sect. 29 of the Workmen's Compensation Act provides that no individual is to get payment both under the Employers' Liability Act and under the Workmen's Compensation Act. It would seem to be the logical conclusion of this decision that, if some of the dependants institute proceedings under the Employers' Liability Act, it is the duty of the tribunal invoked to assess the damage to the whole class of dependants in one lump sum, and to apportion it between all the members of that class. In the same way, if others of the dependants institute proceedings under the Workmen's Compensation Act, it is equally the duty of the tribunal invoked to ascertain the aggregate sum available for all the dependants and apportion it between them. No person in whose favour an apportionment is made under both Acts can claim both apportionments. If he or she has elected to proceed under one of the Acts, he or she can recover only what is apportioned to him or her under that Act. The introduction, by the Workmen's Compensation Act, of an alternative remedy to that afforded by the Employers' Liability Act cannot affect the construction of either Act so as to increase the amount available for distribution among those electing to take compensation under one or other of the two Acts.

Our attention was called to the decision of the Court of Appeal in *Gill* v. *Fortescue (N.) & Sons, Ltd.* (1), and reliance was placed on it by the respondents. For the reasons given by Romer, L.J., in his judgment, which I have had the opportunity of reading, I respectfully agree that this decision does not preclude us from expressing our own view as to the construction and effect of Acts under consideration.

It follows from what I have said that the liability of the railway company to the widow and dependants of each of the deceased workmen should be ascertained under the Employers' Liability Act, and also under the Workmen's Compensation Act. Each widow, having elected to pursue her remedy under the Employers' Liability Act, will be entitled to the amount allotted to her under that Act in respect of the injury she has suffered, and each of the other dependants, having elected to claim under the Workmen's Compensation Act, will be entitled to the respective amounts allotted to them under that Act in respect of the injury suffered by him or her. In the result, I also am of opinion that all the appeals should be allowed, and that each of the cases under appeal should be remitted to the county court, so that awards may be made on the basis laid down in the judgments of this court.

Appeals allowed.

Solicitors: *I. Buchanan Pritchard* (for the appellant company); *Pattinson & Brewer* (for the respondents).

[*Reported by* Derek H. Kitchin, Esq., *Barrister-at-Law.*]

BROWN *v.* ADAMSON (INSPECTOR OF TAXES).

[King's Bench Division (Lawrence, J.), **April 15, 1937.**]

Income Tax—Assessment—Allowance—Non-resident housekeeper—Finance Act, 1924 (c. 21), *s.* 22.

A widower, who had no female relative of his own, or of his deceased wife, able and willing to keep his house, had employed a female person for that purpose. This female person was a married woman, who did not reside with the widower, but with her husband. She attended daily at the widower's house for the purpose of housekeeping, had entire responsibility for all domestic duties and received £60 per annum with full pay and subsistence allowance for 28 days' holiday each year. The widower claimed an allowance from the gross amount of an assessment made upon him of £50 under the Finance Act, 1924, s. 22, in respect of the services of a housekeeper:—

Held: as the housekeeper was not resident with the widower, the allowance claimed was not permissible.

[**EDITORIAL NOTE.** In this case the provision for allowance in respect of a housekeeper is considered in so far as it requires the housekeeper to be "resident." This word has often been construed with reference to income tax, and it is not surprising that its meaning should be challenged. In the present instance, however, it has to receive its literal meaning and it is not enough that the housekeeper attends upon the premises for all the purposes of a resident housekeeper, but she must in fact reside there.

As to Allowance for Housekeeper, see HALSBURY, Hailsham Edn., Vol. 17, p. 303, para. 602; and for Cases, see DIGEST, Supp., Income Tax, Nos. 540g, 540h.]

Appeal by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax Acts for the division of Woolwich in the county of Kent, dismissing an appeal against an assessment to income tax in the sum of £474 10*s.* for the year ending Apr. 5, 1936, made upon the appellant under the Income Tax Act, 1918, Sched. E.

The appellant was a widower who had no female relative of his own, or of his deceased wife, able and willing to keep his house and he had employed a female person for that purpose. This female person was a married woman, who did not reside with the appellant, but with her husband. She attended daily at the home of the appellant, for the purpose of housekeeping, had been so engaged for over 6 years, had entire responsibility for all domestic duties, and received approximately £60 per annum with full pay and subsistence allowance for 28 days' holiday each year. The husband was not liable to income tax. The appellant claimed an allowance from the gross amount of the assessment made upon him of £50, under the Finance Act, 1924, s. 22, in respect of the services of a housekeeper.

Cyril L. King, K.C., for the appellant.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *Reginald P. Hills* for the respondent.

Lawrence, J.: Everything that ingenuity could present by way of argument in this case has been presented by Mr. King, but, in my opinion, the decision of the Commissioners is perfectly right. The question is whether, under the Finance Act, 1924, s. 22, the appellant, who is a widower, and who employs a female who is not a relative as a housekeeper, is entitled to the relief provided by that section, which provides that:

> (1) Sect. 19 of the Finance Act, 1920 (which makes provision for a deduction in respect of relatives taking charge of widowers' or widows' children), shall be extended so as to apply to a person resident with a widower or widow in the capacity of housekeeper as it applies to a person resident with a widower or widow for the purpose of having the charge and care of children, and accordingly for sect. 19 (1) from the beginning thereof down to the proviso there shall be substituted the following:—
> "If the claimant proves that he is a widower and that for the year of assessment a person, being a female relative of his or of his deceased wife, is resident with him for the purpose of having the charge and care of any child of his or in the capacity of a housekeeper, or that he has no female relative of his own or of his deceased wife who is able and willing to take such charge or act in such capacity and that he has employed some other female person for the purpose he shall, subject as hereinafter provided, be entitled to a deduction of £45 in respect of that female relative or female person."

Now, in the court below it was argued on behalf of the appellant that it was not necessary within the meaning of that section that the female person employed by the appellant should reside with him, because it was said that all that the section demanded was that the appellant should employ a female person for the purpose of acting as his housekeeper. That contention has been abandoned by Mr. King before me, A
and the argument that he presents is that, although the section does necessitate that the female person who is employed in the capacity of a housekeeper must be resident with the appellant, "resident" in that section means only "present at the appellant's house to a sufficient extent to carry out her duties as housekeeper." He relies upon the B
terms of proviso (*b*) of the Finance Act, 1920, s. 19, which says:

> No deduction shall be allowed under this section where the female relative is a married woman living with her husband, and the husband has claimed and been allowed a deduction of £225 under the preceding provisions of this part of this Act.

His argument, as I understand it, upon that is that that proviso contem- C
plates that a married woman living with her husband may be a female person employed under sect. 22, and that it therefore does not appear to contemplate that such a person should reside with the widower in the sense of sleeping at his house. But, as Mr. King admitted, a married woman living with her husband need not always sleep at his house, and, D
as the Solicitor-General has pointed out, the proviso may be dealing with—and I think in all probability is dealing with—a case where a widower lives under the same roof with a married couple, and provides that, in such circumstances as that, the widower is not entitled to the relief provided for by sect. 22, where, that is to say, the married woman E
is living with her husband, and the husband has claimed and been allowed a deduction in respect of the fact that his wife has been living with him. In my opinion, the word "resident" in its ordinary significance means "sleeping at." The argument put forward for the appellant seems to me to treat the word "resident" as equivalent to "employed by." F
Mr. King's argument is in substance that, if the female person is employed by the widower in the capacity of a housekeeper, and fulfils that capacity, she is therefore resident with him. I am unable to give that meaning to the word "resident," and I think there are very good reasons for the provision that the female person must be resident with the widower G
in order to earn the relief.

I therefore dismiss the appeal, and the costs will be taxed. I make no further order as to costs.

Appeal dismissed.

Solicitors: *Hughes, Narborough & Thomas* (for the appellant); H
Solicitor of Inland Revenue (for the respondent.)

[*Reported by* LESLIE CARNEGIE, ESQ., *Barrister-at-Law.*]

ORMOND *v.* C. D. HOLMES & CO., LTD.

[COURT OF APPEAL (Slesser and Romer, L.JJ., and Luxmoore, J.), **April 14, 15, May 11, 1937.]**

Workmen's Compensation—Accident—Disease of gradual onset—No specific event to which injury referable.

A blacksmith's striker who had followed this at times strenuous occupation for years on Sept. 27, 1935, had a stroke at home. He returned to work on Oct. 9. On Dec. 20 he gradually became ill at work and collapsed at 10 a.m. The county court judge found on the medical evidence that the work the man was actually engaged on neither caused, nor contributed to, nor accelerated the second stroke and that he could not associate the second stroke with the work the man was engaged upon on Dec. 20 nor with any particular work done before then :—

HELD : the workman's incapacity was due to disease no doubt aggravated by his work, but as it was impossible to point to any specific event that was responsible for his change in condition, there was no accident within the Workmen's Compensation Act, 1925, s. 1 (1).

[EDITORIAL NOTE. In order to be an accident for the purposes of workmen's compensation it is necessary to decide whether the injury would have happened whatever the workman was doing or whether the employment contributed to it. In the present case the disease was such that a second stroke was almost bound to occur in any event and, if the employment had anything to do with it, it was merely to accelerate it. It has also to be noticed that there was no particular exertion or over exertion in the employment which was the immediate cause of the injury.

AS TO ACCIDENT, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 162, 163, para. 342 ; and FOR CASES, see DIGEST, Vol. 34, pp. 273, 274, Nos. 2311-2324. See also WILLIS'S WORKMEN'S COMPENSATON, 30th Edn., pp. 17, 18, 106-122.]

Cases referred to :

(1) *Fenton* v. *Thorley & Co., Ltd.*, [1903] A.C. 443 ; 34 Digest 266, *2264* ; 72 L.J.K.B. 787 ; 89 L.T. 314 ; 5 W.C.C. 1.

(2) *Brintons, Ltd.* v. *Turvey*, [1905] A.C. 230 ; 34 Digest 464, *3799* ; 74 L.J.K.B. 474 ; 92 L.T. 578 ; 7 W.C.C.1.

(3) *Steel* v. *Cammell, Laird & Co., Ltd.*, [1905] 2 K.B. 232 ; 34 Digest 271, *2302* ; 74 L.J.K.B. 610 ; 93 L.T. 357 ; 7 W.C.C. 9.

(4) *Walker* v. *Hockney Brothers* (1909), 2 B.W.C.C. 20 ; 34 Digest 273, *2311*.

(5) *Coe* v. *Fife Coal Co., Ltd.*, [1909] S.C. 393 ; 34 Digest 273, *2314 i* ; 2 B.W.C.C.8.

(6) *Black* v. *New Zealand Shipping Co., Ltd.* (1913), 6 B.W.C.C. 720 ; 34 Digest 273, *2314*.

(7) *Evans* v. *Dodd* (1912), 5 B.W.C.C. 305 ; 34 Digest 273, *2313*.

(8) *Partridge Jones & John Paton, Ltd.* v. *James*, [1933] A.C. 501 ; Digest Supp. ; 102 L.J.K.B. 760 ; 148 L.T. 553 ; 26 B.W.C.C. 277.

(9) *Clover, Clayton & Co., Ltd.* v. *Hughes*, [1910] A.C. 242 ; 34 Digest 273, *2316* ; 79 L.J.K.B. 470 ; 102 L.T. 340 ; 3 B.W.C.C. 275.

(10) *Whittle* v. *Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1936] 2 All E.R. 1221 ; Digest Supp. ; 29 B.W.C.C. 179.

(11) *Miller* v. *Carntyne Steel Castings Co., Ltd.*, [1935] S.C. 20 ; Digest Supp. ; 27 B.W.C.C. Supp. 101.

(12) *Innes (or Grant)* v. *Kynoch*, [1919] A.C. 765 ; 34 Digest 272, *2308* ; 88 L.J.P.C. 85 ; 121 L.T. 39 ; 12 B.W.C.C. 78.

(13) *Barnabas* v. *Bersham Colliery Co.* (1910), 103 L.T. 513 ; 34 Digest 325, *2656* ; 4 B.W.C.C. 119.

Appeal by a workman from a decision of His Honour Judge Sir Reginald Banks, K.C., given on Dec. 10, 1936. The facts are set out in the judgment of Slesser, L.J.

C. Paley Scott, K.C., and *W. Matabele Davies* for the appellant.

F. A. Sellers, K.C., and *J. Alun Pugh* for the respondent company.

Slesser, L.J. : The facts of this case are as follows : The workman, Joseph Ormond, was, on the date of the alleged accident, a blacksmith's striker, his occupation being to take iron stays out of a furnace, lift them with tongs, and hold them under a pneumatic hammer. It was also necessary for him at times himself to straighten the stays by manual labour. The work was described by Mr. Grady, a blacksmith, who had worked with Ormond for four years, as not hard until they began to straighten the stays. Elsewhere he describes the work, at any rate in part, as medium heavy work ; Henry Bell, a striker for 20 years, calls it heavy work, and the county court judge speaks of Ormond's labour generally as, at any rate in part, strenuous exertion. Until Sept. 27, 1935, Ormond appears to have been well. He had been a heavyweight champion of the 10th Army Corps, and had worked as a blacksmith's striker for years. On Sept. 27, 1935, in the early morning, he had a stroke, at home. His doctor, Dr. Haslett, went to him, and found that he had paralysis of the right arm and a slight affection of speech. His blood pressure was very high. He saw the appellant several times, but the doctor told him to stay in bed and rub his arm. On Oct. 9, Ormond wished to return to work. Dr. Haslett advised him not to go. In his own words, he felt that, so soon after the stroke, with that high blood pressure, there was danger of another stroke, but Ormond said he felt all right and he wanted to go, and he did in fact return to work on Oct. 9. He then continued his labours until Dec. 20, when he started work on that day at 7 a.m. At 7.30 a.m. he was engaged in straightening stays under a hammer, though at 7 a.m. the county court judge finds as a fact that he was seen to be looking ill. He was dragging his right foot, and his mouth was turned up on the right side. He also felt his right arm gradually losing power during the morning, and between 10 a.m. and 10.30 a.m. he collapsed, and had to be taken home. This, says the judge, was a second and severe attack of hemiplegia, caused (as he finds on the medical evidence) by thrombosis or clotting. Dr. Haslett was again called in between 12 a.m. and 1 p.m., and found extensive paralysis of the right side and marked affection of speech. He kept Ormond in bed until Christmas, when he was sent to hospital, where he stayed for 3 weeks. After that, the doctor saw him regularly once a week, describing his condition as fluctuating a little, but improved. On Jan. 22, 1936, he came out again. In Sept., 1936, he was under another doctor, Dr. Todd, as he said that he was going a bit funny, but he has not done any further work since. The judge has found, on the medical evidence which was before him, that the work upon which

Ormond was actually engaged on Dec. 20 neither caused, nor contributed to, nor accelerated the second stroke. He finds that the thrombosis was coming on that morning, and would inevitably have resulted in hemiplegia even if the workman had not done any work at all on that day. On the other hand, he finds that all the work that he had been doing since Oct. 9 up to the time he began to work on Dec. 20, and indeed all muscular effort and exertion up to that time, accelerated the second stroke. He adds:

> It would almost certainly have occurred sooner or later, but not so soon had he taken his doctor's advice and remained resting at home after the first stroke. But I cannot associate the second attack at all with the work on which he had been, and was, engaged on the morning of Dec. 20; nor can I associate it with any particular work done on any particular day before then. To put it another way, I have to look upon the case as though the second attack had occurred in his own home and the work done on Dec. 20 becomes irrelevant. If, in fact, the second attack had occurred at home, I could only regard it as the final stage of a long-standing disease accelerated by the general "wear and tear" of previous work and all other strenuous exertion up to, but not including, any work done on that morning.

On these findings, the judge has held that the appellant has failed to prove an accident within sect. 1 (1) of the 1925 Act. From this finding the workman appeals. I should add that Mr. Paley Scott, for the workman, founds his case upon an accident dated Dec. 20, 1935, and does not rely upon the accident of Sept. 27, 1935, although that is described as an accident in the particulars for arbitration. In my opinion, having given full attention to the many authorities which have been cited in this case, I have come to the conclusion that the judge was right in holding that the workman fails, by reason of his inability to prove an accident within the meaning of the Act.

In the well known case of *Fenton* v. *Thorley & Co., Ltd.* (1), the House of Lords held, reversing the Court of Appeal, that it was wrong to say that such injuries as rupture and internal strain sustained by workmen whilst doing their ordinary work in the ordinary way were not caused by accident within the meaning of the Act unless they were brought about by some fortuitous element such as a slip or fall. In *Fenton* v. *Thorley & Co., Ltd.* (1), a workman, in moving a wheel which had stuck, suddenly felt what he described as a tear in his inside, and it was found that he was ruptured. There was no evidence of any slip or wrench or sudden jerk, and LORD MACNAGHTEN points out, at p. 446, that:

> If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident.

LORD SHAND, agreeing, says, at p. 451:

> In holding that the word "accident" in the statute is to be taken in its popular and ordinary sense, I think it denotes or includes any unexpected personal injury resulting to the workman in the course of his employment from any unlooked for mishap or occurrence.

In *Brintons, Ltd.* v. *Turvey* (2), a workman was employed sorting wool in a factory, and a bacillus, according to the medical evidence, passed from the wool to the eye of the workman, and infected him with anthrax, of which he died. This was held by the majority of their Lordships to be a case of "injury by accident." The EARL OF HALSBURY, L.C., at p. 233, pointed out that an accident:

> in popular phraseology from which we are to seek our guidance, it excludes, and was intended to exclude, idiopathic disease; but when some infection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase "accident causing injury," because the injury inflicted by accident sets up a condition of things which medical men describe as disease. Suppose in this case a tack or some poisoned substance had cut the skin and set up tetanus. Tetanus is a disease; but would anybody contend that there was not an accident causing damage? A

In the present case, on the finding of the county court judge that paralysis would inevitably have resulted if Ormond had not done any work at all on Dec. 20, and that the work on which he was actually engaged on that day had neither caused, nor contributed to, nor accelerated, the second stroke, it becomes important to ascertain what was the event, if any, on that day, which could in any way be said to be comparable to the rupture in *Fenton* v. *Thorley & Co., Ltd.* (1), or the entry of the bacillus into the eye referred to in *Brintons, Ltd.* v. *Turvey* (2). As it appears to me, on the morning of Dec. 20, Ormond was suffering from the idiopathic weakness of high blood pressure, caused by arterio-sclerosis and degeneration of the blood vessels. On this matter there is really no dispute between the doctors. The case, therefore, falls within the principle laid down in *Steel* v. *Cammell, Laird & Co., Ltd.* (3), where a man whose employment necessitated the handling of white lead gradually accumulated lead in his system, with the result that he suffered from lead poisoning, which produced partial paralysis, and incapacity for work, as here it is found that the work that he had been doing from Oct. 9 until Dec. 20, and, indeed, all muscular effort and exertion up to that time, had accelerated the second stroke. The county court judge in that case, misinterpreting the authorities, had held that there was an accident, but SIR R. HENN COLLINS, M.R., points out that the resulting incapacity must have come about through long exposure to contact with the lead, and gradually, and not suddenly. He continues, at p. 236: B C D E F

> It is not possible to indicate any precise time at which the mischief arose.

He fortifies his view that there was no evidence of accident by indicating that the Act seems to indicate, in the provisions as to notice, that the date on which the injury by accident came about can be fixed, and COZENS-HARDY, L.J., contrasting the case of *Brintons, Ltd.* v. *Turvey* (2), to which I have referred, says, at p. 238: G

> There the impact of the bacillus upon the particular spot where the disease developed was proved as a fact. The source of the bacillus was known, the place at which it struck the subject was known, and the accident was known. That seems to me to have no relation to a case like the present. H

Of later authorities, all of which I think lead to the same conclusion that the workman must prove, to succeed, an accident, though not necessarily punctuated, yet identifiable in time and circumstance, I would cite in this court *Walker* v. *Hockney* (4), where it was held that a paralysis of the leg caused through the continual riding of a heavy tricycle in the employment could not be said to be an injury by accident, *Coe* v. *Fife Coal Co., Ltd.* (5), where a man suffered cardiac breakdown due to the fact that the work on which he was engaged for some days was too heavy for him, a case in which Lord Kinnear observes, at p. 13, that :

> the word " accident " seems to me to exclude the anticipated and necessary consequence of continuous labour—

Black v. *New Zealand Shipping Co., Ltd.* (6), another case where death was held to be due to the continuous strain of work, and *Evans* v. *Dodd* (7), where a man was affected with eczema caused by gradual exposure to fumes from chemicals. In this last case, Sir H. H. Cozens-Hardy, M.R., said, at p. 307 :

> It has been held again and again that sect. 1 has no application to cases where the applicant is unable to specify the time and place when the so-called accident occurred.

In the present case, it is not possible for the workman to rely upon a time and place on Dec. 20, for on that day, on the express finding of the judge, before the man had done any work at all, all the elements which caused the injury were present, and it cannot even be said on the judge's finding that the work he did on that day accelerated the stroke which occurred—the direct contrary is found. Divorced from this date, Dec. 20, the case becomes starkly one of disease, or tendency to disease, or weakness, accelerated by continuous exertion at work. On this, the only possible view on the judge's findings, the authorities are conclusive against the workman. Indeed, as Romer, L.J., pointed out, in the course of the argument, the very need of sect. 43 of the 1925 Act, following a similar provision in the Act of 1906, which constitutes industrial disease, when certifiable, a notional accident, was produced by this fact. But, in courtesy to Mr. Paley Scott, I must deal shortly with the authorities, and primarily with the case of *Partridge Jones & John Paton, Ltd.* v. *James* (8), which he says has modified the older law on this subject. To my mind, *Partridge Jones & John Paton, Ltd.* v. *James* (8) is of no assistance in, and has no bearing upon, the present case, for there the difficulty of finding a specific accident was overcome by a finding of the county court judge that the operation on which the workman was engaged, that of cleaning out dross, was laborious, and that in fact he died in about ten minutes from the time when he finished work. Lord Buckmaster thought that the case was indistinguishable from that of *Clover, Clayton & Co., Ltd.* v. *Hughes* (9), where there was a specific accident, in that a man, on the finding of the county court judge, was killed by a strain arising out of his ordinary work, which was such as to render the strain fatal. Lord Buckmaster, in *James's* case (8), says at p. 505 :

> There appears to me to be no possible ground of distinction between this case and

> that, excepting that in that case the work that the man was doing caused his arteries to rupture, and in this case produced the condition . . . which caused his heart to fail to function.

In both cases, it will be observed, the man was doing a specific work which accelerated his death. Here, on the finding of the county court judge, the work the man was doing on Dec. 20 must be excluded as a factor in his resulting injury. A As the judge cogently puts it, the thrombosis was coming on that morning of Dec. 20, and would inevitably have resulted, even if he had done no work at all on that day. If the facts in *James's* case (8) had been that there had been a finding that no work which the man had done on the day of his death had contributed in any B way to that death, but that it was the result solely of previous exertion and strain, I have no doubt that the decision would have been the other way. The cases following *Clover, Clayton & Co., Ltd.* v. *Hughes* (9), down to *Partridge Jones & John Paton, Ltd.* v. *James* (8), and the later decision of this court in *Whittle* v. *Ebbw Vale* (10), where again the county C court judge came to the view that certain work involved a good deal of stooping, in the case of a man with a very bad heart, and the county court judge came to the conclusion that the work on which the workman was engaged contributed to and accelerated his death, for the reasons I have stated are not *in pari materia* with the present case. A very D recent decision in *Miller* v. *Carntyne Steel Castings Co., Ltd.* (11), makes the distinction very clear. In that case, the findings of the arbitrator did not attribute the incapacity to a severe strain on any particular date. LORD AITCHISON, Lord Justice Clerk, says, at p. 107:

> I read the findings as meaning that the ordinary work done by the appellant throughout the whole duration [he being a myocardial subject] subjected him to a E severe strain. . . . In other words, the tear and wear of the appellant's ordinary work, which was that of heavy labouring, acting upon a diseased heart has resulted in the appellant being no longer fit for employment. . . . If it had been found in fact that the incapacity of the appellant had resulted from some particular strain, or from the strain of his work on a particular day, operating upon his diseased condition of heart, I think the arbitrator would have been forced on authority to the conclusion that the appellant had suffered an injury by accident. . . . F

LORD ANDERSON, speaking of all the cases founded on *Clover, Clayton & Co., Ltd.* v. *Hughes* (9), says, at p. 113:

> The findings disclose that a definite happening had taken place which satisfied the statutory language—injury by accident. . . . The logical result of the appellant's contention is that statutory compensation falls to be paid when a stage is reached in the working life of an employee at which he can no longer do his work. G To give effect to this argument would, in my opinion, be to read out of the Act the provision as to injury by accident.

Respectfully, I agree.

In my opinion, therefore, by reason of the fact that the workman has been unable to show that there was any accident within the meaning H of the Workmen's Compensation Act, the judge was right in dismissing his application and this appeal fails, and must be dismissed with costs.

ROMER, L.J.: The first question that has to be determined on this appeal is whether, on Dec. 20, the appellant met with an "accident" within the meaning of sect. 1 (1) of the Act. It is only if that question be answered in the affirmative that the further question will arise whether such accident arose in the course of and out of his employment. The meaning of the word "accident" as used in the Workmen's Compensation Acts has been considered in numerous authorities. The first, A though not the earliest of these, to which I wish to refer is that of *Fenton* v. *Thorley & Co., Ltd.* (1). In that case, a workman, by an act of over-exertion in the performance of the work he was employed to do, ruptured himself. It was held by the Court of Appeal, following an earlier decision of their own, that the injury that the workman sustained was not an B "injury by accident" within the meaning of the Workmen's Compensation Act, 1897, inasmuch as the injury was occasioned by his doing something deliberately and in the ordinary course of his work. There was, they said, an entire lack of the fortuitous element. This decision was reversed by the House of Lords. They held that there was no justifica- C tion for introducing into the Act the qualification that the accident must be "fortuitous," so far as that word meant anything different from the word "accidental." LORD MACNAGHTEN said at p. 448:

> I come, therefore, to the conclusion that the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap D or an untoward event which is not expected or designed.

A little earlier in his judgment he had said that the words "by accident" were introduced parenthetically, as it were, to qualify the word "injury," confining it to a certain class of injuries and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design.

E These observations of LORD MACNAGHTEN, in which LORD SHAND and LORD DAVEY concurred, are of the greatest importance in the present case. If a man be incapacitated solely by reason of the fact that he is suffering from a disease, the incapacity is not due to a personal injury by accident. It may be possible, in certain cases, to attribute the con- F traction of the disease to an accident, that is to say, to some unlooked-for mishap, or untoward event, and, when that can be done, and the disease results in an incapacity, it may rightly be said that the incapacity is one caused by that accident. But the disease itself is not an accident, in the popular and ordinary sense of that word. If a man should die G suddenly of heart disease, without any contributing cause, no one would say that his death was accidental or due to an accident. In some cases, however, incapacity is caused by a disease in conjunction with a contributory cause. A man, for instance, may be suffering from a disease of the heart that sooner or later is bound to cause his death. His death, H however, from the disease may be accelerated by some particular, though not necessarily an unusual, act of exertion. In those cases, the death or incapacity can properly be said to be caused by an accident, and, where the contributing cause is furnished by and in the course of the injured workman's employment, he is entitled to compensation under the Act. Numerous cases of this class are to be found in the books. I do not intend to refer to them, for, ever since, at any rate, the decision of the House of Lords in *Clover, Clayton & Co., Ltd.* v. *Hughes* (9), the principle recognised and applied in all of them is precisely the same. The cases become of importance only when a dispute arises as to the circumstances in which it is proper to draw an inference that there was a contributing cause. They give no assistance in deciding the present case, where there is an express finding by the arbitrator that the work in which the appellant was engaged on the date assigned to the accident, namely, Dec. 20, 1935, neither caused, nor contributed to, nor accelerated, the second stroke which is the injury complained of.

It was indeed contended by Mr. Paley Scott, on behalf of the appellant, that some of these authorities, notably the case of *Clover, Clayton & Co., Ltd.* v. *Hughes* (9), to which I have just referred, and another decision of the House of Lords in *Partridge Jones & John Paton, Ltd.* v. *James* (8), support his contention that an injury due solely to a disease, without any contributory cause, is, or may be, an injury from an accident. I can only say that no case to which my attention has been called gives the slightest support to that contention. On the contrary, the passage from the judgment of Lord Macnaghten in *Fenton* v. *Thorley & Co., Ltd.* (1) that I have read is a direct authority against it. So too are the three authorities to which I now propose to refer. In *Coe* v. *Fife Coal Co., Ltd.* (5), a workman had become totally incapacitated by reason of a cardiac breakdown. This was due to the fact that for some days he had been engaged in work that was too heavy for him. He had not been injured by any particular strain at any particular time. The breakdown of the heart was the result of overwork extending over a period of time. In other words, it was caused by illness without any contributing cause. The illness was, no doubt, the result of the man's employment, but it was not caused by a particular unlooked-for mishap, or untoward event. It was held by the Court of Session that the workman's incapacity was not due to a personal injury by accident within the meaning of the Act. The Lord President said at p. 11:

> Where so many have failed, I certainly am not going to try to define what "accident" is, but I can say without fear of being wrong that, negatively, "accident" connotes something different from disease.

Lord Kinnear, after quoting from the speeches of Lord Macnaghten, Lord Shand and Lord Lindley in *Fenton's* case (1), said this at p. 13:

> It seems to me that all these interpretations of the word point to some particular event or occurrence which may happen at an ascertainable time, and which is to be distinguished from the necessary and ordinary effect upon a man's constitution of the work in which he is engaged day by day. So defined, the word "accident" seems to me to exclude the anticipated and necessary consequence of continuous labour.

In *Walker* v. *Hockney Brothers* (4), a workman gradually acquired paralysis of his right leg through the strain of riding a heavy carrier-tricycle for his employers. At the end of five years, the condition incapacitated him from work. It was held that his incapacity was not due to personal injury by accident. It was due, said MOULTON, L.J., at p. 21, to a breakdown from overwork : " Waste overrunning repair is not an accident." In *Steel* v. *Cammell, Laird & Co., Ltd.* (3), a workman, by reason of the nature of his employment, gradually accumulated lead in his system, with the ultimate result that he suffered from lead poisoning and became A incapacitated for work. It was held that, to bring the case within the Act of 1897, there must be an injury by an accident of which notice can be given, and that, since it was not possible to indicate any particular events which caused the injury to the workman, he was not entitled to an award under the Act.

B There may usefully be contrasted with these cases that of *Brintons, Ltd.* v. *Turvey* (2). In that case, a workman died of anthrax, with which he had become infected in the course and as a result of his employment. But it was shown that the infection must have been caused by a bacillus entering the workman's eye on a particular occasion when he was engaged C in sorting wool for his employer. It was held that the man's death resulted from an injury within the meaning of the Workmen's Compensation Act, 1897. It is true that anthrax is a disease, and that the man's death was directly caused by the disease, and nothing else. But the disease was itself due to an accident, i.e., the entry of the anthrax D bacillus into the man's eye, and, consequently, his death could properly be said to have been caused by that accident. LORD ROBERTSON, in a dissenting judgment, said that, if, in that case, the contracting of anthrax were to be regarded as an accident, then, in every case in which a man died of an infectious disease, all that his dependants had to do was to E get the doctor to prove (which could not be disputed) that a bacillus did it, and the accident would be there. But in the case of infectious diseases it is impossible, as a rule, to assert that there was any particular occasion on which the bacillus got introduced into the system. If it can be proved that an infectious disease was contracted at a particular F time during the employment, even though the exact date cannot be specified, then, on the principle of *Brintons, Ltd.* v. *Turvey* (2), the contracting of the disease may be an accident within the meaning of the Workmen's Compensation Act : see *Innes* (*or Grant*) v. *Kynoch* (12). But that authority affords no assistance to the appellant in the present case, G for the man's state of health on Dec. 20 was not due to any particular event that had happened during his employment, or to anything that happened at any particular time or times. All that can be said is that his bad state of health on that day, which resulted in the stroke, was partly due to the work that he had been doing since Oct. 9. It is im- H possible to point to any particular event that can be called an accident. If the appellant could succeed in this case, it would follow that every workman becoming incapacitated through an industrial disease, nystagmus or silicosis, for instance, would be entitled to compensation under the Act of 1925, even if Part II of the Act had been omitted from it. The fact that the legislature found it necessary in that Act (and in the earlier legislation of 1906) to deal specifically with industrial diseases is indeed very good evidence that such diseases cannot be regarded in general as personal injuries by accident. It would not otherwise have been necessary to enact that, in certain circumstances, and in the case of certain industrial diseases only, a workman or his dependants should be entitled to compensation under the Act :

> as if the disease were a personal injury by accident arising out of and in the course of [his employment].

The difficulty in treating an industrial disease as an injury by accident in fact is manifest. It is the result, not of any particular untoward event, or unlooked-for mishap, but one gradually brought about in the course of time. It is not, therefore, accidental. The disease, moreover, may come on after the workman has left the employment that was the cause of the disease. The accident would not, in such a case, occur in the course of the employment. Nor, where the disease was the result of continued employment in one industry, but under different employers, would it be possible to say out of which particular employment the "accident" arose. These difficulties are, as is well known, dealt with by sect. 43 and the other sections forming Part II of the Act. I need not refer to those sections in detail. It is merely the fact that they were considered to be necessary which is important for the present purpose, because that fact strongly corroborates the view that, where the death or incapacity of a workman is occasioned by a disease without any contributing cause, such death or incapacity is not due to an injury by accident within the meaning of the Act, except in those rare cases where the disease itself can be shown to have been the result of some specific unlooked-for mishap or untoward event. In the present case, the appellant's incapacity, following on the stroke of Dec. 20, was occasioned by the arterio-sclerosis and high blood pressure from which he was suffering, and without any contributing cause. Though that condition was the result of his working for the respondent company between Oct. 9 and Dec. 20 in the sense that such condition was thereby aggravated, and the stroke was thereby accelerated, it is impossible to point to any specific event that was responsible for such change in his condition. The change was due (in the words of Moulton, L.J.), to "waste overrunning repair" during the whole period.

In my opinion, the appeal should be dismissed with costs.

Luxmoore, J. : Until 1906, no disease was recognised as a cause of injury unless it could be shown to have been occasioned by some accident or untoward event. In that year, provisions as to compensation were made applicable to certain industrial diseases, and these have been extended by sect. 43 of the 1925 Act. These industrial diseases do not include arterio-sclerosis. Arterio-sclerosis is a bodily condition which may affect any person apart from his employment. In the case of a workman suffering from a bodily condition which makes him susceptible to injury from even moderate exertion, the fact that he is suffering does not prevent the court from holding that the stroke or rupture of the blood vessel which ensues is an accident. The principles applicable to such a case are laid down by the House of Lords in the case of *Clover, Clayton & Co., Ltd.* v. *Hughes* (9). In that case, the workman was suffering from an aneurism, and he ruptured it in the process of tightening a nut with a spanner. This normal exertion could have had no ill effects for the workman but for his physical condition. It was held that the rupture was an injury accidently caused by the exertion expended in the tightening of the nut. Lord Loreburn, L.C., said, at p. 247, that the question to be considered in that class of case is:

> Whether in substance . . . the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it.

He added that the evidence should be looked at broadly, and free from over-nice conjectures, and that the test is: "Was it the disease that did it, or did the work he was doing help in any material degree?" It seems to me that the county court judge has, in the present case, in substance asked himself these questions, and has answered them in favour of the employers and against the workman, and that he was entitled so to do on the evidence before him. But it is argued that there has been some extension of the law since *Clover, Clayton & Co., Ltd.* v. *Hughes* (9) was decided. In support of this argument, reliance was placed by Mr. Paley Scott on the decision in the House of Lords in the case of *Partridge Jones & John Paton, Ltd.* v. *James* (8). In that case, Lord Buckmaster said that it was not necessary, in a case where it is proved that work contributed to the death, to point to a specific injury resulting from a specific act. But this statement must be read in the light of the rest of his speech and bearing in mind the particular facts of the case. It cannot be divorced from the context and read as an extension of the law as previously laid down. Lord Buckmaster pointed out in the plainest terms that the tests enunciated by Lord Loreburn in *Clover, Clayton & Co., Ltd.* v. *Hughes* (9) were correct, and he referred to a passage from the opinion of Lord Macnaghten in *Clover, Clayton & Co., Ltd.* v. *Hughes* (9). The passage is as follows:

> The real question, as it seems to me, is this: Did it (the death) arise out of his employment? On this point the evidence before the county court judge was undoubtedly conflicting. But he has held that it did, and I think there was sufficient evidence to support that finding. . . . "The death," the learned judge says, "was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal." The fact that the man's condition predisposed him to such an accident seems to me to be immaterial. The work was ordinary work but it was too heavy for him.

The work referred to in the last sentence plainly refers to what the man was doing at the time the rupture occurred. As I read the findings of fact in the *Partridge Jones* case (8), the county court judge held that the work the man was doing in the course of his employment on the day of his death contributed to the rupture of the aneurism from which he died.

In my judgment, the decision in the *Partridge Jones* case (8) falls within the decision in *Clover, Clayton's* case (9), and does not constitute any extension of it, for there was in fact a finding that the work done on the day the rupture of the blood vessels occurred was a contributory cause A to the death. In *Miller* v. *Carntyne Steel Castings Co., Ltd.* (11), Lord AITCHISON, Lord Justice Clerk, said, at p. 108:

> Can any distinction be properly drawn between a particular cause limited in point of time and a general cause extending throughout a period? If the question fell to be looked at from the point of view of whether the legislature ought to recognise B such a distinction I would answer the question in the negative. Logically it is difficult, if not impossible, to draw any distinction between the two cases. When a workman collapses under a particular strain it may be, and in many cases probably is, the climax of a general strain to which he has been subjected throughout many years of employment and without which no collapse would have occurred. Again, when a workman becomes incapacitated without any definable physiological injury or alteration of phase in the disease from which he suffers . . . there may none the less be a physiological injury although it may not be medically possible to isolate C and define it. These considerations suggest a doubt as to whether the distinction sought to be drawn can be maintained.

I respectfully agree with this criticism. LORD AITCHISON proceeded to point out that, in a case where the incapacity of the workman is due to the ordinary wear and tear of his employment over a period D of time, the question whether there is anything to satisfy the meaning of the word "accident" as used in the Act of Parliament is one of construction of the Act. He said:

> In every case in which the machine runs down, the work is a contributing cause of the incapacity, and that is equally so whether the workman has a diseased con- E dition of heart, as the appellant in this case, or whether the workman suffers from no disease but the body becomes, through age or other cause, unequal to the continuing strain. I think it would be extending the notion of injury by accident unduly to apply it to the case of an incapacity which results from the ordinary tear and wear of a man's work in the absence of some incident or event or happening in the course of the employment to which the term accident in its ordinary meaning can reasonably be applied. It will be found when the cases are examined that in each case in which accident has been affirmed there has been something of the F nature of an occurrence of some kind that could satisfy the meaning of accident.

In *Barnabas* v. *Bersham Colliery Co.* (13), decided in 1910, a miner who had a diseased condition of his arteries was found dead in his working hours at his place of work in a mine. It was held in the Court of Appeal and in the House of Lords that there was no evidence on which the G county court judge, who had held as a matter of inference that the miner had died from an accident arising out of his employment, could properly come to that conclusion. In the recent case of *Whittle* v. *Ebbw Vale Iron & Coal Co.* (1), MACKINNON, J., said that, in his opinion, it was impossible to reconcile the decision in the *Barnabas* case (13) with that H in the *Partridge Jones* case (8), to which I have already referred. With all respect to the judge, I am unable to appreciate that point of view. In the *Partridge Jones* case (8), there was, as I have already pointed out, evidence that the work on which the man was engaged immediately before his death was wrong for a man in his state of health, and could not be otherwise than detrimental to him. This evidence was held, in the circumstances of the particular case to be sufficient to justify the finding that the workman had suffered an injury by accident arising out of and in the course of his employment. I do not think it necessary to make any specific reference to any of the other cases to which we were referred during the course of the argument of the present case. It seems to me that those cases are only examples of the application of the tests laid down in *Clover, Clayton & Co., Ltd.* v. *Hughes* (9). After a careful consideration of the cases, I am unable to find that there has been any extension of the law as laid down in the *Clover, Clayton* case (9), and I am satisfied that the tests there propounded are still proper to be applied in cases like the present. As I read the decision of the county court judge, in the present case he applied those tests, and there is sufficient evidence to justify his finding that no accident was suffered by the appellant on Dec. 20, 1935. I therefore agree that this appeal must be dismissed, with costs.

Appeal dismissed with costs.

Solicitors: *Russell Jones & Co.*, agents for *Pearlman & Rosen*, Hull (for the appellant); *Carpenters*, agents for *F. G. & H. E. Smith*, Bradford (for the respondent company).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

HOLLAND *v.* GERMAN PROPERTY ADMINISTRATOR.

[COURT OF APPEAL (Lord Wright, M.R., Romer and Scott, L.JJ.), **February 25, 26, 1937.**]

Choses in Action—Assignment—Statutory order to pay—Notice—Treaty of Peace Order, 1919 (*S.R. & O.* 1919, *No.* 1517 (*as amended*)), art. 1 (xvii).

Subject to a life interest for B., trustees held part of a trust fund in trust for D. for life with remainder to her children. D., an Englishwoman married to an Englishman, at all material times lived with her family in Germany. B. died in 1917 and thereafter there was no communication between D. and her relatives in England, some of whom were the trustees, until 1927, when the trustees were informed that D. and her family had adopted German nationality during the War. D.'s income from the trust fund had been paid to D. regularly since the end of the War and continued to be paid until D. died in 1934. The fact of D.'s German nationality was then communicated to the Administrator of German Property, who claimed against the trustees the amount of the income received by D. from 1927, when the trustees first heard of D.'s change of nationality, to Aug. 31, 1929, when all German-owned property which had been under the control of the Administrator was released. Other claims had been made, but were abandoned during the hearing. The Administrator claimed that the Treaty of Peace Order, 1919 (as amended), art. 1 (xvii) (*ccc*) and (*e*), effected a statutory assignment to the Administrator of D.'s life interest, that after 1927 it became the duty of the trustees to pay the income thereafter accruing to the Administrator, and that in paying such income to D., the trustees committed a breach of trust and that they were accordingly accountable to the Administrator as the rightful beneficiary for the income thus wrongly paid to D. The trustees, in addition to denying that there was a statutory assignment, pleaded that they acted honestly and reasonably within the Trustee Act, 1925, s. 61, and ought fairly to be excused :—

Held : (i) the Treaty of Peace Order, 1919, as amended, did not effect a statutory assignment of D.'s life interest.

(ii) if there were such a statutory assignment, the trustees ought, in the circumstances of the case and notwithstanding that they ought to have known the illegality of paying income to a German national, fairly to be excused for their breach of trust.

Decision of Clauson, J. ([1936] 3 All E.R. 6) *affirmed.*

[**EDITORIAL NOTE.** An attempt is here made to create an equitable assignment out of the provisions of an order in council. Even if there was no real difficulty in showing an order to pay the suggested assignee, i.e., the Custodian of Enemy Property, it was clear that there was no evidence that he had ever given any notice to the persons who had to make the payment. The Court of Appeal have rejected the contention and affirmed the decision of Clauson, J., both on this point and upon the point that, if there had been a breach of trust, the trustees ought to be excused.

As to Essentials of Assignments, see HALSBURY, Hailsham Edn., Vol. 4, pp. 440-444, paras. 810, 811 ; and for Cases, see DIGEST, Vol. 8, pp. 466-468, Nos. 371-392.]

Cases referred to :

(1) *Austrian Property Administrator* v. *Russian Bank for Foreign Trade* (1932), 48 T.L.R. 37 ; Digest Supp.

(2) *Josef Inwald Act.* v. *Pfeiffer* (1928), 44 T.L.R. 352 ; Digest Supp.

(3) *German Property Administrator* v. *Knoop*, [1933] Ch. 439 ; Digest Supp.

(4) *Re Allsop, Whittaker* v. *Bamford*, [1914] 1 Ch. 1 ; 43 Digest 996, *4370* ; 83 L.J. Ch. 42 ; 109 L.T. 641.

(5) *Carter* v. *McLaren* (1871), L.R. 2 Sc. & Div. 120 ; 4 Digest 547, case *q*.

(6) *Perrins* v. *Bellamy*, [1899] 1 Ch. 797 ; 43 Digest 996, *4374* ; 68 L.J. Ch. 397 ; 80 L.T. 478.

Appeal from a judgment delivered by Clauson, J., on July 9, 1936, and reported in [1936] 3 All E.R. 6. The facts are fully set out in the judgment of Lord Wright, M.R.

The Solicitor-General (*Sir Terence O'Connor, K.C.*) and *J. H. Stamp* for the appellant.

Gavin T. Simonds, K.C., and *J. W. Scobell Armstrong* for the respondents.

Lord Wright, M.R. : This appeal raises two questions. The first depends upon the terms of the Treaty of Peace Orders, 1919, as subsequently amended, and the second is a question which arises in the alternative, and has reference to the exercise by the court of its discretion under the Trustee Act, 1925, s. 61.

The facts of the case are not really in dispute. The action was brought by three plaintiffs, as trustees of the will of John Blacker, deceased, against the Administrator of German Property. It claimed a declaration that the defendant had no right to claim certain moneys which he was claiming against the plaintiffs under the order, and, in the alternative, a declaration under the Trustee Act, 1925, s. 61, and an injunction. That action was brought because it was necessary, from the point of view of the trustees, to clear up the position which was arising by reason of the claims of the defendant, and also by reason of his refusal, until his claims were dealt with, to release certain funds, appertaining to the trust, which it is now agreed he had no right to retain. By way of defence, there were the usual denials, and there were certain admissions and allegations, and then a counterclaim. Under the counterclaim, the defendant claimed to be entitled to payment of sums amounting in all to £4,863 0*s.* 11*d.*, and also to three other sums of money. The claim was for a declaration that the plaintiffs were accountable for these sums, in the circumstances to which I shall refer in a moment. As the case proceeded, the defendant reduced his claim to £1,333 0*s.* 11*d.* There was a further small sum which is not now claimed in the case.

Before this court the claim against the three plaintiffs was abandoned for a reason which will appear in a moment. The plaintiffs were the trustees under the will of John Blacker deceased, a British national, who died in 1896. By his will, he directed that his widow should have a life interest in the income from his residuary estate, and that, subject to that, the estate should be held in trust for his four children. The widow, Mrs. Blacker, died in 1917, and thereupon the income became payable in equal fourths to the four children. One of those children was Mrs. Holland, the first-named plaintiff, and another was Mrs. Carmen Devaux, and it is the position of Mrs. Carmen Devaux which has to be considered in these proceedings. She and her husband were by birth British nationals, and her three children had all been born in England, but a number of years before the War they settled in Germany, and there remained, and, in or about the year 1915, they assumed German nationality, for various reasons which then appeared sufficient to them. During the War, and after 1917, the then trustees of the will were unable to send remittances to Mrs. Devaux. In 1919, the present trustees, the three plaintiffs, were appointed, and from Jan., 1920 (when the War came to an end, according to the Act and order relevant to that circumstance), until Apr. 19, 1934, the income of the trust fund was regularly paid by the trustees to Mrs. Devaux. In 1934, Mrs. Devaux died, and it was necessary to transfer the fund, or to transfer the appropriate portion of the fund, to her three children, in whom, under the will, it vested absolutely on the death of Mrs. Devaux. That led to an inquiry into the position of these three beneficiaries, and of their mother, and it then became apparent that for all purposes they were of German nationality. But Mrs. Holland, the plaintiff, and her son Kenneth George Holland, had been informed in 1927 of the change of nationality. However, they made no change in their procedure and continued to pay the income to Mrs. Devaux under the will. I shall have to consider the circumstances in which that was done when I come later to consider the second question in this case. There is one other date which is material, Sept. 1, 1929, the effective date for the operation of the agreement entered into on Dec. 28, 1929, between the British Government and the

German Government. The date is to be found in a supplemental exchange of notes, according to which it was agreed, as between those two governments, that there should be a release, and, where necessary, a re-transfer, to the original German owners or persons deriving title through them, of all property, rights, and interests originally belonging to those owners and covered by the Treaty of Peace Order; that is to say, in so far as such property, rights, and interests had not already been liquidated or finally disposed of. It was because of that latter circumstance that the Crown abandoned its claim to any more than the sum of £1,333 0*s.* 11*d.* Its claim is now limited to the payments of income made by the trustees to Mrs. Devaux between Apr., 1927, and Sept. 1, 1929. Payments before 1927 involve no question, nor do the payments after Sept. 1, 1929, because the Crown has acted upon the general release embodied in the agreement to which I have just referred. It is for the same reason that the Crown makes no claim to the corpus, which was the share of Mrs. Carmen Devaux or her children, which accrued due, as I have stated, on her death in 1934.

Now, the claim of the Crown is to these sums of money as being subject to the charge under the Treaty of Peace Order, 1919. It is a claim for a declaration that the plaintiffs were accountable to the defendant for these sums (I read it now as limited), and a claim for payment of those moneys by the two first-named plaintiffs to the defendant as Administrator of German Property under the terms of the Treaty of Peace Order. In order to see whether that claim is maintainable, it is necessary to refer, as I think I can do quite shortly, to the relevant provisions of the Treaty of Peace Order. I might observe, in passing, that the claim is not a claim for debt in the ordinary sense of the term; it is a claim for an account such as would be properly made against a trustee for a breach of trust, or in respect of the funds of the trust which ought to have been administered, but were not administered, in a particular way. The Treaty of Peace Order had, as its general object—and I want to refer to this quite shortly, because it does not, for general purposes, really help in the decision of this case—the establishment of a clearing office, with the necessary machinery, so that any moneys due, or any property held, in this country, either due to or held as the property of German nationals, should be paid into the clearing office, and the proceeds availed of for the purpose of paying British subjects who had claims against German nationals. I need not refer to the international aspects of the scheme, nor is it material to consider the disposition of the funds which were paid into the clearing office by virtue of the operation of the order, because this case turns on the precise machinery provided, and on the precise terms of the order. At the outset, I may say that the defendant can justify his claim here only if he is able to point to precise and distinct terms in the order which justify it. Apart from the Treaty of Peace Order, the plaintiffs were not only entitled, but were bound, to fulfil the terms of their trust, and, if their duty and their liability are to be affected, that must be done by clear and operative language to be found in the order itself.

Art. 1 (xvi) of the order enacts—because the provisions of the order are to have the force of law—that:

> A all property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force . . . and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged.

Then follows a definition of the purpose of the charge, which is not here material. Then comes para. (xvii), which says:

> B With a view to making effective and enforcing such charge as aforesaid—

and then follows a number of provisions. The first, as I read it, deals only with a particular prohibition enforced by a particular sanction. It is a prohibition of a *quasi*-criminal character, and the sanction which it imposes is that of a fine or imprisonment. It says:

> C (*a*) No person shall, without the consent of the custodian, acting under the general direction of the Board of Trade, transfer, part with or otherwise deal in any property, right or interest subject to the charge, and if he does so he shall be liable on summary conviction to a fine not exceeding £100 or to imprisonment for a term not exceeding three months or to both such imprisonment and fine.

That is not a section on which any civil claim could be based; it is a D prohibition, to which criminal sanction is attached. Then sub-para. (*aa*) gives the court, on the application of the clearing office or the custodian, power to order any person known or suspected to have in his possession, control, or management, any property, right or interest, subject to the charge, to attend as a witness, and give evidence and produce documents. E That gives the custodian the means of applying to the court to obtain this particular information. I ought to say that the custodian named in this order corresponds to, and is represented by, the Administrator of German Property. Then comes sub-para. (*b*), another piece of machinery to enable the custodian to ascertain the facts. It requires F any person having the control or management of anything subject to the charge to give notice in writing of the fact to the custodian, and to give such further particulars as the order specifies. Then come three sub-paragraphs which provide for the enforcement of the charge. Each of these deals with particular classes of property, and deals with that G property in a way which is appropriate to that type of property. Sub-para. (*c*) deals with charged property consisting of inscribed or registered stock, shares or other securities, and it provides that, on application being made by the custodian, the company or other body shall enter the custodian in its books as proprietor of the securities, and then he H is to have the rights appertaining to the proprietor. Then sub-para (*cc*) deals with property transferable on delivery, that is to say, chattels or bearer bonds, or anything of that nature: it provides that such property being charged, shall be delivered, by the person having it, to the custodian, on being so required by the custodian. If that is done, the custodian, subject to the consent of the Board of Trade, is to have the power to sell or otherwise to deal with the property so delivered. Sub-para. (*ccc*) deals with money claims, and, in the manner appropriate, to the taking possession of sums of money. It provides:

> Where the property, right or interest subject to the charge, consists of any sum of money due to a German national . . . it shall be payable to the custodian, and shall be paid to him on demand, and the custodian shall have power to enforce the payment thereof, and for that purpose shall have all such rights and powers as if he were the creditor. A

There is a further provision, which relates to a certificate which may be given by the custodian with regard to any particular property subject to the charge, which certificate is to be evidence of the facts which it states. That is to prevent any claims against any persons by reason B of the fact that the custodian has recovered the property, subject to this, that the custodian may be liable, in cases where the property was not in truth subject to the charge, to repay the proceeds of sale, or to return the property to the claimant if he shows a certificate properly issued. That sub-paragraph does not effect any change of title or any C change of property. So far, those are the only provisions relevant for this purpose which deal with the rights of the custodian in respect of property charged. There is, however, in sub-para. (*d*), a power which enables the Board of Trade to make an order vesting in the custodian any property, rights and interests subject to the charge or the right to D transfer the same, and it incorporates the Trading With the Enemy, (Amendment) Act, 1916, s. 4 (1), (2), (3), (4). Finally, for this purpose, there is sub-para. (*e*), which provides:

> If any person called upon to pay any money or to transfer or otherwise deal with any property rights or interests has reason to suspect that the same are subject E to such charge as aforesaid he shall before paying transferring or dealing with the same report the matter to the custodian and shall comply with any directions that the custodian may give with respect thereto.

That does not effect a change of title; it is mandatory in its terms; it imposes a duty on a person coming within its scope, but, so far, it does not seem to carry with it any practical effect or certainly any effect F which is of practical importance in the circumstances of this case. Now, the whole of those sub-paragraphs which establish the charge are governed by the initial words of para. (xvi):

> All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the treaty comes into force. G

In this case it is important, first of all, to consider how those words apply to the facts of this particular case. It is beyond dispute that a life interest in income, such as Mrs. Devaux had, comes within the definition of:

H

> property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the treaty comes into force—

and if that life interest which has become subject to the charge had become vested in the Administrator, by his obtaining the requisite order from the Board of Trade, he would then have had the right to claim from the trustees the enforcement of the trusts by the combined effect of the various provisions which I have read. But no vesting order has ever been made. The subject of this particular claim is not the life interest, but certain specific payments in respect of income arising out of that life interest, and such payments, regarded by themselves, obviously cannot be treated as belonging to German nationals at the date when the treaty came into force, which was Jan. 10, 1920. The equitable right to those instalments of income attached as at the various dates between 1927 and 1929, when the trustees were accountable to the *cestui que trust* for them. Therefore, it becomes necessary to ascertain what words in the Treaty of Peace Order give the defendant the right to claim these payments. He makes his claim for the first time in 1935, and, for some years before that, the payments had been made in perfectly good faith by the plaintiffs to Mrs. Devaux.

Now, I have found no words which would justify the defendant's claim in this action. Going back to sub-paras. (*c*), (*cc*) and (*ccc*), and remembering that all matters coming under those sub-paragraphs are governed by the initial words, " belonging to German nationals at the date when the treaty comes into force," I cannot find the obligation expressed. Clearly, the only sub-paragraph under which these items can possibly fall is sub-para. (*ccc*). The words of that sub-paragraph are not, in my judgment, applicable to these pecuniary claims arising in the administration of the trust which accrued due at the various dates which I have specified, and I think that is enough to answer the claim made here by the Administrator.

The nature of the charge has been discussed in a number of cases, but, so far as I have been able to apprehend, none of those cases throws any light on the question to be determined here. For instance, in *Austrian Property Administrator* v. *Russian Bank for Foreign Trade* (1), there is some discussion of the nature of the charge in respect of a debt and it is said that the effect of the charge is to take away power from the creditor and to give it to the Administrator, so that the Administrator alone can deal with the matter, but what was being dealt with there was an ordinary debt—it was a debt on a bill of exchange—payable before the date of the Treaty of Peace Order. The same is true of a case which went to the House of Lords, *Josef Inwald Act.* v. *Pfeiffer* (2), where the headnote defines it as : " a debt incurred before outbreak of war." The decision was that the creditor there suing in 1926, or thereabouts, could not claim it, because, in the words of LORD SUMNER, at p. 353 :

> the power to sue was no longer in the former creditor, but had been transferred to the Administrator in such a way that the debt was for the time being a debt due to the Administrator and to him alone, and that, therefore, an action by the former creditor was incompetent.

That was a debt coming within the precise words of sub-para. (*ccc*). Then the case of *German Property Administrator* v. *Knoop* (3) was a case in which no such point as is here in question was raised. There were certain specific funds in existence, and no question of any kind

as to amount is raised at all. The Attorney-General, in opening the
case, at p. 448, said: "The whole dispute arises out of the London
agreement," and he also said: "There is no controversy at all as to
the funds or their amount, nature, or liability to be charged." Those
are the only cases to which I need refer. Giving, therefore, to the extent
of the charge the fullest effect which the circumstances admit, and A
admitting that a life interest as such comes within the charge, and admitting
further that the defendant or the custodian, if so minded, could
have vested the whole life interest in himself, there still remains the
problem of finding in the words of the order apt language to give the
Administrator the right which he here claims, that is to say, a right to B
recover from the trustees these sums of money which they paid away
in the fulfilment of their trust, as they thought, and without having
any intimation from the defendant or the custodian that he required
payment to be made to him, or any demand for payment. On the view
which I have taken of these paragraphs, I do not think that any demand C
would have been justified. He could easily, if he had thought fit, have
had the life interest vested in himself, and then he would have been in
full possession of the position; but he did not do so, and I think what
I have already said is enough to dispose of the claim in this case.

Supposing I were wrong in that, there still remains the alternative D
answer raised on behalf of the plaintiffs, and that is that, even if they
have paid away moneys to the wrong person, and have committed a
breach of trust, the circumstances are such as to entitle them to relief
under the Trustee Act, 1925, s. 61. Now, the Crown has contended
that in any case the Trustee Act does not apply to the circumstances E
of this case. It is said that, under the Treaty of Peace Order, the case
becomes not a case of trustee and *cestui que trust* at all. The trustees
have imposed upon them a statutory duty, and the trust is merely
relevant in order to determine the sums of money which become due,
and which are payable under sub-para. (*ccc*), to the defendant. There F
is, it is said, no question as to the precise amount, and, as soon as the
sum is ascertained, the statute comes in and determines that the payment
must be made as being a money payment to the defendant. Therefore,
it is said, the trustees cannot come and ask to be excused as for
a breach of trust. What they have failed to do is to perform their G
statutory duty to pay the defendant. Reference was made, in support
of that, to the prohibition under sub-para. (*a*). I have already said
that, in my opinion, sub-para. (*a*) is merely a prohibition with its own
sanctions. I do not accept the argument of the Crown. I think its
argument, if it is to be accepted at all—and, for the reasons which I H
have stated, I do not think it is sound—must involve this, that there is
a statutory assignment to the defendant of the rights of the *cestui que
trust*, but not of any other or different rights. Sub-para. (*ccc*), the only
relevant sub-paragraph for this purpose, in terms says that the custodian
is to have all such rights and powers as if he were the creditor, and,

assuming that this equitable debt comes within sub-para. (*ccc*), then "the creditor," as used there, must mean the *cestui que trust*, and it would seem to follow from the very language that, the *cestui que trust* being the creditor, and the defendant being put into the shoes of the *cestui que trust*, the relationship between the trustee and the defendant is that of trustee and *cestui que trust*, and no other. Therefore, the court has, I think, jurisdiction, in a proper case, to apply the provisions of sect. 61, and, if so advised, to relieve the plaintiffs from their breach of trust, if they think that the plaintiffs have acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court as to the breach which they have committed. The judge has held that this is a case in which the court ought to exercise that remedial discretion, and I agree with him. I do not say that this is a case in which an appellate court would hold itself bound to follow the manner in which the trial judge has exercised the discretion permitted to him. I do, however, say, as HAMILTON, L.J., said in *Re Allsop, Whittaker* v. *Bamford* (4), at p. 15, in a case wnere the judge had not exercised his discretion at all:

> I need hardly say that had he exercised his discretion I should have been slow to interfere with it.

I apply the same view to this case, though I think an appellate court, having all the facts before it, is bound to decide for itself whether the circumstances are or are not such as to induce it to give relief under the section. It must consider the position from the point of view of the requirements of justice and reasonableness. While not bound by what the court below has done, it will, however, not depart from that course unless for reasons which appear to require a reversal of the exercise of the discretion of the judge. Now, it is strenuously contended that, in a case like this, the trustees have committed the error, which it has now been assumed they have, simply because they did not know or appreciate what the law was, though they had knowledge of all the material facts. It is said that, in 1927, the two first-named plaintiffs were fully aware of the fact that Mrs. Devaux had become a German national, and was not simply a German resident, and that it would follow from that, that all the obligations at law under the order fell upon them, and that ignorance of the law was no excuse. For that there was cited the case of *Carter* v. *McLaren* (5), where the doctrine was laid down with great force and particularity that ignorance of law would not be an excuse. But the real point discussed in that case was whether certain words in the statute which were relied upon were sufficient to give a power to the court to relieve against a breach of the particular enactment. LORD WESTBURY said, at p. 126:

> It is quite out of the question to hold that this statute conferred upon a court of justice a discretionary power to apply its enactments or not.

LORD COLONSAY said, at p. 127:

> The only point of any real difficulty that has been made in this case is with refer-

> ence to the words " unless cause be shown to the contrary,"—as to which I think it enough to say that I concur in the views which have been expressed by your Lordships.

So that two things appear there. The real question of difficulty was whether the words were sufficient for the purpose relied upon—that was the real point which was discussed—but it is clearly implied, as I think, in the judgments, that, if they had been sufficiently clear, they would A have had the effect of enabling the court to give relief. Lord Chelmsford said, at p. 125:

> If a discretionary power was meant to be given where a party legally delinquent had erred through ignorance, but not immorally, the power would have been expressed in the clearest language.

B

I think in the Trustee Act there is such a power given. I do not pretend to lay down any precise rules as to the methods according to which, or the limitations subject to which, a court should exercise its remedial jurisdiction under this clause. In the case of *Perrins* v. *Bellamy* (6), Lindley, L.J., pointed out that decisions applicable to trustees had C shocked people's sense of humanity and of fairness, and that that led to the passing of the section which is now reproduced in sect. 61 of the Act of 1925. He says, at p. 800:

> The Act throws upon the court the extremely difficult and responsible task of saying, " You, a trustee, have committed a breach of trust, but at the same time, under the circumstances and having regard to your having acted honestly, reasonably, and fairly, you shall be excused: we are of opinion it is not a case in which you ought to be held liable to make good the loss." D

There are also very important expressions of opinion in *Allsop's* case (4), to which I have already referred. For instance, Swinfen Eady, L.J., says, on p. 21: E

> The language of sect. 3 is wide, and a narrow construction ought not to be placed on it. It was intended to give power to the court to relieve an honest trustee in proper cases. The words "is or may be liable" appear to point to doubtful questions of construction. In my opinion the case of a trustee committing a breach of trust by paying the wrong person in consequence of acting upon an erroneous construction is within the section, and the court has jurisdiction to relieve against the personal liability. F

The other members of the Court of Appeal state it in the same way. First of all, Cozens-Hardy, M.R., says, on p. 11:

> I can see no ground for narrowing or limiting the application of the wide words of the section.

G

In this particular case, it was not so much a misunderstanding of the Treaty of Peace Order as a failure on the part of Mrs. Holland to regard it at all as applicable to the matter in question. It must be remembered that, from 1920 onwards, acting under the impression that Mrs. Devaux was still a British subject, though resident in Germany, she had continued to pay the money without any question, and, indeed, with a H licence from the appropriate authority authorising her so to do, a licence no doubt based upon the same misapprehension as that under which she was suffering; but, in 1927 for the first time, she learnt that Mrs. Devaux had changed her nationality during the War. She says she did not think that that involved any change at all in her position. Though she had heard, undoubtedly, as appears from the correspondence and the evidence, of the Treaty of Peace Order, she never thought of it at that time, 7 years after the Treaty of Peace Order and 8½ after the end of the War; she never thought of that particular matter. I agree with the learned judge A that, as it is perfectly clear that she acted honestly, it would not be right to say that she had acted in such circumstances that she had not acted reasonably and fairly. I agree with him that the discretion of the court ought to be exercised in favour of these plaintiffs. I agree completely with the judgment of the learned judge. The appeal ought B to be dismissed with costs.

ROMER, L.J., and SCOTT, L.J., agreed that the appeal failed and must be dismissed with costs.

Appeal dismissed with costs.

C Solicitors: *Solicitor to the Clearing Office* (for the appellant); *Johnson, Jecks & Colclough* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

D

UNSWORTH *v.* PEASE & PARTNERS, LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and Scott, L.JJ.), **April 26, 27, May 11, 1937.**]

E *Workmen's Compensation—Compensation—Average weekly earnings—Concurrent contracts of service—Collier acting as sub-checkweighman and collector of union subscriptions—Workmen's Compensation Act,* 1925 (*c.* 84), *s.* 10 (ii).

F A miner, in addition to his work as a collier, acted as a sub-checkweighman at the colliery and collected subscriptions from members of his union. In a claim for compensation in respect of an accident which totally incapacitated him, the miner contended that his average weekly earnings ought to be computed by reference both to his earnings as a collier and to his earnings as a sub-checkweighman and collector of union subscriptions:—

G HELD: as a sub-checkweighman, the miner was working under a contract of service with the workers for whom he acted, and as a collector of subscriptions he was working under a contract of service with the union. The miner was, therefore, working under concurrent contracts of service within the Workmen's Compensation Act, 1925, s. 10 (ii), and all his earnings ought to be included in calculating his average weekly earnings.

Decision of His Honour JUDGE SIR REGINALD BANKS, K.C. (1937, 4 L.J.N.C.C.R. 125), *affirmed.*

H **[EDITORIAL NOTE.** The ascertainment of the total earnings of a workman is usually complicated by what may be termed extra earnings, such as tips, bonuses and the like. There are also additional earnings under concurrent contracts of service, that is, contracts with employers other than the principal employer. In order for there to be a concurrent contract of service it is necessary to prove that there is a contract of service with an employer distinct from the principal employer and the question in the present case is whether having regard to the terms of his employment and the statute regulating the same a checkweigher is as such merely the holder of a statutory office or is in the employment of the men.

As to Concurrent Contracts of Service, see HALSBURY, 1st Edn., Vol. 20, Master and Servant, pp. 204, 205, para. 454; and for Cases, see DIGEST, Vol. 34, pp. 426, 427, Nos. 3467-3473. See also WILLIS'S WORKMEN'S COMPENSATION, 30th Edn., pp. 301, 302.]

Cases referred to:

(1) *Hopkinson* v. *Caunt* (1885), 14 Q.B.D. 592.

(2) *Wild* v. *Brown (John) & Co.*, [1919] 1 K.B. 134; 34 Digest 22, *20*; 88 L.J.K.B. 119; 120 L.T. 143; 11 B.W.C.C. 237.

Appeal from a decision of His Honour Judge Sir Reginald Banks, K.C., given on Dec. 17, 1936, and reported in 1937, 4 L.J.N.C.C.R. 125. The facts are set out in the judgment of Sir Wilfrid Greene, M.R.

F. W. Beney for the appellant company.

John Neal for the respondent.

Sir Wilfrid Greene, M.R.: I am authorised by Romer, L.J., to say that the judgment which I am about to read is one which has his complete agreement.

The dispute in this case relates to the calculation of the respondent's pre-accident earnings. He was totally incapacitated by an accident which happened to him while working as a collier in the defendant company's mine, and in respect of this accident he was paid, during the incapacity, a sum of 18*s*. 9*d*. per week, based on his average weekly earnings as a collier, which were £1 4*s*. 8*d*. a week. He claims that his average weekly earnings ought to have been computed by reference, not to his earnings as a collier alone, but to those earnings and certain other earnings which he claims to have received under concurrent contracts of service within the meaning of the Workmen's Compensation Act, 1925, s. 10. That section provides that:

> For the purposes of the provisions of this Act relating to "earnings" and "average weekly earnings" of a workman, the following rules shall be observed: . . . (ii) Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident.

These other earnings were his earnings as a sub-checkweighman at the colliery, and his remuneration for collecting subscriptions from members of his union. The sums earned under these two heads during the relevant period of 12 months were £65 5*s*. 8*d*. and £9 15*s*. 5*d*. respectively. The county court judge has held that the earnings under each head were earnings under a concurrent contract of service, and the only question which arises on this appeal is whether or not he was right in so holding.

I will deal first with the respondent's earnings as a sub-checkweighman. The position would have been the same if he had been the checkweigher, and I shall so treat the matter. As the name implies, the primary function of the checkweigher is to check the weights of coal brought to the surface, in order to ensure that colliery workers, who are paid by weight, receive the full amount of wages to which they are entitled. This is a task which the workers themselves are, for obvious reasons, unable to perform, and, accordingly, it is necessary that someone should be employed to do it for them. This could, of course, be arranged by agreement with the colliery proprietor. A person so appointed would be employed by the colliery workers appointing him, and, if the terms of the contract of employment fell to be inferred from the mere circumstance that he was appointed checkweigher on their behalf at a certain remuneration, the contract would, in my opinion, clearly be a contract of service. There is nothing in the nature of the work, or the relationship of the parties to the contract, which would tend to negative the existence of those powers of control which are characteristic of a contract of service. But it was found unsatisfactory to leave colliery workers without a statutory right to protect their interests by appointing a checkweigher, and such a right was first given to them by the Mines (Coal) Regulation Act, 1872, s. 18. It is not necessary to state the provisions of that section, since they are substantially repeated in the Coal Mines Regulation Act, 1887, s. 13, to which I will refer presently. There is one point, however, to be noted, that, under sect. 18 of the Act of 1872, the checkweigher had to be one of the persons employed in the mine, or in some other mine belonging to the owners. It was held, under this provision, that a checkweigher appointed by the men ceased to be employed by the owners, and "entered upon a new employment, which was an employment by the men." This is the language of A. L. SMITH, J., in *Hopkinson* v. *Caunt* (1), and it is significant that the same judge described the contract with the men, into which the checkweigher entered upon his appointment, as "a new contract of service." This, in my respectful opinion, is an accurate description of the relationship. A worker in the mine is taken from the mine and employed to do work by his fellow workers, the nature of the work being such that any workman in the mine could perform it.

The Coal Mines Regulation Act, 1887, in substance re-enacted sect. 18 of the Act of 1872, but it added certain machinery to provide for the fact that the workers in a mine are, or may be, a shifting population. These provisions relate to the remuneration of the checkweigher, which he is empowered to recover proportionately from any person for the time being employed at the mine and paid by weight, in cases where he had been appointed by the majority on a ballot. This provision is, in my opinion, a piece of mere machinery, which does not affect the nature of the contract. In cases where the appointment is not made by a majority on a ballot, the position is left untouched, and the checkweigher must look for his remuneration to the individuals who appointed him. Sect. 14 itself refers to the remuneration of a checkweigher as "wages or recompense," and the use of the word "wages" is, I think, at any rate an indication of the way in which the legislature regarded the nature of the contract. The Act of 1887, while making a special provision for the case of interference by the checkweigher with matters with which he is not concerned, did not make any provision for removal of the checkweigher by his fellow workers. Provision for that has never been expressly made by statute. The right of the workers, on whose behalf the checkweigher is employed, to remove the checkweigher is, however, impliedly recognised, since, by the Coal Mines (Weight of Minerals) Act, 1905, s. 1 (5), it is provided that, where a checkweigher is appointed by a majority on a ballot, he can be removed only by a majority, ascertained by ballot, of the persons employed and paid by weight at the time of removal. This leaves it competent to the workers who appoint a checkweigher otherwise than by a majority ascertained by ballot to remove him. Sect. 1 (3) provides that, where a checkweigher is appointed by such a majority on a ballot, he is to be deemed to be appointed on behalf of all the persons employed in the mine who are entitled to appoint him. It was this Act that provided for the appointment of deputy checkweighers (sometimes called "sub-checkweighmen"), who, for all relevant purposes, are in the same position as checkweighers.

It is said on behalf of the appellant company that the office of checkweigher is a statutory office, the nature of which is to be ascertained solely from the relevant statutory provisions. Reliance is placed on the special provisions with regard to removal of checkweighers and their payment, to which I have referred, and it is said that these provisions make it impossible to treat the relationship between the checkweigher and the men for whom he acts as one of employment under a contract of service. I am unable to accept this argument. The provisions in question are, in my opinion, merely statutory machinery, specially provided in order to enable obvious practical difficulties to be overcome, and do not affect the substantial nature of the relationship. Reliance is also placed on the language of sect. 13 (1) of the Act of 1887, which describes the functions of the checkweigher as those of taking an agreed account of the weight of the mineral, or determining correctly the deductions, as the case may be. The deductions in question are those referred to in sect. 12 in respect of foreign substances or improper fillings, and, under that subsection, the deductions are to be determined in a manner agreed between the colliery owner and the workers affected, or, in default of agreement, in the case where there is a checkweigher at the mine, by a person appointed by the owners and the checkweigher. If these two disagree, then a third person, mutually agreed, or, in default of agreement, appointed by a chairman of quarter sessions, is to determine the mode of deduction. Now, it is said that the position and functions of the checkweigher are exhaustively stated in sect. 13 (1), and that he is merely a person with a statutory duty to perform, or with statutory powers to exercise in respect of the matters indicated in the subsection. It is further said that his functions, in determining the mode of deduction, are arbitral, or *quasi*-arbitral, in their nature, and are not such as can be referred to a contract of service. In this connection, reliance was placed on the decision of this court in *Wild* v. *Brown (John) & Co.* (2). That case decided (among other things) that a miner appointed by his fellow workmen to inspect the mine under the Coal Mines Act, 1911, s. 16, is not entitled to have included, in the assessment of his average weekly earnings, remuneration received from them for discharging his duties under that section. The section empowers the workmen employed in the mine to appoint two of their number to inspect the mine. The persons so appointed are to have full powers of inspection, and they are under a statutory obligation to make and sign a full and accurate report of the result of their inspection. It was held that a person so appointed does not enter into a contract of service with the men appointing him, the reason being that the duties imposed upon him are to be exercised under the statute in accordance with his own judgment, unfettered by any instructions from those employing him. The case upon this point turned entirely upon the nature of the inspector's statutory duties. In the case of a checkweigher, I can find nothing in the language of the relevant statutes which has the effect of putting the checkweigher in a position where he would be free from that control, by the persons appointing him, to which he would be subject if he were appointed (as, by agreement with the colliery owner, he well might be) independently of the statutory power of appointment. The work which the checkweigher performs appears to me, in its nature, to admit of complete control by the workers for whom he acts, and this is a matter with which the statutory provisions have no concern. All that those provisions do is to give the workers the right to appoint their checkweigher, to ensure that, when he is appointed, no obstacle shall be placed in his way by the mine owner, and to provide special machinery to enable him, when not appointed by a defined group of men, but by a majority on a ballot, to recover his remuneration from those who enjoy the benefit of his services, notwithstanding the fact that they are, or may be, a shifting population.

The special powers of the checkweigher with regard to determining the mode in which deductions are to be made do not, in my opinion, alter the essential character of the contract. In exercising those powers, he merely takes the place of the men on whose behalf he is acting, and I can find nothing in the language of sect. 12 (1) of the Act of 1887 which places the checkweigher, when exercising his powers, in an arbitral or *quasi*-arbitral position, or prevents him from acting in accordance with directions given to him by the men. The subsection merely provides machinery for arriving at agreement in a more convenient way than by negotiation with a large body of workmen.

The remaining question relates to the remuneration received by the respondent for collecting subscriptions from the members of his union employed at the mine. The county court judge held that, in respect of this work, the relation of master and servant subsisted between the respondent and the branch of the union to which he belongs, and that, consequently, the remuneration in question was received under a concurrent contract of service. I agree with the result, but not with the reason given by the county court judge, since, in my judgment, the contract was a contract, not with the branch, but with the union itself. Mr. Beney, on behalf of the appellant company, very fairly agreed that, if we came to the conclusion that there was a contract of service between the respondent and the union, we should be at liberty so to hold notwithstanding the finding of the county court judge that the contract was with the branch. In order to ascertain the nature of the employment, it is necessary briefly to examine the relevant rules of the union. Under r. 4, the supreme government of the union is vested in a council, to which each branch sends a delegate, elected by the branch to serve for 12 months. The respondent is the delegate elected by his branch. Rule 28 provides for the conduct of branches by a committee, of which the delegate is assumed to be a member; the business of the branch is to be transacted as directed by the rules and minutes of the general council. Contributions from members belong to the union, and moneys collected by branches are, under r. 42, to be paid over to the treasurer. Under r. 46, contributions are to be paid to the secretary or collectors, at the appointed time and place, while, under r. 31 (*b*), the necessary contribution books, cash books, etc., are supplied by the union to branches. Rule 69 provides that the scale of payment for organising and collecting contributions shall be 3*s*. 6*d*., plus the district percentage, but the sum of £9 15*s*. 5*d*. in question in this case was received, not under this rule, but under r. 72. This latter rule is applicable wherever a day's work is lost by a member in order (amongst other things) to do any business of the union at the request, and by the resolution, of a branch meeting, and the remuneration payable is a "delegate's day wage." We are to assume, in this case, that the respondent, when collecting subscriptions, was acting under this rule, and the sum of £9 15*s*. 5*d*. represents payments made under it for lost days' work. The power of removal of officers of the union, including local officials, is vested ultimately in the council of the union, under r. 41.

The practice in the respondent's branch of the union is for the officers of the branch and the members of the branch committee to take it in turns to collect subscriptions on Fridays. The collection is made by two men sitting in a hut, one of whom takes the money and marks the men's cards, and the other of whom books it. The work has nothing to do with that done by the respondent in his capacity as delegate, and the provision in r. 72 that he is to receive a delegate's day wage does no more than fix the measure of remuneration. The effect of the rules, in my opinion, is that a member employed to collect subscriptions is employed by the union, the money which he collects is the union's money, the remuneration which he receives is paid out of funds belonging to the union, and it is the council of the union which has the power to dismiss him. He is no doubt selected for the work by the branch, but the work is business of the union (r. 72), and the branch, in employing him, is, in my opinion, acting on behalf of the union. But, although I differ from the county court judge in holding that the contract of employment is with the union and not with the branch, I am in agreement with his view that the contract is a contract of service. The work is of a perfectly simple character, and it appears to me clear that the union, either directly or through the branch committee, has complete control over those who perform it, with regard not only to what they are to do but also to the manner in which they are to do it.

Save in the respect which I have mentioned, I am, on both points raised by the appeal, in general agreement with the reasoning and conclusions of the county court judge in his careful judgment. The appeal is dismissed with costs.

SCOTT, L.J.: I agree.

Appeal dismissed with costs.

Solicitors: *Johnson, Weatherall, Sturt & Hardy*, agents for *Parker Rhodes, Cockburn & Co.*, Rotherham (for the appellant company); *Corbin, Greener & Cook*, agents for *Raley & Sons*, Barnsley (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

Re ANCHOR LINE (HENDERSON BROS.) LTD.

[CHANCERY DIVISION (Luxmoore, J.), **April 28, 1937.**]

Conflict of Laws—Company—Registered in England with property in Scotland—Floating charge on whole undertaking ranking as first charge—Validity of charge in respect of property in Scotland—Companies Act, 1929 (c. 23), s. 270.

A company incorporated under the English Companies Act, with its registered office in England, carried on a considerable part of its business in Scotland. In Mar., 1934, the company executed in Scotland a charge in favour of a Scottish bank, charging its undertaking and all its property and assets, both present and future, which charge was to rank as a first charge on the undertaking of the company and all its property and assets whatsoever and wheresoever both present and future. The property of the company included heritable and movable property in Scotland, and a floating charge is unknown to the law of that country. In May, 1935, an order was made for the compulsory winding up of the company, and most of the property was sold. The liquidator took out a summons to have the question determined whether the charge of Mar. 26, 1934, had created a valid and effective charge over such assets of the company as were situated in Scotland at the commencement of the liquidation:—

HELD: (i) in the circumstances the charge ought to be construed according to English law, and according to that law the charge had created a valid equitable security. The proceeds of sale of all the property of the company expressed to be subject to the floating charge, including the proceeds of sale of heritable or movable property in Scotland, were therefore payable to the Scottish bank in or towards the satisfaction of the money secured by the charge.

(ii) the Companies Act, 1929, s. 270, is directed not to the distribution of assets, but to the collection of assets by the liquidator, and does not place heritable and other property in Scotland in a position different from that of property in any other part of the world.

[**EDITORIAL NOTE.** The company here in question was an English company which had given a floating charge over property in Scotland, where it carried on its business. A floating charge is unknown to the law of Scotland and the question is whether such a charge is a valid security in an English winding up. It is held to be such applying the decision in *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.* (1).

As to Equitable Jurisdiction Over Foreign Property, see HALSBURY, Hailsham Edn., Vol. 6, pp. 221-227, paras. 270-277 ; and for Cases, see DIGEST, Vol. 11, pp. 347-354, Nos. 338-380.]

Cases referred to :

(1) *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.*, [1910] 1 Ch. 354 ; [1910] 2 Ch. 502 ; 11 Digest 351, *361* ; 80 L.J. Ch. 65 ; 103 L.T. 4.

(2) *Penn* v. *Baltimore (Lord)* (1750), 1 Ves. Sen. 444 ; 11 Digest 351, *363*.

(3) *Mercantile Investment & General Trust Co.* v. *River Plate Trust, Loan & Agency Co.*, [1894] 1 Ch. 578 ; 11 Digest 462, *1187* ; 63 L.J. Ch. 366 ; 70 L.T. 131.

(4) *Re Courtney, Ex p. Pollard* (1840), 4 Deac. 27 ; 11 Digest 350, *356*.

(5) *Coote* v. *Jecks* (1872), L.R. 13 Eq. 597 ; 7 Digest 28, *139* ; 41 L.J. Ch. 599.

(6) *Hicks* v. *Powell* (1869), 4 Ch. App. 741 ; 11 Digest 348, *342*.

(7) *Re Scheibler, Ex p. Holthausen* (1874), 9 Ch. App. 722 ; 11 Digest 350, *357* ; 44 L.J. Bcy. 26 ; 31 L.T. 13.

Application by the liquidator of the company, asking for the determination of the question whether, by a charge dated Mar. 26, 1934, given under the common seal of the company, a valid and effective charge was created over such assets of the company as were situate in Scotland at the commencement of the liquidation.

W. P. Spens, K.C., and *P. J. Sykes* for the applicant.

Wynn Parry, K.C., and *J. H. Stamp* for the respondent bank.

Spens, K.C.: An English court cannot give effect to a charge given in Scotland which is contrary to the law of Scotland. If that is accepted by the court, the charge is wholly ineffective so far as the assets situate in Scotland are concerned. The law of Scotland must be given effect to so far as the property in Scotland is concerned. The secured creditors are seeking to enforce over the Scottish assets this so-called floating charge, and they can have no right against the general creditors unless they can show that they took action 60 days before the commencement of the winding up.

Wynn Parry, K.C.: It cannot be contended that English law should be applied so far as the assets are in England, and Scots law so far as the assets are in Scotland. A floating charge is an indivisible charge. It is a charge in the plainest terms created over the whole of the assets of the company, wherever situated, and the document would have to be in an entirely different form in order to be construed as suggested. Nothing will be found in the Companies Act, 1929, s. 270, to enable anyone to say that it is anything more than a collection section. Having collected the assets, and having brought them, either actually or notionally, to England, it is for the liquidator to distribute them. The only A section which applies to the manner of distribution is sect. 262. In administering the assets, and in collecting the assets, the liquidator, so far as the English assets are concerned, must give effect to s. 268. If, however, sect. 270 (1) (*b*) had not been inserted, there would have been a gap, so far as assets in Scotland are concerned, and that subsection B was inserted to fill that gap.

Spens, K.C., in reply: Sect. 270 (1) (*b*) states that the winding up shall be equivalent to a decree of adjudication of the heritable assets of the company for payment of the whole debts of the company, subject to such preferable heritable rights as existed at the commencement of C the winding up. A floating charge is not an heritable security, and therefore it cannot be a preferable heritable security. The whole point is that the law of Scotland and the law of England are not the same on this matter.

D LUXMOORE, J.: The question which is raised by this summons is whether the charge, dated Mar. 26, 1934, given under the common seal of the company, created a valid charge by the company over the assets of the company—which are set out under nine heads. I do not think that the question in the form in which it has been asked really arises, E for I understand that the bulk of the property has been sold, and the proceeds of sale are in the hands of the liquidator. It seems to me that the question I have to determine is whether, in the distribution of the assets of the company, effect is to be given to the document dated Mar. 26, 1934, purporting to charge by way of floating charge the whole F of the company's property, whatsoever and wheresoever situated, so far as the proceeds of sale represent heritable and movable properties in Scotland at the date of the liquidation. The company, Anchor Line, Ltd., was incorporated on July 3, 1899, under the English Companies Act to acquire the shipping business of Henderson Bros. The registered G office of the company was in England, and remained in England throughout the whole of the company's existence. The head office was, I understand, in Glasgow, where a considerable part of the company's business was carried on. In Feb., 1934, the company was in financial difficulties. It had a large number of creditors, and had given to some H of them securities over different items of its property. On Feb. 9, 1934, it entered into an arrangement with the largest of its creditors. I think all of them were secured creditors. In effect, the secured creditors were either to transfer or to release their securities in favour of the Union Bank of Scotland, which was to grant banking facilities to the company. and the bank was to get, as security for moneys which had been or might be advanced afterwards, a floating charge, in accordance with the provisions of cl. 6 of the agreement. That clause provided that:

> the company should forthwith grant and deliver to the bank a floating charge, in terms satisfactory to the bank, creating a security by way of a first charge over the whole of the company's undertaking, property and assets both present and future so far as not already specifically mortgaged.

The document shows that the property of the company included heritable as well as movable property in Scotland. By cl. 13 of the agreement, it was provided that the agreement should remain in force until Oct., 1934, and from that date should go on from year to year until it was determined by notice. Clause 15 provided the way in which the agreement could be determined. On Mar. 26, 1934, the company executed a charge in favour of the Union Bank of Scotland, Ltd., in purported fulfilment of the clause of the agreement which I have just read. The charge was executed in Glasgow. It recites the agreement of Feb. 9, 1934, which I have just referred to, and states:

> that the company in consideration and in implement *pro tanto* of the provisions of the said agreement, hereby charge with payment of the said sums, by way of floating security, their undertaking and all their property and assets, both present and future, which charge hereby created shall rank as a first charge on the undertaking of the company and all their property and assets whatsoever and wheresoever both present and future subject to the existing specific mortgages thereof and shall be a floating security but so that the company shall not have power to create any further mortgages or charges ranking in priority to or *pari passu* with the charge hereby created.

The charge contained certain covenants to which I do not think it necessary to refer in detail. The charge was registered on Apr. 16, 1934, with the registrar of joint stock companies in England. After the charge was executed, the terms of the original agreement of Feb. 9, 1934, were varied on two occasions by documents in June, 1935, and Mar., 1935. I need not refer to either of these documents. Everything, including the Scottish assets, was to be sold. The terms were provisionally arranged, and, on Apr. 16, 1935, notice to terminate the agreement of Feb. 9, 1934, was given by the bank. In Apr., 1935, meetings, which had been duly convened, of creditors and shareholders, were held to consider the question of voluntary liquidation. The creditors voted in favour of voluntary liquidation. The shareholders did not by the necessary majority vote in favour of voluntary liquidation. The bank presented a petition for the compulsory winding up of the company, and the Official Receiver was appointed liquidator. In May, 1935, an agreement for sale was entered into, and, on May 13, 1935, an order for the compulsory winding up of the company was made. On June 14, 1935, the liquidator was appointed, and this summons is taken out by him to have the question I have referred to decided. It is said that the proceeds of sale of the Scottish heritable and movable property cannot be claimed by the Union Bank of Scotland, Ltd., under the charge which was given to it on Mar. 26, 1934, because the floating charge thereby created was ineffective under Scots law to create a charge, because no step of any kind was taken for the purpose of reducing any of the property into its possession before the winding up. A floating charge is unknown to the law of Scotland. The charge was given by an English company. True, it was executed in Scotland. It is true that, according to Scots law, it does not effect a charge, but it does according to English law, and I think that the agreement under which it was given and the whole circumstances of the case show that the charge must be construed according to English law. When an English company possesses land abroad, and purports to charge it by way of floating charge, a valid equitable security according to English law is created. I refer to the well known passage in the judgment of SWINFEN EADY, J., in *British South Africa Co.* v. *De Beers Consolidated Mines, Ltd.* (1), at p. 387:

> An English debenture purporting to charge by way of floating security all the English company's property and assets does amount, where the English company possesses land abroad, to an agreement to charge that land, and is a valid equitable security according to English law; and the debenture-holders, upon any winding up of that company, would rank as secured creditors in respect of the foreign land, and upon a winding up in England they would be paid in full out of the proceeds of sale of that land, before any distribution of the proceeds of it was made among ordinary unsecured creditors. The law on this point is correctly stated in PALMER'S COMPANY LAW, 5th Edn., p. 236: "Even without complying with the formalities required by the local law in relation to transfers or mortgages, it is competent to a company to create an effective charge on property belonging to it in a foreign country, for the court, in virtue of its Chancery jurisdiction *in personam*, enforces equities in regard to foreign land where the mortgagor company is within the jurisdiction. (*Penn* v *Baltimore* (*Lord*) (2), *Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan & Agency Co.* (3), WESTLAKE'S INTERNATIONAL LAW (1880), p. 183); and in determining whether there is an equity the court regards English, not foreign, law, and if according to English law there is an equity, e.g., if for valuable consideration a company agrees to give a charge on foreign property, the court will enforce it, although the equity may be one not recognised by the *lex loci rei sitæ* (*Ex p. Pollard* (4); *Coote* v. *Jecks* (5); *Hicks* v. *Powell* (6); *Ex p. Holthausen* (7))."

In my judgment, this governs the present case, and I need say nothing about it except to refer to an argument, put forward by Mr. Spens and Mr. Sykes, that property situated in Scotland is in a position different from that of property in any other part of the world, by reason of the Companies Act, 1929, s. 270. They argued that this section provides that any equity arising out of it is to be completely ignored, and the property is to be shared amongst the unsecured creditors of the company. In my view, sect. 270 is not directed to the distribution of assets in a liquidation at all. The sections which deal with that position are to be found in another part of the Act, particularly sect. 262. Sect. 270, like sect. 268, seems to me to be directed to the collection of assets by the liquidator. In my judgment, sect. 270 certainly does not override the provisions of sect. 262, or limit its operation in any degree. Reliance, I think, was mainly placed upon sect. 270 (1) (*b*), which provides that the winding up is to be equivalent to a decree of adjudication of the heritable assets of the company for the payment of the whole debts of the company. I do not think that this is intended to be a direction as to the distribution of the proceeds of the heritable property different from that found in the Act. "Payment of the whole debts of the company" means payment in accordance with the provisions of the Act, that is, as required by those sections of the Act, which deal with the distribution of the assets in question. I cannot think that, by sect. 270, it was the deliberate intention of the legislature to put heritable or other property in Scotland in a position different from that of property belonging to a company registered in England or in other parts of the world. In my judgment, the proceeds of sale of all the property of the company expressed to be subject to the floating charge, including the proceeds of sale of heritable or movable property in Scotland, are payable to the Union Bank of Scotland, Ltd., in or towards satisfaction of the money secured by its security.

Solicitors: *Collyer-Bristow & Co.* (for the applicant); *Allen, Edwards & Oldfield* (for the respondent bank).

[*Reported by* W. K. Scrivener, Esq., *Barrister-at-Law.*]

Re WARWICK'S SETTLEMENT TRUSTS, GREVILLE TRUST CO. *v.* GREY.

[Chancery Division (Farwell, J.), **April 21, 22, 28, 1937.**]

Settlement—Jointure and interest on portions—Charged primarily on income—Charged also on capital—Deficiency of income—Paid voluntarily by tenant for life—Recoupment from capital.

A tenant for life of settled estates assigned all his life interest under the settlement to a company. A jointure annuity and the interest of certain portion sums were charged on the income as well as the capital of the settled estates, and under the charge the income of subsequent years was charged to meet arrears of interest. In the years ending Mar. 31, 1933, 1934, 1935, respectively, the income was insufficient to meet these interest charges, and the company voluntarily, and without reference to any other party interested in the settled estates, paid that interest out of other money belonging to it. The company asked for a declaration that the interest so paid was a charge upon the capital of the settled estates:—

Held: it was impossible to say that the deficiency of income would continue in future years, and there might therefore be future income sufficient to provide the interest that had been paid. The company had no right to be recouped out of the capital of the settled estates until the whole account could be taken, upon the death of the tenant for life or, possibly, on the sale of the estates.

[EDITORIAL NOTE. In general, interest is payable out of the income of the settled estates, but here the interest is expressly charged, primarily upon the income, and also upon the capital of the settled estates. The position arising upon the voluntary payment by the tenant for life out of his own moneys other than the income of the settled property has not been fully decided, and, if properly advised, he would do so only upon some proper agreement with those entitled in remainder. In view of the express charges in the present case, it would seem that the tenant for life would in equity have a remedy against the corpus of the settled property, but the present application was in fact premature. The interest was charged generally on income, and not on the income of any particular year, and therefore any excess of income in future years would be available to meet past deficiencies, and the right to charge the corpus would not arise until an accounting period has been completed, presumably at the death of the tenant for life.

As to Discharge of Interest, see HALSBURY, 1st Edn., Vol. 25, Settlements, pp. 619, 620, para. 1090; and for Cases, see DIGEST, Vol. 40, pp. 689-693, Nos. 2248-2288.]

Case referred to:

(1) *Kensington* (*Lord*) v. *Bouverie* (1859), 7 H.L. Cas. 557; 40 Digest 691, *2268*; 29 L.J. Ch. 537; 34 L.T. O.S. 16.

Adjourned Summons asking for a declaration that the plaintiff company, as equitable tenant for life, is entitled to be recouped out of the capital of the property charged by a settlement dated Apr. 28, 1909, with the payment of a jointure annuity and interest on certain portion sums to the extent to which the said annuity and interest through insufficiency of income became a charge upon the said capital and was paid by the plaintiff company out of its own money in the years ending Mar. 31, 1933, 1934 and 1935, and will be entitled to a like recoupment for the year ending Mar. 31, 1936, and future years. The terms of the settlement and the facts are fully set out in the judgment.

C. J. Radcliffe, K.C., and *A. Guest Mathews* for the plaintiff company.

Fergus Morton, K.C., and *L. W. Byrne* for all the defendants except the Earl of Warwick and the trustees of the will other than Lady Warwick.

G. P. Slade for the Earl of Warwick.

H. O. Danckwerts for the trustees of the will.

Farwell, J.: On Apr. 28, 1909, the sixth Earl of Warwick, then Lord Brooke, executed a settlement in the following terms. It is a settlement made between Lord Brooke, of the first part, and Miss Eden, of the second part, and certain trustees of the third part. It recited that a marriage was then intended to be solemnised between Lord Brooke and Miss Eden, and it then recited that, at the date of an agreement of May 6, 1904, thereinafter recited, certain minimum rents, amounting to £3,500, were reserved by certain mining leases. Another of the recitals which it is material to notice recited that, under and by virtue of an indenture disentailing assurance dated Nov. 4, 1907, and made between Lord Brooke and his father and some other person:

> Lord Brooke is entitled absolutely (subject to certain charges) in reversion expectant on the death of the Earl of Warwick to Warwick Castle and divers freehold messuages lands and hereditaments forming the estates commonly known as the Warwick settled estates and to certain moneys and investments liable to be laid out in the purchase of lands to be enjoyed with the last-mentioned estates. And whereas upon the treaty for the said intended marriage it was agreed that Lord Brooke should secure in manner hereinafter appearing to Miss Eden as pin money an annual sum of £500.

Then there is a term of years to secure the payment of the pin money.

> Secondly if Miss Eden shall survive Lord Brooke then thenceforth during the rest of her life the payment to her or her assigns for her separate use of the rentcharge or yearly sum following that is to say as from the death

> of Lord Brooke so long as the Earl of Warwick shall be living the yearly sum of £1,000 and as from the death of the survivor of the Earl of Warwick and Lord Brooke the yearly sum of £2,000 and further as from the death of the survivor of the Earl of Warwick and Lord Brooke if at the time of the death of Lord Brooke there shall be living a son of the said intended marriage or a son of such a son an additional yearly sum of £1,000 (making with the said annual sum of £2,000 a total of £3,000) every such yearly sum as aforesaid together with interest as hereinafter mentioned to be charged upon and issuing out of all the said castle lands estate moneys investments and premises [and it is to be] free from all death duties and so that every payment shall carry interest as from the expiration of a quarter after the quarter day on which the same is due at 4 per cent. per annum.

Then there is a term of 500 years to secure that jointure.

> And this indenture further witnesseth that in pursuance of the said agreement in this behalf and in consideration of the said intended marriage Lord Brooke hereby charges all his estate and hereditaments to which Lord Brooke is entitled under the said disentailing assurance of Nov. 4, 1907, or otherwise and all moneys and investments liable to be laid out in the purchase of lands to be enjoyed with the last-mentioned estates subject to the annual sums hereinbefore charged thereon or such of them as shall be payable and the securities therefor with the payment to the child or children of him Lord Brooke by Miss Eden (other than a son who is excepted as hereinafter provided) or the issue of any such child or children to be born and take vested interests within limits allowed by law of the different sums hereinafter mentioned (according to the events hereinafter specified) that is to say if there shall be but one such child the sum of £10,000 if there shall be only two such children the sum of £15,000, and if there shall be three or more such children the sum of £20,000 free from death duties such sum to be an interest vested in such child or children other than as aforesaid or his her or their issue or such one or more exclusively of the others or other of such children or issue at such age or times or respective ages or times if more than one in such shares and with such future or other trusts for the benefit of any child or children or issue upon such conditions with such restrictions and in such manner as Lord Brooke and Miss Eden shall by any deed or deeds revocable or irrevocable jointly appoint and in default of and subject to any such appointment as the survivor of them Lord Brooke and Miss Eden shall in like manner or by will or codicil appoint And in default of and subject to any such appointment to belong to such child or children other than as aforesaid who being male shall attain the age of 21 years or being female shall attain that age or marry and if more than one in equal shares as tenants in common but not to be raisable or payable during the life of Lord Brooke without his consent in writing And also doth hereby charge all the said premises hereinbefore charged with the said portion moneys as aforesaid but subject and without prejudice as aforesaid with such annual sum of money as shall be equal to interest at the rate of 4 per cent. per annum.

Then there is a term of 2,000 years to secure payment of that charge.

The marriage, in contemplation of which that settlement was made, was solemnised, and there have been issue of the marriage, the eldest son, who is the present Earl of Warwick, and who is of the age of 26 years, and other children in respect of whom the portions were provided. The sixth Earl of Warwick made his will on Feb. 11, 1924, and by his will the testator appointed his executors and trustees, and he appointed the trustees as trustees for the purpose of the Settled Land Acts. He devised and appointed to the trustees the capital mansion house of Warwick Castle and all the other lands, and then said:

> And I direct that during the period (hereinafter called " the appointed period ") from my death until the expiration of 20 years after the death of the survivor of the issue living at my death of my late grandfather the Right Honourable George Guy 4th Earl of Warwick and the issue living at my death of his late Majesty King Edward VII my trustees shall hold the settled hereditaments in trust for the person who shall for the time being be the Earl of Warwick in each case during his life (without impeachment of waste) within the appointed period And that after the expiration of the appointed period my trustees shall hold the settled hereditaments

in trust for the person (if any) who shall at such expiration be the Earl of Warwick in tail male but subject to the provisions in cl. 9 hereinafter contained.

Clause 9 provided:

> It shall be lawful for any Earl of Warwick for the time being of full age jointly with the trustees for the time being of this my will (being not less than two in number or being a corporation) at any time or times within the appointed period by any A deed or deeds revocable or irrevocable wholly or partially to revoke the trusts powers and provisions hereinbefore declared and contained concerning the whole or any part or parts of the settled hereditaments and or all or any of the said heirlooms.

Then there is a devise and bequest of all the residue of the estate.

By the second codicil the testator bequeathed to his:

B

> wife during her life an annuity of such amount as together with the aggregate yearly sum of £3,000 secured to her by my marriage settlement will make up the net yearly amount of £3,000 free from income tax and super-tax and from all death duties.

The result of that was to increase very materially the jointure for Lady C Warwick. Then, in cl. 4 of the codicil, he bequeathed to his trustees:

> In respect of each son of mine who shall survive me (except any son at my death succeeding to the earldom of Warwick) the sum of £10,000 together with interest thereon at the rate of 5 per centum per annum from my death until the actua payment or satisfaction thereof such sum and interest to be free from all death duties.

D Then there are other provisions, to which I do not think I need refer, except that, in cl. 6, he charges:

> the hereditaments devised by cl. 5 of my will with the payment (in aid of my residuary estate) of the annuity and the sums and interest bequeathed by cls. 3 and 4 of this codicil and I empower my trustees in their absolute discretion to permit the said sums or any of them or any part or parts hereof respectively to E remain so charged and unpaid and unsatisfied for any period the interest thereon being paid quarterly or otherwise as may be found convenient.

The sixth Earl died on Jan. 31, 1928. Thereupon the present earl, the seventh Earl, succeeded to the title, and to the property. On Apr. 1, 1932, by an agreement made between the present Earl and a company F known as the Greville Trust Company, an unlimited company, which is the plaintiff in this action, the Earl sold all the equitable life estate or interest of the vendor under the will of the sixth Earl of Warwick:

> and all other (if any) the real and chattel real property investments and moneys now by any means subject to the settlement made by the said will but exclusive G of any chattels personal so subject [together with the benefit of all pending licences contracts, &c., in consideration of the payment of the sum of £12,500] to be paid and satisfied by the payment by the company to the vendor during the residue of his life of an annuity of £700.

The purchase was to be completed on Apr. 1, 1932, on which date the company would be:

> H entitled to enter into possession and receipt of the rents and profits . . . and shall as from the same date discharge all outgoings and outstanding liabilities in respect whereof no apportionments shall be made.

The effect of that was that, during the lifetime of the present Earl of Warwick, the property belonged to the plaintiff company, subject to the plaintiff company, out of the rents and profits, so far as they go, keeping down the jointure and the interest on the charges which were imposed on the estates by the settlement and will of the sixth Earl.

It appears, the plaintiff company having gone into possession of the rents and profits, that, for the three years ending Mar. 31, 1933, 1934, and 1935, respectively, the actual amounts received by the plaintiff company in respect of the rents and profits of this property were insufficient to pay the whole of the interest payable in respect of those charges on the estate, and the plaintiff company elected out of other moneys belonging to the company to pay the deficiency, that is to say, the amount which was required to make payment in full of the interest on those charges. It made that payment voluntarily, and without any arrangement between other persons interested in the estate, no doubt to prevent the trustees of the terms of years taking any steps to enforce payment of the amount. It appears that, in the current year, the actual amount received by the company will be probably somewhat a little in excess of the amount required to pay the interest on the charges. A B C

In those circumstances the plaintiff company is seeking a declaration :

> that the plaintiffs, as equitable tenants for life, are entitled to be recouped out of the capital or corpus of the property charged by the above-mentioned settlement with the payment of an annuity of £3,000 a year and the payment of interest on two portions each of £7,500 to the extent to which the said annuity and interest on portions (through insufficiency of income) became a charge upon the said capital or corpus and was paid by the plaintiffs out of their own moneys in respect of the years ending Mar. 31, 1933, 1934 and 1935, and will be entitled to a like recoupment for the year ending Mar. 31, 1936, and future years [and certain other relief and accounts]. D

This question of how far the company is entitled, if at all, to any such declaration, is a question which, so far as I know, is not covered exactly by any authority. The plaintiff company has relied, and I think the whole of its case is really based, on *Kensington* (*Lord*) v. *Bouverie* (1). It will be necessary to consider how far that authority supports this application, and how far the plaintiff company may be entitled, having regard to that authority, to any such charge as is claimed. There are quite obvious differences between that case and the case with which I am dealing, and I think that it is impossible to say that it is an authority which covers this case. There are three obvious differences. They are, first, that in that case the payments which were made in respect of which recoupment was claimed were made by a person who was the tenant for life, and not, as in this case, the assignee of the rents and profits of the estate ; secondly, a claim for recoupment was made after the cesser of the life interest, because the claim was a claim by the legal personal representative of the late tenant for life ; and, thirdly, in that case the remainderman was a person in existence who was known, whereas, in this case, who may ultimately become entitled to the estate as tenant in tail is not known, and cannot be known for many years. E F G H

But that authority does assist the plaintiff company in that I think that all the Lords who were parties to the decision recognised that there might be some right to recoupment in certain circumstances in the tenant for life, or his legal personal representative, in respect of interest on mortgage which the tenant for life had to pay out of his own resources. To that extent the case may assist the plaintiff company, but I think that this question requires consideration from a rather wider aspect. I propose in the first instance to consider it apart from the difficulty which may arise owing to the fact that the plaintiff company is not the tenant for life. I will, so far as it is necessary, deal with that position a little later, but for the moment I am going to disregard that factor, and to consider it from the point of view of the plaintiff company as, strictly speaking, the tenant for life.

It is well settled that, where a tenant for life pays off a capital charge on the estates out of his own moneys, he is entitled, *prima facie*, to keep that charge alive for his own protection. How exactly that came to be decided, and on what principle I have not been able to discover—that is to say, I have found no case which in terms explains the principle on which that rule rests. Ordinarily speaking, where a person out of his own moneys voluntarily chooses to pay off a charge on the property of another without taking an assignment of the charge, the charge goes, and the person making the payment has no claim against the estate or against the owner of the estate. What is sometimes called the right of subrogation is a right which is extremely limited in its application. There are rights of subrogation at common law in respect of insurance. There are rights in equity of subrogation in cases of sureties and in some cases of trustees, and there may be other cases, but the right in itself is a limited right. Therefore, it is a little necessary to see how this right in a tenant for life, who pays off a capital charge, arose.

In my judgment, it is quite clearly an equitable, and not a legal, right, and I cannot help thinking that it originated in the court of equity, when administering an estate as a whole, coming to the conclusion that, as both the tenant for life and the person entitled in remainder had some interest in the estates as a whole, if the tenant for life paid off a charge on the whole estate out of his moneys, it was inequitable to permit the remainderman to have the benefit of such a payment, and, to do equity between the parties, and regarding the estate as a whole, the court came to the conclusion that it would be right that the tenant for life in those circumstances should be entitled to stand in the shoes of the mortgagees or chargees, and, *prima facie*, have a right to recoup.

The position has now become this, that the equity which there is in the tenant for life to be recouped moneys applied in paying off a capital charge on the estates is a right which, *prima facie*, he is entitled to enforce. The onus rests on those who say that, by such a payment, there was no intention on the part of the tenant for life to keep the charge alive. Whether such an equitable right exists in a tenant for life in relation to the payment of interest out of his own pocket on such

charges is, as I have said, a matter which, so far as I know, has never
been decided, but I think that, in the face of *Kensington* (*Lord*) v.
Bouverie (1), it would be difficult to say that there could be no equity
in favour of a tenant for life in respect of the payment of interest out of
his own moneys, because, although in that case the Law Lords appear
to have differed whether or not, in the particular circumstances, the A
equity could be successfully asserted by the legal personal representative
of the tenant for life, they all seem to have recognised that there might
be such an equity, and that, in certain circumstances, the tenant for
life could successfully assert his right or his claim to be recouped.

But that, of course, is only a recognition of the claim by a tenant B
for life, or his legal personal representative, to recoupment of interest
so paid after the determination of the life interest. Other considerations
must necessarily apply when the court is considering the equity of a
tenant for life to a charge or a declaration of charge in respect of interest
during the continuation of the life interest. I think that it is plain C
from the decision in the House of Lords that, successfully to assert an
equity in the tenant for life to be recouped for payment out of his own
pocket of interest, it is necessary, first, for the tenant for life or his legal
personal representative to show that there has actually been payment
out of his own pocket. Secondly, if it were shown that there had been D
mismanagement or misuser of the property, so that the income in fact
received was not such as should have been received, given good management,
then I think that it is plain, from *Kensington* (*Lord*) v. *Bouverie* (1),
that, if the income which could have been received would have been
sufficient to satisfy the interest, no such equity would exist. E

Further, I think that there is this distinction between paying off a
charge on capital and paying interest, that it is for the tenant for life
or his legal personal representatives to show that there is no reason in
equity to prevent his setting up such a claim. In *Kensington* (*Lord*) v.
Bouverie (1), the majority of the House of Lords held that the equity F
could not be successfully asserted in that case, because payments had
been made by the tenant for life without communication or notice to
the remainderman, and the majority of the court seems to have thought
that it was not equitable that the tenant for life should assert such a
claim if he had not given the remainderman an opportunity to take G
steps if he objected to the payments being made. It is, I think, obvious
from that authority that, when a tenant for life or his legal personal
representatives are asserting an equity in their favour with respect to
payment of interest, their position is one of greater difficulty than where
a tenant for life is asserting his equity to the benefit of a charge on the H
estates which he has himself discharged out of his own money.

When one considers those circumstances, the difficulty of such a claim
as the present must be apparent. The interest in this case and the
jointure is a continuing charge on the income, as well as a charge on
the capital. It appears to me to be quite impossible for a tenant for

life, while he is alive, or, at any rate, so long as the properties remain unsold, to show that there is, or rather will be, a deficiency in the amount received to make the necessary payments. It is not, in my judgment, right to say that, because there has been a deficiency in one or two or more years, there will necessarily be a deficiency when the whole account comes to be taken. It may well be that when the whole amount received, or which ought to have been received, is calculated against the sums which have been paid out of the pocket of the tenant for life in full payment of the interest, it will then appear that there has been sufficient, notwithstanding that in some years the income has been insufficient, and a claim by the tenant for life for a charge or declaration of charge, because in one year, or in more than one year, there was a deficiency which he chose to pay out of his own pocket, seems to me to be a claim which this court could not sustain.

As I have said, there may or may not be a right to recoupment at the end of the period, but that there is a right now to a charge appears to me to be quite impossible. Presumably, if the tenant for life is entitled to a charge, he is entitled to interest on his charge. It may be that he would be entitled to compound interest on his charge, and while he is paying that charge he still remains in possession of the income for the future years, which income may, in the years to come, be more than sufficient to pay the whole of the interest and leave a surplus in hand for the tenant for life.

In those circumstances it seems to me that it is impossible even for a tenant for life to claim, during his lifetime, that ultimately he has a right to be recouped then, or at some other time, money which he has chosen to pay out of his own pocket for interest on the charges. It may be that it suits his own purpose to make these payments out of his own pocket, but there is no obligation on him to make them. If he elects to do so, he does it at his own risk. Until the tenancy for life comes to an end, or possibly if and when the estates are sold and the proceeds of sale are invested in securities, which alters the position, there can be no means by which the question, whether or not there is a right to recoupment, can properly arise or can properly be determined. While I am not denying that there may ultimately be some right to recoupment, and it may be that, when the due time comes, a tenant for life may be entitled, having regard to the decision in *Kensington* (*Lord*) v. *Bouverie* (1), to assert an equity in his favour to claim recoupment of moneys paid, until that event happens, he is not, in my judgment, entitled to come and ask this court for relief, because this court will not make a declaration that there may be a charge in the future, but will leave the tenant for life to see, or, rather, it may be for his legal personal representatives to see, whether they can successfully assert an equitable right after the determination of the tenancy for life.

In those circumstances, it appears to me that this application is misconceived, and must be dismissed, with costs, but, before I leave the matter, I think that it would be right to say this. The question whether the plaintiff company may be able to assert successfully an equity for recoupment is a future and a hypothetical question. It is a future question, because it cannot be determined until the death of the tenant for life, or, as I said, possibly until the sale of the estate. It is a hypothetical question, because it may never arise at all, since there may not be any deficiency, when the accounts ultimately come to be taken. Therefore, it is not a question which I ought to decide, or on which I ought to express any decided opinion, but I think that it would be right to say that, if there be an equity such as I have mentioned in favour of the tenant for life, I myself am unable to see why such an equity could not be equally successfully asserted by an assignee of the rents and profits. If the reason for an equity in favour of the tenant for life is that the tenant for life and the remainderman are both interested in the property as a whole, and the court considers it inequitable that the reversioner should have the benefit at the expense of the tenant for life of a discharge of an incumbrance, I myself fail to appreciate why a similar equity is not open to be asserted by an assignee of the tenancy for life. I am not deciding it, but that is my view on that matter.

The other matter which I desire to mention is this. The other distinction between *Kensington* (*Lord*) v. *Bouverie* (1) and the present case is that, in the case in the House of Lords, there was a remainderman who was alive, and was known to be alive, and to whom notice could have been given. In the present case, there is no such person, but a trustee represents to some extent the persons entitled to the ultimate remainder. I should hesitate to say myself that I decided that notice to the trustees might not be sufficient to prevent the court ultimately saying that the equity could not be asserted in favour of the tenant for life, because of failure to give notice, as was the position in the case in the House of Lords. As I have said, those are not really matters with which I am concerned to-day. If, when the final account can be taken of this particular property and the rents and profits which are accruing from it, it can then be shown that, given proper management of the estate, and allowing for that, there was not sufficient income to pay the whole of the interest on the charges, then, and only then, in my judgment, can the plaintiff company make the claim to be recouped which it is seeking to make to-day. Whether that claim could succeed or not would be a matter depending on the position at the time, and the equities existing as between the tenant for life, and the persons entitled in remainder, in the particular circumstances of the case as it then appears. In my judgment this summons is misconceived, and must be dismissed.

Solicitors: *Frere, Cholmeley & Co.* (for the plaintiff company, the Earl of Warwick and the trustees of the will); *Tarry, Sherlock & King* (for all the defendants except the Earl of Warwick and the trustees of the will other than Lady Warwick).

[*Reported by* W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

ASHBY *v.* TOLHURST.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Romer and Scott, L.JJ.), **May 5, 6, 1937.**]

Bailment—Motor car—Car park—Car left by owner—Ticket—Exception from liability—Delivery to third party without production of ticket—Liability of proprietors of car park.

The plaintiff drove his motor car on to a piece of ground belonging to the defendants, paid 1*s.* to an attendant, who was in the defendants' employment, received a ticket and left the car with its doors locked. He returned later to find that his car was no longer there, the attendant saying that he had given it to the plaintiff's friend, who was in fact a stranger. The ticket was called a "car park ticket" and contained the words: "The proprietors do not take any responsibility for the safe custody of any cars or articles there, nor for any damage to the cars or articles however caused, nor for any injuries to any persons, all cars being left in all respects entirely at their owners' risk. Owners are requested to show ticket when required":—

HELD: (i) the relationship between the parties was that of licensor and licensee, and not that of bailor and bailee, and there was therefore no obligation upon the defendants towards the plaintiff in relation to the car left in the car park

(ii) assuming that there was a contract of bailment and that the attendant had authority to deliver possession of the car and that he did so quite honestly under a mistake, the conditions on the ticket were wide enough to protect the defendants.

(iii) there could not be implied into the contract a term that the car should not be handed over without production of the ticket.

Decision of His Honour JUDGE BEAZLEY (1937, 4 L.J. N.C.R. 78) *reversed.*

[EDITORIAL NOTE. It would seem that the present case only deals with the legal result of leaving a car in a car park for a nominal fee. This result is not a contract of bailment, but a mere licence by the owner of the park to allow the car to stand there. The owner of the park therefore obtains no possession of the car and is not responsible for the car being handed to a person who does not produce the ticket given in respect of it.

AS TO NATURE OF CONTRACT OF BAILMENT, see HALSBURY, Hailsham Edn., Vol. 1, pp. 747, 748, para. 1231; and FOR CASES, see DIGEST, Vol. 3 pp. 53-57, Nos. 1-32.]

Cases referred to:

(1) *Gibaud* v. *Great Eastern Ry. Co.*, [1921] 2 K.B. 426; Digest Supp.; 90 L.J. K.B. 535; 125 L.T. 76.

(2) *Lancashire & Yorkshire Ry. Co., London & North Western Ry. Co. & Graeser, Ltd.* v. *MacNicoll* (1918), 118 L.T. 596; 43 Digest 470, *99*; 88 L.J. K.B. 601.

(3) *Cordey* v. *Cardiff Pure Ice Co.* (1903), 88 L.T. 192; 3 Digest 74, *139.*

(4) *Rutter* v. *Palmer*, [1922] 2 K.B. 87; Digest Supp.; 91 L.J. K.B. 657; 127 L.T. 419.

(5) *Morritt* v. *North Eastern Ry. Co.* (1876), 1 Q.B.D. 302; 8 Digest 49, *307*; 45 L.J. Q.B. 289; 34 L.T. 940.

(6) *Lilley* v. *Doubleday* (1881), 7 Q.B.D. 510; 3 Digest 77, *163*; 51 L.J. Q.B. 310; 44 L.T. 814.

APPEAL by the defendants, car park proprietors, from a judgment given by His Honour JUDGE BEAZLEY in Southend County Court on Jan. 13, 1937, and reported in 1937, 4 L.J. N.C.C.R. 78. The facts and questions of law are stated in the judgments.

Percy Lamb for the appellants: This contract was made between persons capable of making it. Their relationship must therefore be determined by the terms of the contract and nothing else. The court will not imply a term in a contract unless to do so is necessary to give the transaction the efficacy that both parties must have intended it to have, and to prevent such failure of consideration as could not have been within the contemplation of the parties. If there is no implied term, the appellant must succeed. There is nothing in the contract which amounts to a bailment. There has never been any possession. The car was left under a licence to leave it, and the freeholder took no responsibility for safe custody; the car was left in all respects entirely at owner's risk. This phrase is wide enough to cover a misdelivery by negligence from the place in which the car was left: *Gibaud* v. *Great Eastern Ry. Co.* (1); and everything but wilful misfeasance: *Cordey* v. *Cardiff Pure Ice Co.* (3). The court will first ascertain the liability, and then construe the clause: *Rutter* v. *Palmer* (4). Even if the defendants did something different from that which they contracted to do, they are not necessarily liable: *Morritt* v. *North Eastern Ry. Co.* (5). To hand over a chattel in complete innocence is not conversion. The exemption clause in the contract was intended to cover this kind of event. To uphold the county court judge's decision would throw an intolerably heavy burden upon park owners.

B. M. Cloutman for the respondent: On the evidence, the judge was entitled to come to the conclusion that there was a contract of bailment. The appellants admitted deposit and negligence. The receipt is not a mere receipt for 1*s.*; it is a car park ticket. Every contract of bailment involves a licence. If this is a mere licence, there is nothing for the conditions to act upon. The conditions connote a relationship between the parties in which the defendants think that they need to be safeguarded. The words on this ticket do not confer in clear and unambiguous language an exemption from the consequences of a conversion by misdelivery: *Rutter* v. *Palmer* (4). *Gibaud's* case (1) is distinguishable because there the bicycle was not in the cloakroom, and there was no interposing act of the defendants' agents. By giving the car away to somebody who did not possess a ticket, the agent of the defendants committed a misdelivery amounting to a conversion. He was putting the car in some other place than that in which he had contracted to keep it. He took it out of the contract, and therefore cannot rely on the other terms of the contract: *Lilley* v. *Doubleday* (6).

SIR WILFRID GREENE, M.R: On Aug. 25, 1936, the plaintiff drove his motor car to Southend. He was accompanied by a friend and, being desirous of leaving the car while he went about his business or his pleasure, he drove it on to a piece of ground belonging to the defendants. This piece of ground was triangular in shape, open on two sides, and it was apparently a perfectly bare piece of ground. There was no evidence whether or not there was a notice indicating that it was a car park. It would be reasonable to think that such a notice was put up inviting motorists to park their cars at that place. The plaintiff drove his car on to the land, and on the land there was a man in the employment of the defendants. He was furnished with a book containing tickets and counterfoils, the counterfoil and the ticket being in the same form and in the same language. The plaintiff paid 1*s.*, which was the charge made for parking cars on this piece of land, received from the attendant half the ticket, the counterfoil being left in the book, and departed. He locked his car, but access to the car could be obtained if anyone put his hand through the windscreen and I suppose moved the handle from the inside. Some time later he returned with his friend and found that the car was no longer there. On inquiring of the defendants' employee, that person, according to the plaintiff's own evidence, gave a certain reply. The judge evidently accepted the plaintiff's evidence, and I am reading now from what the judge finds in his findings of fact:

> At 2 p.m. the plaintiff returned to the car park with the object of resting awhile in the car, accompanied by his friend, Mr. Squires. He was informed by the car park attendant "that he had just given it to his, the plaintiff's, friend." The plaintiff replied that he had no friend in Southend except Mr. Squires, who was with him, and asked why he had given up the car without production of the ticket. The attendant replied that a friend of his, the plaintiff's, said he wanted it to ride to Thorpe Bay and that he, the plaintiff, knew all about it, and should the plaintiff return he was to wait for him.

That is the evidence as to the conversation which then took place. The car was never recovered and this action has resulted. The ticket which was handed by the defendants' employee to the plaintiff was in this form: it contained a serial number, it was headed in large print, "Sea Way Car Park," then in somewhat smaller print, "Car Park Ticket," the word "Date" with a space, "Number of vehicle" with a space, then "Received 1*s.*," and then it contained the following words:

> The proprietors do not take any responsibility for the safe custody of any cars or articles there, nor for any damage to the cars or articles however caused, nor for any injuries to any persons, all cars being left in all respects entirely at their owners' risk. Owners are requested to show ticket when required.

Then underneath is the word "Signature" and a row of dots on which the person whose signature is desired is to sign. It is not at all clear from the face of this document whose signature is intended to be placed in that space. As the document purports to be a receipt at least, "Received 1*s.*," I should have thought that the signature is to be the signature of the person who has received the 1*s.*, with the result that this document is a voucher for the car owner saying that he has duly paid his 1*s.* to the right person authorised to receive it. In the present case the date was inserted, the number of the car was inserted, but there was no signature. The ticket, of course, remained in the possession of the plaintiff, and one of the complaints in the case is that the car was delivered to this stranger without the production of the ticket being insisted upon.

If that had been done the stranger would, of course, have been unable to produce the ticket. The judge has come to the conclusion that the relationship between the parties, constituted partly by conduct, partly by the terms contained in this document, was not a relationship of licensor and licensee, but was a relationship of bailor and bailee. He has read into the contract an implied term to this effect : that the owners of the park will not hand over the car save on production of the ticket. On this basis, he decided the case in favour of the plaintiff, because he held there had been a breach of that implied undertaking. He also held that there had been a conversion.

The first thing to do is to examine the nature of the relationship between the parties, a matter upon which the character of the ground is, I think, not without importance, but the most important element is the document itself. It describes the place in which the car is to be left as a " car park," and the document is described as a " car park ticket." I myself regard those words as being in one sense, in a real sense, I think, the most important part of the document, because they indicate the nature of the rights which the proprietor of the car is going to get. " Car park ticket " : you take a ticket in order to park you car, and parking your car means, I should have thought, leaving your car in a place. If you park your car in the street, you are liable to get into trouble with the police. On the other hand, you are entitled to park your car in places indicated by the police or the appropriate authorities for the purpose. Parking a car is leaving a car and, I should have thought, nothing else. The right, therefore, which this document starts off by giving on its face is a right to park the car. It then proceeds to indicate that the owner of the car is not thereby to have claims against the proprietors of the park. It is said that the existence of these conditions indicates that the relationship is necessarily a contractual one, not merely that of licensor and licensee, but a relationship of bailment, because it is said there would be no necessity for excluding these liabilities unless the relationship was one which, *prima facie*, would import them. I cannot construe a document of this kind in that strict way. It seems to me that reading the document as a whole, including its own description of itself, namely, " car park ticket," it really means no more than this : the holder of this ticket is entitled to park his car in the Sea Way Car Park, but reading it quite shortly, this does not mean that the proprietors are going to be responsible for it. If that be the true construction of the document, and I think it is, the argument that the presence of these exempting conditions points to the view that they are inserted in order to remove a contractual liability which would otherwise be there disappears and, in my opinion, the argument, when applied to a document of this kind, is not one of any real weight. If that be the true view, the relationship was a relationship of licensor and licensee alone, and that relationship in itself would carry no obligations of the licensor towards the licensee in relation to the chattel left there, no obligation to provide anybody to look after it, no liability for any negligent act of any person in the employment of the licensor who happened to be there.

There is one other way, I think, of usefully testing the position, and that is to consider in whom possession of this car was at the relevant time. In doing that, of course, one has to be careful to see that one is not unconsciously begging the whole question; but it would be a surprising result, I think, if the effect of the relationship between these parties was that when the car was left on this piece of ground possession of the car in the legal sense became vested in the owners of the park. It would involve the consequence that the owners of the park could maintain an action of trespass, they could maintain an action of conversion if their special property in the car was interfered with. As I say, that argument must not be used in such a way as to beg the question, but it would be rather a surprising result if, when a man left his car on land like this and paid 1*s.* for the privilege of doing so, the possession passed in a way in which it certainly would not pass if he left it in a public park in a square in London and paid the attendant 6*d.* for the ticket, or whatever he has to pay. In such a case possession, it seems to me, clearly would not pass; I quite fail to see why possession should pass in a case such as this. That, as I say, is merely a way of looking at the matter and is not, of course, a conclusive argument.

It is said, contrary to that view, and I must deal with this branch of the argument, that the true relationship of the parties was that of bailor and bailee, but that the obligations which that contract would normally impose upon a bailee are cut down to the extent, and only to the extent, that the conditions prescribe. I find difficulty myself in seeing, when the conditions are truly construed, what there is left of the obligations arising under a contract of bailment when the obligations are cut out of it to which these conditions refer. But assuming that there is the ghost, so to speak, of a contract of bailment left here one has to see what the conditions mean. It is conceded by Mr. Cloutman that the ordinary obligations of a bailee in respect to the custody of the article bailed are excluded by the words of the conditions. Those words would permit a negligent custody, they protect the bailee in a case where damage is negligently done to the car by himself or by his servant. Mr. Cloutman admitted that the contract would impose no obligation on the bailee to provide an attendant to look after the car, and that it would impose no obligation on the bailee or his attendant, if he provided one, to take any active step whatsoever to prevent somebody from removing the car who had no title to remove it, even if it was done under the eyes of the bailee or the eyes of his attendant. If the bailee or his attendant standing a yard away from the car saw somebody who they knew had no title to do so removing it, they would be under no obligation whatever to move one finger to stop it. But Mr. Cloutman says this: although admittedly the conditions place the bailees in that favourable position, the con-

ditions do not protect them if they do some active step in the way of delivering the motor car to somebody else. It is said that that is in this case what was done by the attendant. When that is examined on the point of fact, it appears to me to rest on no sure foundation on the facts, because all that we have to differentiate the case from a mere standing by of the attendant and to convert it into a case of a delivery by the A
attendant of the car consists in the evidence of the plaintiff in which he said that the attendant told him that he had given his car to his friend. On that rather slender foundation the whole of the argument for the respondent on this part of the case rests, because it is said that the word " give " imports that the attendant took some active step to place B
this thief in possession of the motor car. I find it impossible to collect that meaning out of the words. The word " give " in the text quite clearly is not accurately used. The car is placed upon the ground, and if the owner came for it he would get into it and drive it away. There is no question of giving, no question of physical delivery comes into C
it at all. It is not like articles in a railway cloakroom which have to be handed out by the cloakroom attendant before the person claiming them can get them. This is a case where anyone can walk on to the land and get into a car, and I cannot myself read that one phrase as evidence of any such delivery as Mr. Cloutman admits is essential for the D
success of his case.

But let me assume that I am wrong about that, and that there was such a delivery of possession as to amount, apart from the conditions, to a wrongful act and a breach of the contract. Then it becomes necessary to see whether the defendants are protected by the conditions against E
acts of that kind done by their employee. There is one aspect of this matter which has not been dealt with, and therefore I do not propose to base any part of my judgment upon it ; but if the argument be that this attendant did some act which amounted to delivery of possession, I for myself do not see why the court is to infer that the doing of any such F
act was within the scope of his authority at all. All we know about him is that he was put there with a bundle of tickets and counterfoils in the book to receive money and to give receipts for it. As I say, I refrain from pursuing that matter further, because it is not one which has been raised hitherto. I will assume, therefore, that the attendant did have G
authority to deliver possession and that he did so obviously quite honestly under a mistake. Is the language of the conditions sufficient to protect the defendants ? In my opinion the language of those conditions is wide enough to protect the defendants not merely in respect of the acts of third persons, but in respect of the acts of their own servants. The H
opening words, " the proprietors do not take any responsibility for the safe custody of any cars or articles therein," would clearly cover the case where an attendant being put there and instructed by the park owner to look after the safety of the cars negligently omitted to do so. It could not be suggested, and is not suggested, that that sentence would

not protect the park owners. Taking the next limb, "nor for any damages to the cars or articles however caused," it could not be suggested, and indeed is not suggested, that those words do not cover the case of damage to the car through the negligent act of the park owner or their servants. It is interesting to observe, while those words are under consideration, that they are exactly the words, with the substitution of the word "injury" for "damage," which have been held to produce the effect which I have said. I need only refer to a passage in the judgment of Scrutton, L.J., in *Gibaud* v. *Great Eastern Ry. Co.* (1) at p. 437, where he sums up the effect of the authorities and states the words, not exhaustively, of course, that have been held to be a protection against the negligence of the contracting party himself, which, of course, would cover the negligence of his servants. What he says is this:

> The words that have been held to give protection are, "Under any circumstances whatsoever," "In any circumstances," "Under any circumstances," or "any injury, however caused."

What we have here is "any damage, however caused." Then it concludes, "all cars being left in all respects entirely at their owners' risk." It is quite clear that in that last phrase it would not be possible to use an expression similar in type to the words "however caused," because the frame of the sentence and the thought expressed in it are not suited to those particular words. The words that have been used, corresponding, in my opinion, in content, are the words "in all respects" which appear to me to be the suitable words to show in a sentence, expressed as this one is, that whatever may happen, whatever may be done with regard to that car, the owner takes the risk of it happening or of it being done. It appears to me that the language is wide enough to produce that result and does on its true construction produce that result. The position, therefore, is this, that if the owner of the park puts his servant there, even if he puts him there with instructions to see that he does not hand over the car to anybody but the true owner, and if the servant in the performance of that duty performs it negligently, and, acting under a misapprehension which a little more care might have prevented, hands over the car to the wrong person, that, as it appears to me, is one of the risks which, on the true construction of this document, the car owner takes.

That, I think, covers the whole of this case, subject to two matters. First of all, the county court judge found that he could imply into this contract a term to the effect that the car should not be handed over without production of the ticket. I myself think that it was not legitimate to imply any such term. Not only is there no necessity to do so, but it seems to me that the implication of such a term would not be consistent with the express language of the conditions, because it would import into the contract an obligation with regard to safe custody which the language itself in terms negatives; and again I think it would not be consistent with the phrase "owners are requested to show ticket when required." In my opinion, therefore, it is not possible to imply such an obligation into this contract.

The last matter is this. It is said that this was a case where a bailee was guilty of conversion by delivering the article bailed to a person who was not the owner of it, and that having departed from the contract of bailment by so doing he is not protected by the particular conditions which are intended to apply only during the contract of bailment. I am unable to accept that argument. The cases on which it was based —I need not go through them—appear to me to be cases dealing with quite a different class of subject matter. In the present case, if the construction which I have placed upon these conditions is the correct one (and assuming, contrary to my view, that there is a contract of bailment), the owners of the park are exempt from liability if, when the car is delivered out of their park (assuming always that it was delivered), it is negligently delivered to the wrong person. That is the way in which I think these conditions should be construed.

In the result the appeal must be allowed with costs here and below.

Romer, L.J.: I agree. Mr. Cloutman has strenuously contended, and the contention found favour with the county court judge, that in this case the car was handed over under a contract of bailment. In Termes de la Ley, a book which was apparently described by Bailey, J., as a book of great antiquity and accuracy, it is said:

> Bailment is a delivery of things whether it be of writings, goods or stuff to another, sometimes to be delivered back to the bailor, that is to him that so delivered it, sometimes to the use of the bailee, that is to say, of him to whom it is delivered, and sometimes also it is delivered to a third person.

Then in Stephen's Digest of the Criminal Law this is stated:

> When one person delivers, or causes to be delivered, to another any movable thing in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom delivery is made, or that it may be kept as a pledge by the person to whom delivery is made, or that it may be carried, or that work may be done upon it by the person to whom delivery is made gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made shall be delivered either to the person making the delivery or to some other person appointed by him to receive it, the person making the delivery is said to bail the thing delivered; the act of delivery is called a bailment; the person making the delivery is called the bailor; the person to whom it is made is called the bailee.

This much, at any rate, emerges from those two passages quite clearly: in order that there shall be a bailment there must be a delivery by the bailor, that is to say, he must part with his possession of the chattel in question. In the present case there is no evidence whatever of any delivery in fact of the motor car to the attendant on behalf of the defendants. All I can see is that the plaintiff left his car on the car park, paying the sum of 1*s*. for the privilege of doing so. It is true that, if the car had been left there for any particular purpose that required that the defendant should have possession of the car, a delivery would rightly be inferred, and, if the car had been left at the car park for the purposes of being sold or by way of pledge or for the purposes of being driven away to some other place or indeed for the purposes of safe custody, delivery of the car, although not actually made, would readily be inferred. It is perfectly plain in this case that the car was not delivered to the defendants for safe custody. You cannot infer a contract by A. to perform a certain act out of circumstances in which A. has made it perfectly plain that he declines to be under any contractual liability to perform that act. The defendants made it as clear as writing can make it in the ticket which was delivered to the plaintiff that they would not take any responsibility for the safe custody of any car. One cannot infer, therefore, in those circumstances that the car was left in the car park for the purpose of being in the custody of the defendants. It is perfectly plain that the car was not left there for any other purpose. That being so, it is impossible, it seems to me, to find that the car was delivered to the defendants or that there was any contract of bailment. That being so, it is quite unnecessary for me, at any rate, to deal further with the numerous authorities, not all of them very easily reconcilable, in which the court has to consider to what extent and in what circumstances a bailee is entitled to defend himself by a stipulation purporting to exonerate him from all damage or loss to the article which has been delivered to him as bailee. There being no contract of bailment here, because there was no delivery and no evidence of any undertaking on the part of the defendants to take the car into their custody, I do not have to consider the particular circumstances, as I say, in which a bailee is entitled to exonerate himself. But further than that, inasmuch as there was no delivery of the car to the defendants, plainly one cannot infer a contract between the defendants and the plaintiff that the defendants would only redeliver the car on production of the ticket.

It only remains to deal with the suggestion that there was a conversion of the car by the servant of the defendants. Although the car was not delivered to the defendants I apprehend that the servant acting within his authority might have bound the defendants by an act of conversion if he had purported to deal with the car as the owner. All that is said is that the attendant told the plaintiff, when he came back for his car and found it was not there, that he, the attendant, had given the car to somebody else. It is quite plain that the attendant did not use the word " given " in its ordinary sense, because the car was not his to give and he knew it. But it is said by Mr. Cloutman that what the word " given " shows is this, that the attendant purported to deal with the car in some way inconsistent with the rights of the plaintiff who was the true owner. The circumstances in which such a dealing amount to conversion have been stated thus by ATKIN, J., in *Lancashire & Yorkshire Ry. Co., London & North Western Ry. Co. & Graeser, Ltd.* v. *MacNicoll* (2), at p. 598:

> It appears to me plain that dealing with goods in a manner inconsistent with the

> right of the true owner amounts to a conversion providing it is also established that there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right.

It is perfectly plain that this attendant did neither the one nor the other. For these reasons, in addition to those which have been given by Sir Wilfrid Greene, M.R., I think that this appeal must be allowed. A

Scott, L.J.: I agree with the judgments which have been delivered, but out of respect to the careful judgment of the county court judge, I desire to add a few reasons as to why I am differing from him. The essence of his judgment is that he assumed the *de facto* possession of the car passed from the owner to the defendants and that the contract represented by B the car park ticket was a contract of bailment appropriate to the passing of possession. In my view there was no contract between the parties except the mere permission to leave the car there for payment of 1*s*., but I sympathise with the judge's view that the ticket imported a contract of bailment, because the language in which the defendants protected C themselves from liability is language which in itself was much more appropriate to the assumption that the relationship of bailor and bailee existed than to that of licensor and licensee. The natural and simple way of indicating on the ticket that there was no contract and that it was a mere licence would have been to say so. The moment you find D detailed provisions for immunity such as those which are printed on the ticket you at once infer that there is a contract imposing an obligation from which the party putting forward the conditions of immunity is seeking to protect himself. I sympathise, therefore, with the view of the county court judge that these clauses exonerating the proprietors E of the car park from liability might reasonably be assumed to be inserted on the basis of a contract of bailment being the substance of the relationship. On analysis I agree with both my colleagues that that view is erroneous. I think, if you look at the whole of the provisions on the ticket, you realise in the result, after careful scrutiny, that they leave F no obligation of a contractual kind at all upon the owner of the car park, and that the form of expression is merely due to a layman's choice of language and the absence of what you may call a natural lawyer's way of expressing that warning. In the result on the proper interpretation of these conditions I entirely agree that the dominating words are "All G cars are left in all respects entirely at their owners' risk." Those words, I think, are unambiguous and in themselves exclude the idea of any contract of bailment. The words at the beginning of the sentence, namely, "The proprietors do not take any responsibility for the safe custody of any cars," read in the light of those concluding words, I think H ought not to be read as importing any indication of a contract of bailment. On those two short grounds, (i) that the ticket when properly interpreted shows that there was nothing more than a licence, and (ii) that the moment you assume that there is no contract of bailment in the ticket there is no ground at all for assuming as a fact that the possession of the car ever passed to the defendants, I think that the judge's judgment was wrong.

As regards the additional point he makes that there ought to have been implied an additional term not to hand over the car to anyone else, I think probably that he had in mind the obligation of a bailee from which A he protects himself by clauses of exception from the ordinary obligation of a bailee in respect of care in safe custody. Yet that he still will be liable if he misdelivers at the end of the contract of bailment, unless he has covered himself by very carefully chosen words, was said to be the principle that ought to be applied in the interpretation of this document. B I think again he was wrong there, and there was no ground at all for implying any term in this particular contract, because it would not have been a necessary term and because also the express terms are inconsistent with any such implication.

For these reasons I think that the judge's judgment must be reversed.

C *Appeal allowed.*

Solicitors: *Cunliffe, Blake & Mossman*, agents for *Tolhursts & Cozens*, Southend-on-Sea (for the appellants); *Geoffrey B. Gush* (for the respondent).

[*Reported by* DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

D

E. TIMM & SON, LTD. *v.* NORTHUMBRIAN SHIPPING CO., LTD.

[KING'S BENCH DIVISION (MacKinnon, L.J., sitting as an additional E judge of the King's Bench Division), **April 19, 20, 21, 22, 23, 26, 27, 28, 29, 1937.**]

Shipping—Seaworthiness—Voyage in stages—Sufficiency of coal—Water Carriage of Goods Act, 1910 (*Canada*).

Under the Water Carriage of Goods Act, 1910 (Canada), s. 6, if the owner of any ship transporting merchandise from any port in Canada F exercises due diligence to make the ship in all respects seaworthy, neither the ship nor the owner shall be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect. Under sect. 7 neither the ship nor the owner is liable for loss arising from dangers of the sea or other navigable waters.

G A ship-owner had contracted to carry a cargo from Vancouver to Hull, and had arranged that his ship should call on the way at St. Thomas for the purpose of bunkering. The quantity of coal normally required by the ship for the voyage to St. Thomas was 650 tons, and the ship left Vancouver with 675 tons on board. A few days after passing through the Panama Canal the captain realised that he had not sufficient coal to reach St. Thomas and accordingly altered course for H Jamaica. While proceeding there he struck a reef and his vessel and cargo became a total loss. The cargo owners claimed damages, and the ship-owner contended that (*a*) the ship on leaving Vancouver had sufficient coal and a proper margin to take her to St. Thomas; (*b*) there was a potential coaling port at Colon, and this fact must be regarded in fixing the margin:—

HELD: (i) on the facts the ship when she left Vancouver for St. Thomas was not carrying a proper margin of coal.

(ii) if Colon was to be regarded as a coaling port then the stage to be considered was Colon to St. Thomas, and it was clear on the facts that the ship when it passed Colon had not sufficient coal to take her to St. Thomas.

[**EDITORIAL NOTE.** When a voyage is divided into stages the vessel must then be seaworthy at the commencement of each stage. Thus a vessel which has liberty to call at a particular intermediate port to coal, if she is to be seaworthy after passing that port and not calling there, must have had sufficient coal on passing that port to carry her to the next port of call. The present case considers in detail the seaworthiness of a ship from the point of view of carrying sufficient bunkers. A

As to Voyage in Stages, see HALSBURY, 1st Edn., Vol. 26, pp. 214-216, para. 306; and for Cases, see DIGEST, Vol. 41, p. 475, Nos. 3064-3074.]

B

Cases referred to:

(1) *Thin* v. *Richards & Co.*, [1892] 2 Q.B. 141; 41 Digest 475, *3072*; 62 L.J. Q.B. 39; 66 L.T. 584.

(2) *The Vortigern*, [1899] P. 140; 29 Digest 192, *1517*; 68 L.J. P. 49; 80 L.T. 382.

(3) *Greenock S.S. Co.* v. *Maritime Insurance Co.*, [1903] 2 K.B. 657; 29 Digest 192, *1518*; 72 L.J. K.B. 868; 89 L.T. 200.

C

Action for damages for the loss of a cargo of wheat by reason of the breach of contract and/or duty to deliver the cargo. The plaintiff company contended that the vessel was unseaworthy in not carrying a sufficient quantity of bunker coal. The facts and arguments are fully set out in the judgment. D

A. T. Miller, K.C., *Sir Robert Aske, K.C.*, and *A. J. Hodgson* for the plaintiff company.

H. U. Willink, K.C., *G. St. Clair Pilcher, K.C.*, and *Cyril Miller* for the defendant company.

E

MacKinnon, L.J.: In this case the plaintiff company was the owner of a parcel of cargo of wheat on board the steamship "Newbrough," and the indorsee of the bill of lading. That cargo was shipped at Vancouver for carriage to and delivery at Hull. The defendant company owns the "Newbrough." That is the action in form. In substance F it is a claim by the underwriters of the cargo against the ship's protection club. The vessel sailed, with this cargo of wheat on board, from Vancouver on Nov. 26, 1932. Her route was *via* the Panama Canal and then across the Atlantic to the United Kingdom, calling on the way, according to the plan laid out by the owner, at St. Thomas, in the G Virgin Islands, for a supply of bunkers. Having sailed from Vancouver on Nov. 26, on Dec. 22, a few days after she had passed through the Panama Canal, the captain realised that he had not sufficient bunker coal to take him to St. Thomas, and he therefore altered his course from roughly an easterly direction to a northerly direction, in order to go to H the nearer source of coal supply in Jamaica, instead of trying to get on to St. Thomas. On Dec. 24, very early in the morning, the vessel struck a reef, what is called the Morant Cays, south of Jamaica. It was quite impossible to get the vessel off. She remained there, being pounded by the seas, and eventually became, with her cargo, a total loss.

In respect of that loss of the cargo which the plaintiff company had purchased, and which, by the terms of the bill of lading, it was entitled to have delivered to it at Hull, the plaintiff company brings this action, claiming damages against the defendant company, the owner of the ship.

A Whether the plaintiff company is entitled to assert that claim depends upon the contract between itself and the defendant company. That contract is contained in a bill of lading dated in Vancouver Nov. 26, 1932, which is a document of immense length. It records the shipment of the amount of wheat:

> B to be conveyed and delivered to the order of Sanday & Co. or his or their assigns at Hull under and subject to the conditions and exceptions herein expressed.

Then there follows a very lengthy set of conditions; but one can go straight to cl. 35, which says:

> C This bill of lading is subject to all the terms and provisions of, and exemption from, liability contained in the Act of Parliament of Canada, 9-10 Edward VII, c. 61.

In effect, the mass of printed matter in the bill of lading is all made subject to the prohibitions and other stipulations in that Canadian Act, called the Water Carriage of Goods Act, 1910. That provides, in sect. 4, D that, where any bill of lading contains any clause, covenant or agreement whereby the obligations of the owners of ships are lessened or limited, such clause, covenant or agreement shall be illegal and null and void. That, *prima facie*, cancelled out all the great mass of printed conditions which appear on the bill of lading. The Act then goes on, E by sect. 6, to say this:

> If the owner of any ship transporting merchandise or property from any port in Canada exercises due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, neither the ship nor the owner, agent or charterer shall become or be held responsible for loss or damage resulting from faults or errors in navigation or in the management of the ship, or from latent defect.

F

Sect. 7 provides that the ship and the owner shall not be held liable for loss arising from various causes, the first and most important of which are "fire, dangers of the sea, or other navigable waters." It is to be noted that sect. 7 is not subject to any condition like the exemption G under sect. 6. Sect. 7 states without any preliminary condition the terms of exemption from liability. Sect. 6 confers these grounds of exemption only subject to a condition, namely, that the owner of the ship shall have exercised due diligence to make the ship in all respects seaworthy and properly manned.

H In the old days of sailing-ships, when the law was settled, and the obligation to make a ship seaworthy was discussed, the parallel to the provision of bunkers was the provision of proper and sufficient sails and spars and other means of navigation. When steamships came in, those rules so laid down had to be adapted to the different type of vessel; and, in regard to this matter of providing bunkers, many years ago a particular modification of the law took place. The old rule as to the warranty of seaworthiness was that at starting on the contractual voyage the ship must be seaworthy for the whole of that voyage, equipped with sails, spars, and other equipment for the whole of that voyage. If the same rule had been rigorously applied to steamers, it would have necessitated the ship being supplied, at the commencement of the contractual voyage, with sufficient bunkers to provide motive power for the whole of that contractual voyage, having regard to the amount of coal which was required. That, being applied without modification, would have been, in many cases, a very onerous burden on the shipowner. For that reason, a modified form of the obligation came to be recognised. It was first, I think, discussed in *Thin* v. *Richards & Co.* (1), to which I need not refer, and then again, and more elaborately, in *The Vortigern* (2). A. L. SMITH, L.J., in his judgment, at p. 155, says this :

> In my judgment when a question of seaworthiness arises between either a steamship owner and his underwriter upon a voyage policy, or between a steamship owner and a cargo owner upon a contract of affreightment, and the underwriter or cargo owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that, at the commencement of each stage, the ship had on board a sufficiency of coal for that stage—in other words, was seaworthy for that stage. If he fails in this he fails in defeating the issue of unseaworthiness which *prima facie* has been established against him.

The same sort of thing was said in an insurance case, *Greenock S.S. Co.* v. *Maritime Insurance Co.* (3). VAUGHAN WILLIAMS, L.J., says this in his judgment, at p. 661 :

> The warranty of seaworthiness in the case of a long voyage is not broken because the steamer does not start in a seaworthy condition, but that the shipowner is entitled to satisfy the implied warranty by taking on board coal at the commencement of each stage of the voyage. It is plain that to hold that there is no such breach of warranty is a concession made by the law in favour of the shipowner rather than of the underwriters ; and it is also plain that the way in which the court regards these stages is to look at the voyage which is contemplated at each point at which the ship takes advantage of this liberty and stops to coal —that is to say, the shipowner must coal before the then contemplated voyage. That does not mean, however, in a case like the present, a voyage which is defined in terms upon the face of the policy ; but it means that the shipowner, taking advantage of this method of satisfying the implied warranty, must make up his mind to what port he intends to proceed ; and he will only satisfy the warranty if he takes on board a sufficiency of coal for that contemplated voyage.

As I have said, the old rigid rule in law would be that the " Newbrough " must have started from Vancouver with sufficient bunker coal to take her to Hull. But as a concession from that obligation the shipowner is allowed to say, " No, I intend to provide coals in stages on this voyage, and my obligation under the warranty of seaworthiness is a recurring one. It exists at Vancouver, and it will exist again and recur at the beginning of the next stage or stages that I fix for the voyage." In this case in fact the shipowner, by arrangement with its captain, in communication with him had instructed him, on his outward passage to Vancouver, to take on more coals at Port Royal, Jamaica, and to take on there a sufficient amount of coal to take him through the Panama Canal up to Vancouver, while there loading, and then back from Vancouver through the Panama Canal to St. Thomas. In one sense, therefore, the stage for coaling purposes that it had arranged in the course of this round voyage was from Port Royal, Jamaica, up to Vancouver, and back again to St. Thomas. But, of course, from the point of view of its obligations *vis-à-vis* the plaintiff company, it has to be translated into a stage from Vancouver, because it is only at Vancouver that the contractual link between these parties arises. This case has been treated on the footing that the defendant company might have established that it has fulfilled its obligation at common law to make the ship seaworthy if it establishes that she took on board at Vancouver a sufficient amount of coal to take her to St. Thomas, and, if it has done that, it has again established that she took on board enough at St. Thomas to get to Hull, and it would have fulfilled its common law warranty of seaworthiness, and it would equally have fulfilled the requirement of the Act to exercise due diligence to make the ship seaworthy and properly equipped.

The question, therefore, is whether there was a sufficiency of coal put on board at Vancouver, with a reasonable margin for the passage from Vancouver to St. Thomas. In regard to this, there is a very considerable conflict of evidence about various aspects of the case. *Prima facie*, the plaintiff company is in a position, as I think with much cogency, to say: "You took on board a certain amount of coal at Vancouver. Your ship proceeded on her voyage. She had a voyage which was not perhaps very favourable, but the sea is liable to disturbance, any voyage is liable to head winds, bad weather, currents, and all the other incidents of navigation. In fact when you were two or three days out from the Panama Canal it became perfectly apparent to your master that he had not enough coal to get on to St. Thomas. It is therefore the fact, and the indisputable fact, that you did start from Vancouver with an insufficiency of coals for this stage to St. Thomas; and, if you did that, then you can escape the conclusion that you did not make the ship seaworthy in respect of bunkers only if you can make out that there was anything abnormal or unexpected, or anything in the way of a cataclysm or disaster, on this voyage. There was nothing of the sort. There was the usual winter weather in the Pacific part of the passage; there was the usual blowing of the trade winds and currents in the Caribbean Sea. There was nothing really abnormal in the voyage, and yet that which you took was insufficient." I think there is very great force in that argument. It is the conclusion to which, *prima facie*, one would be driven on that mere statement of fact, just as, on the other branch of the case, if you are told that a ship on a comparatively fine night is piled up on the Morant Cays, the *prima facie* answer you would give to the question of why did it happen is that it must have been some fault of navigation. But I will not rest my conclusion in this matter merely upon those premises and that conclusion. There is another aspect of this case. This passage from Vancouver to St. Thomas is practically 5,200 miles. This ship was a slow ship. She never, at her best, was a fast ship, and it is quite clear, from the previous records of her performances, that, whenever she had head wind, she was abnormally—when I say abnormally, I mean more than most ships—retarded and her pace slowed. On an examination of all her loaded ocean voyages for some years past, her average speed in every sort of weather and in all parts of the world was only just over 8 knots. A I think upon average she might well be described as an 8-knot boat. That results in a comparatively simple calculation—5,200 miles at 8 knots means 650 hours' steaming-time. Our calculations all through this case have been simplified by the fact that she burns 24 tons per day, and therefore directly you ascertain how many hours she would be on B a certain passage, you get the number of tons required to carry her through that period. Therefore, if, on an average, she was an 8-knot boat, she would want 650 tons.

The question now arises, how much did she start with ? About this, of course, there is a good deal of dispute and uncertainty. All the con- C temporary documents say that she had 675 tons. Mr. Willink, in his extraordinarily able discussion of the evidence, and his most persuasive argument, has tried to make out that that is too little, that perhaps it ought to be treated as 690 tons. I am not at all satisfied about that. It depends upon a supposed measurement of the coal in the bunkers D made by the chief engineer and two other officers, when the shortage of coal was becoming seriously threatening, a day or two out from the Panama Canal. One of them made it 75 tons, and two of them made it 84 tons ; and, if that was the amount then, and you add up what had been consumed before, then Mr. Willink says that brings up the total E at Vancouver to 690 tons, or a little more, instead of the 675 tons in the documents. I have considered this matter, and I do not want to go into it in great detail. I do not think it has been made out that she had more than 675 tons at Vancouver. Was that enough ? That question has been debated from various points of view and various aspects. Here F again I do not want to go into all those details. My conclusion is that, if it be a question of supplying this vessel at Vancouver with a sufficiency of coal to take her to St. Thomas, and with a reasonable margin, in addition to the likely minimum amount required for that—a reasonable margin for the contingencies to which any voyage must be subject—I think that G she did not have enough coal in starting with 675 tons. If that be so, it means that the defendant company, when it allowed her to start off from Vancouver with 675 tons of bunkers as the equipment to carry her to St. Thomas, had not exercised due diligence to make the ship in all respects properly supplied. With regard to this, I emphasise the fact H that the defendant company is seeking to say that it had sent the ship out from Vancouver properly equipped for a voyage to St. Thomas. I emphasise that, because that is the stage which I think it is claiming to use under the concession of the principle of *The Vortigern* (2) in place of an obligation to supply bunkers all the way to Hull.

On this aspect of the case, Mr. Willink has taken a point perhaps of some novelty—at least he says it is of novelty—to which I must refer and with which I must deal. He raised it first in his cross-examination of Commander Froud, and he raised it in this way. He said :

> Is this right, in your view, that the margin [of coal] that is required depends on the voyage ?
>
> (*A.*) Yes.
>
> (*Q.*) What will be a reasonable margin on one voyage of 1,000 miles in length will not be a reasonable margin on another voyage 1,000 miles in length ?
>
> (*A.*) That is so.

Then he developed that by saying this :

> Supposing I was starting out in a motor car for 1,000 miles across the Sahara, I would want a different margin of spares, every sort of thing, from what I would want if I were starting out in a motor car for 1,000 miles in England and Scotland ?
>
> (*A.*) Yes.
>
> (*Q.*) So if you are going a voyage, let us say, from Durban to Australia, right across that sea where there is not anything but water, no islands, no ports, you would want a large margin, would you not ?
>
> (*A.*) Yes, I should think so.

By contrast he meant, if you are going on a voyage with several ports on the way, you do not want as much. He puts the contrast a little later :

> Let us contrast that with such a voyage as I have been describing from Australia to Durban.

Then he goes back to the Vancouver voyage, and he put the same point to the other experts called for the plaintiff company. Put in other words, the point that Mr. Willink makes is this : he said the fact that Colon exists as a potential coaling-port entitled the defendant company to limit the margin which it was going to take very considerably, and to limit it having reference to the contingencies which might arise on the first part of the voyage, that is, the voyage from Vancouver to the Canal. Again, in his final argument, Mr. Willink said : If an owner is sailing 2,000 miles from A. to C. *via* B., and there is the chance of needing 200 tons more on the passage from A. to B., and of needing 300 tons more on the passage from B. to C., if there was no coal available at B., the intermediate port, then he would need to take a margin of 500 tons—that is, the 200 and 300 tons—for the contingencies necessary on both parts of the full voyage. But supposing on that voyage on a later occasion he finds that a coaling-depot has been opened at port B., then he need take only the 200 tons margin at the first port, because he has in mind, which is the fact, that there is available a depot at port B., and if he has used up his 200 tons on that passage he can fill up the necessary 300 tons at port B.

I think that reasoning is unsound. One must bear this in mind. As I have said, originally, on the old common law principle he has to fill up with enough bunkers for the whole of the contractual voyage. It is only a concession to him that he can do it in stages, and, as a result of that concession, he has this advantage, that, though his obligation as to seaworthiness is repeated and recurrent in that he must make the ship seaworthy at the beginning of each stage, if he has done so, and, in the course of that stage, through unforeseen circumstances, a shortage of coal arises, which could be remedied by the captain calling somewhere and taking in further coal, if the captain fails to do that, that is not a breach of the warranty of seaworthiness or the obligation to take reasonable steps to make the vessel seaworthy; it is only, on legal analysis, an act of negligence on the part of the captain, for which, because of the exception of negligence, the owner is excused. That negligence of the captain in not taking in coal at the coaling port will arise only if the necessity for coal has arisen during a stage, and if, at the beginning of that stage, the shipowner has taken in enough coal for the whole of that stage. But the shipowner's obligation, I think, is, and must be, to take in enough coal for the whole of that stage, and, if he diminishes the amount which he takes in at the beginning of the stage because there is in the course of the stage a coaling port at which he can supplement the supply of bunkers, then I think the truth is that he is, if not expressly, impliedly creating two stages, instead of one, two stages into which he intends to split the voyage, and, if he does that, his duty in regard to seaworthiness will arise at the two stages, instead of only at the beginning of the whole stage. Putting it in other words, either in this case the shipowner's duty was to take at Vancouver undoubtedly sufficient coal to get all the way to St. Thomas, or, if he decided to take less than the whole amount necessary for that at Vancouver, because he would be in a position to fill up at Colon, then, in that case, his liability in regard to making the ship seaworthy will arise in this voyage, not twice at Vancouver and St. Thomas, but three times at Vancouver, Colon, and St. Thomas.

Mr. Willink relied for the purpose of analogy on the analogy of the requirement as to seaworthiness and equipment of the ship in regard to her structure. He said if she leaves the port of departure reasonably fit, but a defect develops on the voyage, which could be repaired at a port of call, but is not so repaired, then that is no breach of the warranty of seaworthiness, but is an act or neglect on the part of the captain in not having the ship repaired as he ought at the possible port of call; and the owner, in such a case, if he became liable for that failure to repair at that port, would be liable, not for breach of his warranty of seaworthiness, but for the fault of his captain for not doing his duty during the voyage. I think the argument on that parallel involves this fallacy. Structural equipment of a ship is a thing which, if properly attended to at the beginning of the voyage, makes the vessel fit for the whole voyage right through, and, if that is done, a supervening effect necessarily arises from some event which it was not the duty of the owner to foresee, or possible for him to foresee. But the equipment and supply of adequate bunker coal is, of necessity, a matter as to which a mere lapse of time may create a deficiency; it is an equipment, in its nature, of a wasting description; and, in that case, the deficiency may arise, not from any untoward or unforeseen event, but from mere lapse of time.

I do not know that I need discuss this point of law really in greater detail, because I think it has already been dealt with—perhaps foreseen and dealt with—in the judgment of Gorell Barnes, J., as he then was, A in *The Vortigern* (2). In that case, the ship had started from Colombo for the United Kingdom. The shipowners had not shipped at Colombo sufficient bunkers for a voyage to the United Kingdom, but they had shipped enough to get to Port Said or Suez, it does not matter which. They contended that they had intended to divide the voyage, for this B purpose of making the ship seaworthy, into two stages, Colombo to the Suez Canal, and the Suez Canal to England. She fell short of coal on the way short of the Suez Canal, and that deficiency could have been remedied by putting into Perim, which was a coaling port that the master passed and where he could have obtained coal. He did not do so, with the C result that, as he was nearing the Canal, he had to take some of the cargo and burn that. That is how the litigation arose. So that there is this similarity between these two cases. If you substitute Colombo for Vancouver, Perim for Colon, and Suez and Port Said for St. Thomas, you get this case. Gorell Barnes, J., in his judgment, having dealt with the D doctrine of stages, says, at p. 147:

> My opinion is that the view expressed by Lord Esher, M.R., Fry and Lopes, L.JJ., in the case of *Thin* v. *Richards* (1) was . . . if the voyage is broken up into distinct stages, as is usual in these long voyages nowadays, for the purpose of coaling, that then the vessel must be made seaworthy at the commencement of each stage of the voyage, and that the master has to determine when he starts from one port to another what is the stage which he E intends to perform with the vessel, and the vessel must be supplied with sufficient coal when starting on each stage. If that is so, and I think that is what is intended by these judgments, and what I think myself is right, it follows from what I have already said, that there was a breach of this warranty in this case, and that it is immaterial to consider what happened afterwards in passing Perim. But even if it be not a breach of the warranty for the vessel to start with insufficient coal to reach the next port at which it is intended that she should coal, provided there is F another coaling port which she will pass on the way and can have as it were in reserve to go into if necessary, then it seems to me that the plaintiffs would be in this difficulty: that they must then treat the voyage as divided into two stages from Colombo to Port Said instead of one, and that the second stage, namely, from Perim to Port Said, was one on which it is clear that this vessel was not seaworthy when she started upon that stage, and, therefore, they cannot say that they have complied with the warranty of seaworthiness. The vessel must be seaworthy for the whole stage, or made seaworthy for each division of the stage, and she was not seaworthy G for the portion of the voyage on which the loss occurred.

Applying that (and it seems to me it can be exactly applied to this case), I think either the vessel must have been provided at Vancouver with sufficient coal to go all the way to St. Thomas, or if the defendant company says, "Well, we need not do that, because there was Colon H on the way, where we could fill up if we had not enough," then it must admit, or is driven to admit, that it is not one stage that arises in regard to its undertaking or obligation, Vancouver to St. Thomas, but two stages, Vancouver to Colon and Colon to St. Thomas, just as Gorell Barnes, J., says it must then treat the voyage as divided into two stages, from Colombo to Perim and then from Perim to Port Said.

If that be the result of this attempt to rely upon the existence of Colon as a port as diminishing the amount of coal necessary to be supplied at Vancouver, then, as I say, I think there would arise a renewed and recurring obligation to have this ship made seaworthy by sufficient bunkers provided at Colon. That would be within the duty of the shipowner under its obligation as to seaworthiness, and would not be merely part of the duty of the master for which it could escape under an exception of negligence. If that be so, I do not think there can be the slightest doubt that this ship started from Colon with a totally insufficient supply of coal to take her in safety to St. Thomas, and in fact that it proved totally insufficient. There is some question whether the amount at Colon was 148 tons or 156 tons, but still more in this case, having regard to the shortness of the distance, if one may apply that common phrase, "The proof of the pudding is in the eating," I think it is abundantly clear that she did not leave Colon with a sufficiency of coal to carry her to St. Thomas.

I think that deals with all the points which it is necessary for me to discuss in this case. I think the loss of the cargo was due to negligence, or, to use a less unkind phrase, to faults or errors in navigation. The defendant company, therefore, is not entitled to rely on the exception of perils of the sea under sect. 7 of the Act. I think it has been established that the defendant company did not at Vancouver exercise due diligence to make the ship in all respects properly supplied with bunker coal for the voyage to St. Thomas. If it is said that it did supply her with sufficient coal from Vancouver to Colon, then I think it is abundantly clear that it did not supply her with sufficient bunker coal for the next stage of the voyage, from Colon to St. Thomas. The result is that this double condition under sect. 6 has not been fulfilled, and, as a result, under the Act the defendant company is not entitled to rely upon the exception of faults or errors in navigation. There must be judgment for the plaintiff company for an amount to be agreed or ascertained in some way.

Judgment for the plaintiff company.

Solicitors: *Clyde & Co.* (for the plaintiff company); *Middleton, Lewis & Clarke,* agents for *Middleton & Co.*, Sunderland (for the defendant company).

[*Reported by* Malcolm Logan, Esq., *Barrister-at-Law.*]